

THEMIS

ASSOCIATION OF JUDGES

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

From bad to worse - Polish judiciary in the shadow of the ‘muzzle act’

report prepared by Dariusz Mazur,
press officer of the Association of Judges “Themis”
updated for 20 November 2020

I. Introduction.

A year ago, in a ground-breaking judgment of 19 November 2019 (C-585/18, C-624/18, C-625-18)¹, the Court of Justice of the European Union (CJEU) agreed with the reservations of the Polish Supreme Court (SC) raised in a request for a preliminary ruling that the new Polish 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 CJEU has simultaneously authorized all Polish courts to establish whether judges appointed with the participation of the neo-NCJ are judges in the meaning of EU law and provided clear criteria according to which they are to assess the independence of the neo-NCJ and the Disciplinary Chamber. On the one hand, the CJEU ruling undermined the compliance with the provisions of European Union law, the core elements of the pseudo-reform of the Polish judiciary and, on the other, it provided Polish judges with the ability to question the independence of the central elements of this reform, which are the Disciplinary Chamber, the neo-NCJ and the judges appointed and promoted with its participation.

In line with the guidelines contained in the CJEU judgment of 19 November 2019, in its judgment of 5 December 2019 (III PO 7/18)² the Labour Chamber of the Polish SC assessed that the Disciplinary Chamber and neo-NCJ are not independent and that the Disciplinary Chamber is not a court either under the Polish constitution or EU law.

¹ <http://curia.europa.eu/juris/document/document.jsf?docid=220770&doclang=en>

² https://ruleoflaw.pl/wp-content/uploads/2020/02/III-PO-0007_18_English.pdf

Another ruling issued by the Polish SC in the implementation of the CJEU ruling of 19 November 2019 is the Resolution of the Joined Chambers of 23 January 2020 (BSA I – 4110 – 1/2020)³ on the basis of which:

- the SC did not nullify all judgments issued by judges appointed or promoted with the participation of the neo-NCJ, but upheld the judgments of the ordinary courts issued up to 23 January,
- while referring to the judgments of the ordinary courts passed after 23 January, the SC decided that they would not be automatically squashed, but would be examined at the request of a party. In each specific case, the court of the second instance will need to assess whether the procedure for choosing the judge who issued the decision in the first instance justifies the presumption that he is not an independent judge under Article 47 CFR EU and Article 6 ECHR (**the independence test**); in the justification of the said resolution, the Polish SC also presented a detailed list of criteria that should be taken into account by the appellate court when assessing whether the method of appointing a judge of the first instance justifies the presumption that the judgment issued with his participation is not a judgment of an independent and impartial court in the meaning of Polish and European law,
- only all judgments issued by the Disciplinary Chamber of the SC, regardless of the moment that they were issued, were considered void by the SC.

After the above rulings were issued, it would have appeared that this would be a good year for the Polish judiciary, as the CJEU and the Polish SC armed the Polish appellate courts with the ability to assess the correctness of appointing judges of first instance courts, which should eliminate the negative effects of the appointment of the politicized and unconstitutional neo-NCJ and therefore ensure the right of citizens to a fair trial before an independent and impartial court.

The main reaction of the Polish government to the judgment of the CJEU of 19 November 2019 was to state that the system of courts is an internal matter of the member states and is not subject to the jurisdiction of the CJEU, so only the Polish Constitutional Tribunal can finally rule on the independence of the neo-NCJ and the status of candidates for judges appointed by it. As for the above judgments of the SC, the Ministry of Justice arbitrarily stated that they were in breach of the constitution and this was the message that dominated the pro-government media for several days,⁴ including threats of imprisonment of the presiding judge of the bench that issued the resolution of 23 January 2020, the First President of the SC, Małgorzata Gersdorf. Another response was the intensification of politically motivated disciplinary proceedings against judges and the introduction of the ‘muzzle act’ to strengthen the political subordination of the judiciary.

In this situation, it is worth answering the question of whether the past year was actually positive for the Polish judiciary, contributing to increasing its independence from the political factor or just the opposite.

³ https://forumfws.eu/bsa-i-4110-1_20_english.pdf

⁴ http://themis-sedziowie.eu/wp-content/uploads/2020/01/Comments_SC_resolution_23_01_2020.pdf

II. The 'muzzle act' as the crowning achievement of the government's actions intended to politically subordinate the judiciary

The muzzle act, which entered into force on 14 February 2020 (its draft was submitted to the parliament on 12 December 2019⁵), constituted the Polish government's legislative response to the CJEU ruling of 19 November 2019, which among others:

- introduced new types of disciplinary torts for judges (a request for a preliminary ruling submitted to the CJEU or the Polish SC regarding the status of judges appointed with the participation of the neo-NCJ, or questioning the legal status of the neo-NCJ or other constitutional bodies became a serious disciplinary offence, punishable by expulsion from the profession). It is striking that the obvious objective of introducing this disciplinary tort is to prevent Polish judges from implementing the recommendations contained in the CJEU judgment of 19 November 2019;
- deprived the bodies of the judicial self-government of any significance (e.g. they have lost the right to issue opinions on candidates for the office of judge and candidates for senior judicial positions, as well as the right to pass critical resolutions regarding changes in the justice administration);
- politicized criminal proceedings against judges even further. For instance, decisions on lifting a judge's immunity (which, *ex lege*, also includes elements of disciplinary repression in the form of suspension of the judge from his duties and a pay cut) and the temporary detention of a judge will only be made by the Disciplinary Chamber of the SC;
- imposed the obligation on judges to disclose their membership of judicial associations (information on this is posted in the Internet);
- granted, in a manner which was contrary to the constitution, to the President of the Republic of Poland the right to correct – by handing a nomination to a judge – the defectiveness of the procedure of appointing a judge, ;
- granted the Chamber of Extraordinary Control and Public Affairs of the SC the exclusive right to assess the correctness of judicial appointments. According to the respective provisions of the 'muzzle act', every court that receives a request to remove a judge from hearing a case because of the lack of independence of the court or the lack of independence of the judge is required to submit such request to the Chamber of Extraordinary Control and Public Affairs. Furthermore, if the application applies to the establishment and assessment of the legality of a judge's appointment, such an application is to be set aside without consideration. The obvious objective of this amendment is to prevent ordinary court judges from applying the independence test recommended by the 'old' part of the SC in the resolution of the joint chambers of 23 January 2020 in practice. The transfer of cases of this type to the Chamber of Extraordinary Control and Public Affairs fully secures the status of judges appointed with the participation of the neo-NCJ, as all members of the Chamber of Extraordinary Control and Public Affairs were also appointed with the participation of the neo-NCJ and therefore have an obvious personal interest in not challenging the status of other judges appointed with the participation of this unconstitutional body. It is natural that nobody would want to hang themselves. Therefore, this change seriously undermines the effectiveness of European law, as it should be

⁵ <http://themis-sedziowie.eu/materials-in-english/declaration-of-the-first-president-of-the-supreme-court-warsaw-17-december-2019/>

remembered that the resolution of the joint chambers of the SC was issued in accordance with the recommendations contained in the ruling of the CJEU of 19 November 2019.

III. **Politicization of the position of the First President of the SC.**

The ‘muzzle act’ enabled the ruling party to take over the position of the First President of the SC when Małgorzata Gersdorf’s term of office expired (April 2020), by reducing the quorum required for the election and enabling the Polish President to nominate an acting president of the SC for the duration of the election. These amendments made it possible for President Andrzej Duda to elect Małgorzata Manowska to the office of First President of the SC on 25 May 2020, even though her election breached the provisions of the Polish Constitution.⁶ She is loyal to the ruling camp, but only received 15 votes in support, while her independent opposing candidate, Professor Andrzej Wróbel, received as many as 50 votes, which constituted the majority of the members of the assembly of judges of the SC.⁷

Just after her election, in her statement of 27 May 2020, Ms. Manowska expressed the need to revise the resolution of the joint chambers of the SC of 23 January 2020 as being ‘extremely harmful’ thereby confirming her absolute loyalty to the ruling camp. It should be added that the First President of the SC does not have the right to question the resolution of the joined Chambers of the SC, while it can only be amended by way of another resolution of the joined Chambers.

IV. **Disciplinary proceedings against judges who tried to follow the guidelines contained in the CJEU judgment of 19 November 2019.**

It should be emphasized that, after the judgment of the CJEU of 19 November 2019, literally every Polish judge who, in line with the guidelines contained in that judgment, took any steps to examine the legal status of the neo-NCJ or the legal status of judges nominated or promoted with the participation of the neo-NCJ, encountered an immediate, sharp response from the disciplinary commissioner. This primarily applies to judges who, following the guidelines of the CJEU ruling of 19 November 2019, submitted requests for a preliminary ruling either to the CJEU (**Anna Bator-Ciesielska**) or to the Polish SC regarding the legal status of the neo-NCJ, or judges appointed with its participation (**Aleksandra Janas, Irena Piotrowska, Andrzej Żuk, Krystyna Skiepmo, Bożena Charkiewicz, Agnieszka Żęgarska, Ewa Dobrzyńska-Murawka, Dorota Ciejek, Jacek Barczewski and Mirosław Wieczorkiewicz**), but also others who tried to verify the correctness of the appointment of the neo-NCJ (**Paweł Juszczyzyn**), or only to determine whether the neo-NCJ took part in the appointment of a judge who issued a judgment in the first instance (**Mieczysław Wilczek, Rafał Lisak and Wojciech Maczuga**), or those who drew attention in official documents to doubts regarding the legality of this body (**Ewa Malinowska**), in this light called on other judges to comply with the law (**Krzysztof Markiewicz**) and questioned the legality of the appointment of individual judges appointed

⁶ <http://themis-sedziowie.eu/materials-in-english/position-of-the-board-of-the-themis-judges-association-of-28-may-2020-regarding-the-appointment-of-the-first-president-of-the-supreme-court/>

⁷ <http://themis-sedziowie.eu/materials-in-english/statement-by-50-judges-of-the-supreme-court-on-the-irregularities-of-the-election-procedure-of-23-may-2020/>

with the participation of the neo-NCJ (**Waldemar Żurek**).⁸ Disciplinary proceedings against Judge **Maciej Żelazowski**⁹ were initiated because, as an appellate judge, he conducted an independence test with regard to a judge of a first instance court – in line with the recommendations contained in the resolution of the joint chambers of the SC of 23 January 2020. Disciplinary proceedings were also initiated against Judges **Dariusz Mazur** and **Maciej Czajka**, because they hanged posters in the court building in Kraków questioning the legality of the neo-NCJ and the newly established disciplinary bodies.¹⁰ Therefore, a total of 21 judges have already been repressed in this respect.

One of these judges (Paweł Juszczyzyn) has already been unjustifiably suspended in his duties in connection with the disciplinary proceedings pending against him and was therefore removed from adjudicating by the Disciplinary Chamber of the SC, which also meant that his salary was cut by 40%. In his case, Disciplinary Commissioner Przemysław Radzik and the Disciplinary Chamber behaved like a real firing squad,¹¹ as the judge was not only *de facto* suspended under the ‘muzzle act’, which had not yet entered into force (i.e. in breach of the *nulla poena sine lege anteriori* principle), but also as a result of the examination by the Disciplinary Chamber of a complaint that was inadmissible under the law. Therefore, by suspending Judge Juszczyzyn, the Disciplinary Chamber acted in a qualified lawless manner.¹² The Disciplinary Chamber may soon make the same decisions with respect to further judges who followed the guidelines contained in the judgment of the CJEU of 19 November 2019.

On the other hand, Judge Waldemar Żurek is the first judge against whom proceedings were formally instituted under the ‘muzzle act’, which does not change the fact that a number of disciplinary proceedings described above were instituted before the ‘muzzle act’ came into force, which was in breach of the principle of *lex retro non agit*. These actions, taken in connection with the judicial activity of judges, unacceptably interfere with judicial independence. They are also intended to intimidate other Polish judges so as to prevent them from executing the judgment of the CJEU of 19 November 2019.

More than 80 Polish judges are currently being harassed on disciplinary grounds for political reasons (including disciplinary and explanatory proceedings). Many unjustified disciplinary proceedings are simultaneously conducted against judges who are most active in defending the rule of law. For example, 5 disciplinary proceedings and 2 explanatory proceedings are currently pending against judge Waldemar Żurek¹³.

⁸ http://themis-sedziowie.eu/wp-content/uploads/2020/05/Response_Polish_Authorities_CJEU_Judgement_19.11.2019.pdf

⁹ <http://rzecznik.gov.pl/wp-content/uploads/2020/08/KomunikatSzczecin.pdf>

¹⁰ <http://themis-sedziowie.eu/materials-in-english/ziobros-man-wont-forgive-the-krakow-judges-for-the-poster-campaign-in-defence-of-the-free-courts-by-mariusz-jaloszewski-okno-press/>

¹¹ The description of the technological sequence created by the new system of disciplinary proceedings against judges created in 2018 can be found here: http://themis-sedziowie.eu/wp-content/uploads/2019/04/Judges_under_special_supervision_second-publication.pdf

¹² A more detailed description of the course of disciplinary proceedings against Judge Juszczyzyn is provided on page 3 of the publication at: <http://themis-sedziowie.eu/wp-content/uploads/2020/02/Newsletter.pdf>

¹³ <http://themis-sedziowie.eu/materials-in-english/wholesale-disciplinary-proceedings-for-judge-zurek-two-hearings-in-one-day-by-magdalena-galczyńska-onet-pl/>

The interim measure applied by the CJEU ruling of 8 April 2020 suspending the operation of the Disciplinary Chamber of the SC and the initiation by the European Commission of infringement proceedings against Poland for the ‘muzzle act’ on 29 April 2020 constituted the response of the bodies of the European Union to disciplinary proceedings against Polish judges and the ‘muzzle act’.

In response to the interim measure applied by the CJEU, on 20 April 2020, the former First President of the SC, Małgorzata Gersdorf, issued an order prohibiting the transfer of cases to the Disciplinary Chamber, and simultaneously ordered the transfer of cases within its jurisdiction to other chambers of the SC, while disciplinary cases and the lifting of a judge’s immunity were to be passed to the Criminal Chamber.¹⁴

Unfortunately, President Gersdorf’s term of office expired shortly afterwards and, on 5 May 2020, Kamil Zaradkiewicz, who was appointed the acting president of the SC, repealed the order of 20 April, restoring the ability of the Disciplinary Chamber to operate.¹⁵

V. **Lifting judicial immunities as a way of circumventing the CJEU’s interim measure of 8 April 2020 by the Disciplinary Chamber.**

Since the CJEU imposed an interim measure on 8 April 2020 freezing the activities of the Disciplinary Chamber of the Polish SC, this authority essentially ceased examining typical disciplinary cases against judges. This does not mean, however, that the Disciplinary Chamber and its bodies have completely stopped their judicial and administrative activities, as some categories of cases are still being examined by this Chamber. Firstly, the adjudicators in the Disciplinary Chamber adopted the interpretation that, despite the CJEU interim measure, this Chamber is able to pursue cases to lift the immunity of judges, which then enables criminal proceedings to be brought against them.¹⁶ Secondly, at the request of disciplinary commissioners in their proceedings against judges, the President of the Disciplinary Chamber issues orders to appoint local disciplinary courts that have the right to hear the cases of individual judges (there is no doubt that this is an activity constituting proper disciplinary proceedings). According to the author of this paper, the types of activity of the Disciplinary Chamber and its President described violate the interim measure of the CJEU of 8 April 2020. In accordance with the decision on the interim measures issued by the CJEU: *The Republic of Poland shall be required, immediately and pending the judgment in Case C 791/19, to suspend the application of the provisions of Article 3(5), Article 27 and Article 73(1) of the Supreme Court Act of 8 December 2017 (OJ L 2018, item 5), as amended, which constitute the basis for the jurisdiction of the Disciplinary Chamber of the Supreme Court in both the first and second instance, in disciplinary cases of judges.*¹⁷

From the formal point of view, the scope of application of Article 27 of the Act on the Supreme Court covers both proper disciplinary proceedings and the proceedings to lift a judge’s

¹⁴http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/Zarz%C4%85dzenie%20nr%2048_2020%20Pierwszego%20Prezesa%20SN%20z%20dnia%2020%20kwietnia%202020r.pdf

¹⁵ http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/Zarz_PP_SN_55_2020.pdf

¹⁶ It was the muzzle act that extended the jurisdiction of the Disciplinary Chamber of the SC in such a way that it adjudicates cases for the waiver of judicial immunity as a court of both first and second instance.

¹⁷<http://curia.europa.eu/juris/document/document.jsf?docid=225141&text=&dir=&doclang=FR&part=1&occ=first&mode=req&pageIndex=1&cid=1818419>

immunity. Proceedings to lift a judge's immunity are not strictly disciplinary proceedings, but a preliminary stage of criminal proceedings against a judge, which must be conducted in order to press charges against a particular judge and question him as a suspect, without which an indictment could not be brought to the court. However, attention should be paid to two specific features of the proceedings on lifting a judge's immunity. First of all, the proceedings to lift the immunity are conducted primarily in accordance with the provisions governing the course of disciplinary proceedings, while the provisions of the Criminal Procedures Code (Article 128 of the Act on the Organization of Ordinary Courts) only apply accordingly in matters not covered by the provisions on disciplinary proceedings. Second, according to Article 129, para. 2 and para. 3 of the Act on the Organization of Ordinary Courts, when issuing a decision to lift a judge's immunity, the Disciplinary Chamber of the SC automatically suspends a judge in his/her duties (for the duration of criminal proceedings against the judge, which, in practice, means indefinitely), and reduces his/her salary by 25% to 50% for the duration of the suspension. These are measures of a purely disciplinary nature. Furthermore, pursuant to Article 80, para. 2h of the Act on the Organization of Ordinary Courts, if the prosecutor requests that a judge be temporarily arrested, the resolution lifting his immunity also means consent to the temporary arrest of the judge. Given the effects of lifting a judge's immunity described above, which are manifested in the indefinite removal of a judge from adjudication, reducing his salary and agreeing to his temporary arrest, there is no doubt that this procedure also constitutes a potentially powerful weapon of repression against judges in the hands of the politicized Disciplinary Chamber of the SC.

In 2020, the Internal Affairs Department of the State Prosecution Office, which is loyal to the ruling camp, pressed absurd charges against Judges **Beata Morawiec**,¹⁸ Igor Tuleya and Irena Majcher of having allegedly committed criminal offences in connection with their judicial activity. As soon as the Disciplinary Chamber lifted Judge Morawiec's immunity on 12 October 2020, it simultaneously suspended her from her judicial activity and reduced her salary after the hearing that grossly breached her right to a fair trial.

On 18 November 2020, the Disciplinary Chamber of the SC made the same decision with respect to Judge **Igor Tuleya**, who was suspended from office, his judicial immunity was lifted and his salary was reduced by 25%. His only 'fault' is that, three years ago, he ordered the prosecutor's office to restart the investigation into the case of so-called column chamber voting in the Sejm. He pointed out, among other things, that the testimonies of the witnesses, who admitted that PiS intentionally blocked the opposition from voting and submitting motions, were not taken into account. Furthermore, he reported 230 PiS deputies to the prosecutor's office, including Marshal of the Sejm Terlecki, former Prime Minister Szydło and Prime Minister Morawiecki, of suspected false testimony. The criminal prosecution conducted by the prosecutor's office is in conflict with the law and logic. They are accusing the judge that the decision to restart discontinued proceedings and its motives were announced in an open session and journalists informed the public about the case. They classify the judge's crime as 'disseminating unauthorized information from pre-trial proceedings before they were disclosed in court proceedings' (Article 241, para. 1 of the Penal Code), or unlawful disclosure of information obtained in connection with his function. The problem is that, according to the

¹⁸ <http://themis-sedziowie.eu/materials-in-english/humiliate-in-order-to-subordinate-judge-beata-morawiec-case-study-prepared-by-judge-dariusz-mazur/>

law, it is within the discretionary power of the judge, who presides over the proceedings, to decide whether or not the court session is public (Article 95b, para. 1 of the Criminal Procedures Code). Judge Tuleya decided that the court hearing would be public because of the importance of the case and public interest - and agreed for it to be recorded by the media (Article 357, para. 1 of the Criminal Procedures Code). The materials from the investigation he referred to were not classified and the prosecutor who was present in the courtroom did not object to the openness of the hearing.

It was no accident that these victims of this legal persecution were chosen, because both Judge Morawiec, as President of the 'Themis' Association of Judges and simultaneously, a person who humiliated Mister Ziobro by winning a case regarding the protection of personal rights, and Judge Tuleya, as an active member of the Association of Polish Judges 'Iustitia' and a judge who issued several judgments that were inconvenient for the ruling camp, are seen to be leaders of the judicial resistance against the politicization of the judiciary. The date of the hearing in the disciplinary case of Judge Tuleya was set by the Disciplinary Chamber for 18 November 2020.

What is striking is that, in the judgment of 23 September 2020 in case reference II DO 52/20 regarding the waiver of the prosecutor's immunity, 3 people adjudicating in the Disciplinary Chamber of the SC expressed the view that the judgment of the CJEU of 19 November 2019 regarding preliminary questions from the Polish SC in joined cases C-585/18, C-624/18, and C-625/18 is not binding in the Polish legal system.¹⁹ This may not come as a surprise, as it was the judgment of the CJEU of 19 November 2019 that specified the criteria for assessing the independence of a judicial authority, which undermines the legal status of the Disciplinary Chamber. Therefore, the content of this judgment can be seen as a form of self-defence on the part of the Disciplinary Chamber, which does not change the fact that, in issuing the ruling in case II DO 52/20, the Disciplinary Chamber of the SC clearly confirmed that it does not respect European Union law, which absolutely should not be tolerated by the European community.

VI. Central disciplinary commissioners initiate collective disciplinary proceedings against judges.

While, in previous years, unjustified and politically motivated disciplinary proceedings were directed by central disciplinary commissioners against selected judges who were perceived to be leaders of judicial resistance in defence of the rule of law, after the 'muzzle act' entered into force, disciplinary commissioners began to institute proceedings against a larger groups of judges. Three disciplinary actions of this kind have been instigated to date:²⁰

- 1) First, in August 2020, Deputy Disciplinary Commissioner Przemysław Radzik addressed a letter to the local disciplinary commissioners suggesting disciplinary proceedings should be conducted against 1,278 judges who signed a letter to the OSCE requesting the supervision of the presidential elections in Poland, which were originally supposed to have been held on 10 May 2020. One of the disciplinary commissioners actually

¹⁹ <https://ruleoflaw.pl/wp-content/uploads/2020/10/Case-II-DO-52-20.pdf>

²⁰ <https://oko.press/this-is-madness-ziobros-disciplinary-commissioner-wants-to-prosecute-1278-judges-in-poland-at-once/>

initiated proceedings against 15 judges from Piotrków Trybunalski (among them was a member of the central board of 'Iustitia', Judge Tomasz Marczyński);

- 2) The second strikes at the whole of the 10-person management of the 'Iustitia' Association of Polish Judges. Radzik wants to prosecute them for publishing the post-election position of the association's management board, which questioned the legality of the judges from the Chamber of Extraordinary Control and Public Affairs of the SC, which ruled on the validity of Andrzej Duda's election to the office of President of Poland;
- 3) Radzik is also investigating the 14-person management of the Judges' Cooperation Forum (an informal judicial organization that helps repressed judges). The disciplinary commissioner does not like the fact that they did not disclose their membership of this Forum in the declarations of membership of social organizations which they are required to submit from this year. Given that the Judges' Cooperation Forum is an informal organization, the initiation of proceedings is groundless, not to mention the fact that the obligation introduced by the 'muzzle act' to disclose membership of any type of organization by judges is unconstitutional, as it breaches the right to privacy and freedom of association.

Collective disciplinary proceedings are probably supposed to play the role of an effective generator of a chilling effect among the judges of the ordinary courts, while constituting an attempt to intimidate the boards of the associations of judges.

VII. The Constitutional Tribunal as an institution that legalizes breaches of the Constitution by the government and Parliament.

The ruling party took political control over the Constitutional Tribunal (CT) in December 2016 which was achieved by way of an illegal and even unconstitutional hostile takeover, by not admitting 3 legally elected judges to the CT and the refusal to publish 3 rulings of the 'old' CT in the Official Journal of Laws.²¹ It is commonly known that Julia Przyłębska, who is currently the President of the Tribunal, regularly invites the President of the Law and Justice party (PiS), Mr. Kaczyński, to dinner, after which she adjudicates in accordance with the political needs of the ruling camp, arbitrarily juggling judges adjudicating in the tribunal in important cases. Such political subordination of the CT actually means that the very small PiS majority of seats in Parliament is able to pass any law, even unconstitutional laws. Worse still, the CT has been transformed from being the effective guardian of the Constitution into one of the most active instruments of destruction of the rule of law in Poland in the hands of the ruling party.

Examples of the most spectacular and harmful actions of the politicized CT include:

- the decision of 21 June 2017 declaring the method of electing members of the old NCJ to be unconstitutional;
- the judgment of 24 October 2017 stating that the provisions on the basis of which Małgorzata Gersdorf was elected the First President of the SC are unconstitutional;

²¹ The process of political subordination of the Constitutional Tribunal is described in more detail in Chapter II of this study: https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Sanders/Dokumente/Good_change_-_7_October_2017_-_word.pdf

- the decision originally scheduled for 20 October 2020 to deprive Adam Bodnar of the ability to perform the duties of the Ombudsman until his successor is elected by the Parliament (the hearing was postponed because a member of the bench was ill).

In all these cases, it seems obvious that the requests submitted to the ‘new’ CT were based on artificially created problems to achieve specific political objectives, which are to terminate the mandates of fifteen judges—members of the ‘old’ NCJ, the former First President of the SC and the independent Ombudsman. The actions described above are unequivocally assessed by constitutional law specialists as being in conflict with the principles of the Constitution, and simultaneously make the CT a gravedigger of the independence of the most important central state bodies that protect the independence of the judiciary and human rights in Poland.

On 22 October 2020, the CT has revealed itself in a new role as the guardian of the Catholic-national vision of the world, when it held that abortion in the case of irreversible damage to the foetus is unconstitutional. This means the introduction of a practically total ban on abortion in Poland (the situation on which the CT ruled applied to 98% of abortions). This judgment is currently very useful for the ruling camp, which prefers to unleash a domestic ideological war rather than be held accountable for its incompetence in fighting the Covid 19 pandemic. The judgment of the CT in the case raises serious doubts from the procedural point of view for several reasons. First of all, three so-called ‘stand-in judges’ (people elected to positions previously properly filled by parliament of the previous term) were included in the bench, which is why many academics consider the decision to be *sententia non existens*. Secondly, the chairman of the bench was Julia Przyłębska, who was incorrectly elected President of the CT. Thirdly, the judge-rapporteur in the case was Professor Krystyna Piotrowicz, who, until recently, was a PiS MP and the author of the bill on the prohibition of abortion, which clearly indicates that she should be removed from the case because of her lack of impartiality. Moreover, the critics of the ruling party clearly indicate that the CT did not even attempt to resolve the conflict of rights which, in the case of abortion, is between the right to life and the right to the protection of family life, or the prohibition of degrading and inhuman treatment.

Another dubious achievement of the CT is its judgment of 20 April 2020, in which it held that the said resolution of the joint chambers of the SC of 23 January 2020 (described in part I of this paper), issued according to the guidelines contained in the CJEU ruling of 19 November 2019, is in conflict with the constitution, EU law and the ECHR. All acknowledged specialists in constitutional law recognize that, by issuing this judgment (regardless of the fact that it may be considered a *sententia non existens* as issued in a bench containing ‘stand-in judges’), the Tribunal overstepped its powers, as it has the right to review the constitutionality of acts of law, but not court decisions.²²

VIII. Public prosecutor’s office.

The ruling camp took political control over the Public Prosecutor’s Office in April 2016 by combining the functions of the Minister of Justice and the Prosecutor General, which was accompanied by a significant increase in his investigative powers. In particular, the Prosecutor General currently has the power to issue binding orders to take particular procedural steps in

²² <https://oko.press/trybunal-przylebskiej-o-sn/>

individual cases and appoint the managing prosecutors (instead of the competition procedure that was previously applied). This was accompanied by the replacement of the top prosecutors under the pretext of a reorganization. The result is the image of the Public Prosecutor's Office which is potentially entirely subordinated to the PiS party.

For this reason, the legitimacy of the actions of the prosecutors gives rise to serious doubts in the media and among the public, e.g. in the situation when, on 15 October 2020, former Deputy Prime Minister Roman Giertych, currently an active lawyer and a staunch critic of the activities of the ruling camp, who represents several politicians from the current opposition parties in court proceedings, was arrested on a charge of allegedly committing economic crimes.²³ These doubts became even greater when the court refused to apply pre-trial detention in this case, stating that the prosecutor had not substantiated the fact that the suspect had committed the crimes. Roman Giertych's case is only one of many examples of criminal proceedings in which the actions of the prosecutor's office suggest that they are potentially politically motivated. On the one hand, the prosecutor's office initiates proceedings with great enthusiasm against people who are perceived to be opponents of the current ruling camp, while on the other hand, it behaves indulgently with respect to perpetrators of offences who are associated with the current ruling camp²⁴ and is also reluctant to prosecute anyone for crimes related to nationalism or racism.²⁵

On 13 October 2020, Deputy Prosecutor General Bogdan Świączkowski sent an order to the prosecutors to treat European Arrest Warrants issued by the Netherlands with 'special care'. He did this as a retaliation for the court in Amsterdam suspending the enforcement of EAWs from Poland in connection with the question to the CJEU about the independence of Polish courts.²⁶ The application of the principle of reciprocity, which was allowed under classical extradition, should not take place under the EAW, as it undermines the principles of mutual trust and mutual recognition of judicial decisions. It should be emphasized that, in September 2020, the Regional Court in Warsaw unacceptably rejected the Dutch request to execute the EAW, referring to the principle of reciprocity and grounds for the non-recognition of EAW that did not correspond with the facts of the case.²⁷

The **Internal Affairs Department of the State Prosecution Service** was established at the very top of Public Prosecutor's Office in April 2016. Its objective is to 'conduct and supervise preparatory proceedings in cases of intentional crimes committed by judges, prosecutors, trainee judges or trainee prosecutors'. This department was established in whole by an active politician from the current ruling coalition, the Minister of Justice – Prosecutor General Zbigniew Ziobro, to whom the department reports directly and is bound by his orders as the head of the prosecutor's office. Moreover, it mainly employs young prosecutors who are not employed there permanently, but were temporarily posted there by Zbigniew Ziobro and may

²³ <https://www.nytimes.com/2020/10/16/world/europe/poland-lawyer-detain.html>

²⁴ <https://ruleoflaw.pl/kaczynski-above-the-law-the-delicate-work-of-keeping-him-away-from-questioning-and-out-of-court/>

²⁵ <http://themis-sedziowie.eu/materials-in-english/investigations-discontinued-indictments-withdrawn-that-is-how-ziobro-is-helping-hooligans-racists-and-fascists-by-jacek-harlukowicz-gazeta-wyborcza/>

²⁶ <https://ruleoflaw.pl/polands-national-public-prosecutor-is-going-to-war-with-the-netherlands/>

²⁷ <https://twitter.com/ODFoundation/status/1320740274570776577?s=20>

be degraded with a single signature, which would mean that they would lose their post and the related higher salary. Until July 2018, during more than 2 years of its operation, having examined over 1100 complaints and files, the Department only initiated 7 proceedings against specific individuals, 5 of which apply to prosecutors and 2 to judges.²⁸ Given that Poland has approximately 10,000 active judges and over 6,000 prosecutors, such a number of proceedings should be considered insignificant.

In the light of the opinion of Advocate General Bobek of 23 September 2020, the establishment of such a special prosecutorial unit with exclusive jurisdiction for offences committed by the members of the judiciary may be in conflict with EU law, especially if it is not justified by genuine and valid reasons and if it does not meet the requirement of being independent of politicians.²⁹

The Department of Internal Affairs of the State Prosecution Service showed its real political usefulness after the CJEU suspended the activity of the Disciplinary Chamber of the SC in disciplinary proceedings against judges in April 2020. In order to circumvent the interim measure applied by the CJEU and to allow the Disciplinary Chamber to continue its legal harassment of judges, the ruling camp adopted an interpretation according to which the interim measure does not apply to proceedings conducted by the Disciplinary Chamber lifting the immunity of judges, which precede the initiation of criminal proceedings for judges. Therefore, it was the Internal Affairs Department of the State Prosecution Office, which is loyal to the ruling camp, that pressed absurd charges against Judges Beata Morawiec,³⁰ Igor Tuleya and Irena Majcher of having committed criminal offences in connection with their judicial activity (which was mentioned above in chapter V of this paper).

IX. The collapse of the neo-NCJ as an authority safeguarding the independence of the courts and the impartiality of judges.

The Chancellery of the Sejm published the so-called 'lists of supporters' of judge-members of neo-NCJ on 14 February 2020, after more than 2 years of hiding these lists from the public. Such a sudden willingness for transparency may seem surprising, but it seems that this was determined by two factors:

- firstly, the lists of supporters had already been leaked and the first part was published by Poland's largest daily newspaper, 'Gazeta Wyborcza',
- secondly, as mentioned above, the 'muzzle act' introduced the possibility of removing defiant judges from the profession for questioning the legal status of the neo-NCJ, which fully safeguards the interests of the ruling camp. In such a situation, it is hardly a coincidence that the lists of supporters of the candidates to the neo-NCJ were published exactly on the same day that the muzzle act entered into force.

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) which, in conjunction with

²⁸ Data from the beginning of August 2018, <https://www.prawo.gazetaprawna.pl%2Fartykuly%2F1206379%2Cpatologie-wsrod-sedziow-i-prokuratorow.html&usg=AOvVaw1gvqMgjquGFrX4y7DDo5Z>

²⁹ https://curia.europa.eu/jcms/jcms/p1_3230409/en/

³⁰ <http://themis-sedziowie.eu/materials-in-english/humiliate-in-order-to-subordinate-judge-beata-morawiec-case-study-prepared-by-judge-dariusz-mazur/>

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 tampering, such as adding to 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 greatest doubts are raised in the case of the following members of the NCJ: Jarosław Dudzicz,³¹ Marek Jaskulski,³² Joanna Kołodziej-Michałowicz³³ and Jędrzej Kondek.³⁴

Furthermore, the publication of the lists of supporters shows that the neo-NCJ was not validly elected, even in the light of the new, unconstitutional Law, as one of its judge–members (Maciej Nawacki) was lacking the required number of supporting signatures of 25 judges (his list of supporters contains 28 signatures,³⁵ but 5 were withdrawn before the list was submitted to the Speaker of the Sejm; in addition, Maciej Nawacki himself signed his own list as one of the signatories, which should be considered invalid). 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.³⁶

The process of collecting signatures of supporters was politically corrupt, as the vast majority of people who supported 11 out of 15 candidates received benefits in return by way of promotions and various types of additional financial benefits. Furthermore, the judge–members of neo-NCJ do not constitute 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. As many as 10 out of the 15 judge–members of the neo-NCJ would not have become its members, were it not for the support of judges posted to the Ministry of Justice (namely Dariusz Drajewicz, Jarosław Dudzicz, Dagmara Pawełczyk-Woicka, Rafał Puchalski, Grzegorz Furmankiewicz, Joanna Kołodziej-Michajłowicz, Jędrzej Kondek, Maciej Mitera, Maciej Nawacki and Paweł Styrna). This clearly shows that the ruling camp had a decisive influence on the shape of the judicial part of the neo-NCJ.³⁷

It is particularly striking that, according to media reports,³⁸ as many as 4 out of the 15 judge–members of the neo-NCJ (Dariusz Drajewicz, Maciej Nawacki, Jarosław Dudzicz and Rafał Puchalski) were part of the so-called ‘Troll farm at the Ministry of Justice’, headed by former Deputy Minister of Justice Łukasz Piebiak, who was also supposed to coordinate the collection of signatures of supporters for the members of the neo-NCJ at the Ministry of Justice. Despite

³¹ <http://www.sejm.gov.pl/KRS/J.Dudzicz.pdf>

³² <http://www.sejm.gov.pl/KRS/M.Jaskulski.pdf>

³³ <http://www.sejm.gov.pl/KRS/J.Kolodziej-Michalowicz.pdf>

³⁴ <http://www.sejm.gov.pl/KRS/J.Kondek.pdf>

³⁵ <http://www.sejm.gov.pl/KRS/M.Nawacki.pdf>

³⁶ <https://oko.press/podpisy-ujawnione-cala-krs-moze-byc-nielegalna-bo-maciej-nawacki-mial-za-malo-podpisow/>

³⁷ <https://www.iustitia.pl/79-informacje/3707-struktura-poparcia-dla-kandydatow-do-krs>

³⁸ 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/>,

- <http://themis-sedziowie.eu/materials-in-english/troll-farm-at-the-ministry-of-justice-part-3-judges-organize-smear-campaign-against-the-president-of-the-supreme-court/>,

- http://themis-sedziowie.eu/wp-content/uploads/2019/10/How-a-member-of-the-NCJ-Puchalski-helped-EMI_wer.docx

the appeal from 'Themis',³⁹ no effective investigation has been conducted into this to date, despite to positive obligation under the ECHR. It seems obvious that such a politically corrupt and 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.

Like the Constitutional Tribunal previously, the neo-NCJ has become a façade institution which, instead of protecting the independence of the judiciary, is doing everything to subordinate it to the politicians. For example, the neo-NCJ often rejects judges applying for promotion who are the best assessed and recommended by judge-inspectors and assemblies of local courts; instead, the neo-NCJ promotes judges with poor professional achievements, who offer a guarantee of loyalty to the newly-nominated presidents of the courts. In one of its opinions regarding such a loyal candidate for promotion, the neo-NCJ stated: 'the fact that the candidate has a high rate of judgments overturned by the court of the second instance proves that he thinks independently.'⁴⁰ It comes to mind that this statement is cut short and should end with: he thinks independently of professional knowledge and logic.

In 2020, the neo-NCJ also continued the process of pumping new judges, who are loyal to the ruling camp, into the SC, so that – regardless of the placement of a 'trusted' candidate into the position of First President of the SC – they fill most of the judicial posts with their own people.⁴¹ The history of the Constitutional Tribunal shows that, when the ruling camp has at least a small majority of 'its own' (which, in the case of the SC means appointed by the neo-NCJ) judges and 'its own' President of the SC, then 'PiS' will gain effective control over the top Polish judicial authority.

The neo-NCJ is perceived by the vast majority of judges as a politicized committee that rewards judges who are loyal to the ruling camp with rapid promotions. Examples of politically motivated and substantively unjustified promotions approved by the neo-NCJ include the promotion of Deputy Disciplinary Commissioner Przemysław Radzik from the position of a district court judge to the position of an appeal court judge,⁴² the appointment of Przemysław Radzik's wife who has no judicial experience to the Supreme Administrative Court, the promotion of Deputy Minister of Justice Anna Dalkowska from the position of a district court judge to the position of a judge of the Supreme Administrative Court (i.e. directly from the lowest to the highest position in the judicial hierarchy), or the promotion of the neo-NCJ member Dagmara Pawełczyk-Woicka to the position of a regional court judge.⁴³ According to the general opinion of judges, none of these people would have a chance of being promoted in conditions of a properly conducted competitive procedure.

The Polish judicial community was recently surprised to learn that a candidate was selected in the recruitment process to the position of judge of the Regional Court in Olsztyn by the neo-NCJ, whose only advantage over the other applicants was that he paid PLN 12,500 (approx.

³⁹ <http://themis-sedziowie.eu/materials-in-english/appeal-of-the-themis-association-of-judgesof-26-august-2019-regarding-the-so-called-piebiak-scandal/>

⁴⁰ <https://prawo.gazetaprawna.pl/artykuly/1407231,uchwaly-nowej-krs-sa-masowo-kwestionowane.html>

⁴¹ <https://oko.press/prezydent-duda-nagle-powolal-nowych-sedziow-sn/>

⁴² <https://oko.press/radzik-dostal-awans-za-sciganie-niepokornych-sedziow/>

⁴³ <https://oko.press/awanse-last-minute-nowej-krs-dla-sedziow-ktorzy-poszli-na-wspolprace-z-resortem-ziobry/>

EUR 3,000) in 2019 to the PiS party's election fund and openly supported this party with his posts in the Internet.⁴⁴ There is no doubt that this judge would not have had any chance of passing the independence test conducted in accordance with the resolution of the joint chambers of the SC of 23 January 2020. Neither the neo-NCJ nor President Duda saw any signs of a glaring lack of impartiality of the judicial candidate in this, even though this situation gives the impression to outsiders that he had bought himself the office of judge from the politicians of the ruling party, which clearly resembles medieval practices of selling offices.

X. **The neo-NCJ is taking steps to politically subordinate the Supreme Administrative Court.**

It should be noted at this point that Przemysław Radzik's wife and Anna Dalkowska are not the only controversial candidates to the Supreme Administrative Court (SAC) who have recently appeared. There are as many as 12 candidates to the SAC who are clearly assessed as absolutely loyal to the ruling camp, including three members of the neo-NCJ (Maciej Nawacki, Zbigniew Łupina and Teresa Kurcysz-Furmanik), as well as the former Deputy Minister of Justice Łukasz Piebiak, known from the fact that he ran a 'troll farm' in the Ministry of Justice.⁴⁵ In Łukasz Piebiak's case, as in Anna Dalkowska's case, they are to be promoted from the lowest level in the ordinary judiciary to the highest level in the administrative judiciary, so they are substantively unprepared for the function they are to perform.

The fact that so many people, who do not have the necessary judicial experience and substantive preparation and whose only distinguishing feature is loyalty to the ruling camp are promoted to SAC, clearly shows the intention to subordinate this court politically. In the near future, this will lead to a situation in which there will be no independent judicial control over the legality of the operation of public administration in Poland.

XI. **Conclusions.**

The conclusion drawn from the above arguments is indeed depressing. 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 the judiciary: the neo-NCJ which is responsible for the appointment and promotion of judges, and the Disciplinary Chamber of the SC, which is responsible for legally harassing defiant judges (this includes the possibility of suspending a judge and then even removing him from the profession). The new mode of disciplinary proceedings combined with full control of the Minister of Justice over the Prosecutors' Office, his excessive administrative control over the judiciary, which is possible because of the lack of effective constitutional control of new laws, constitute a real 'chilling effect generator'. Judges are exposed to constant attacks, including black PR campaigns in media.⁴⁶ All tools of oppression described above are used to suppress judicial independence and disable the application of EU law and the ECHR by the courts.

⁴⁴ <https://ruleoflaw.pl/donate-and-become-a-judge/>

⁴⁵ <https://ruleoflaw.pl/the-good-change-is-going-for-the-supreme-administrative-court/>

⁴⁶ <https://verfassungsblog.de/defamation-of-justice-propositions-on-how-to-evaluate-public-attacks-against-the-judiciary/>

The main objective of the so called 'great reform of the justice system' is to replace staff in functional positions in the justice system and subordinate the justice system to political factors, in particular the Minister of Justice, in order to create a system of mono-power, by which the State authority will be built on spreading fear among citizens who are deprived of effective legal protection. The right of citizens, which now seems to be particularly threatened, is the right to a fair trial in the meaning of Article 6 of the ECHR and Article 47 of the CFREU. Given that independent judiciary is a necessary and irreplaceable element of the democracy and the rule of law, Polish democracy is seriously endangered. The manner of operation of the politicized prosecutor's office clearly indicates that the aim of the pseudo reform of the judiciary is also to ensure impunity for people associated with the ruling camp and to enable legal persecution of the opposition (see chapter VIII).

After the 'muzzle act' came into force, the government intensified its efforts to politically subordinate the judiciary and, over the last year, its situation has gone from bad to worse. This is evidenced by activities such as the disciplinary persecution of all judges who tried to implement the recommendations contained in the CJEU judgment of 19 November 2019, initiating collective disciplinary proceedings against judges and boards of judicial organizations, politically subordinating the First President of the SC, continuing the activities of the Disciplinary Chamber of the SC despite its suspension by the CJEU, involving the politicized CT in challenging the binding force of the resolution of the Joint Chambers of the SC of 23 January 2020 and attempting to remove Adam Bodnar from the position of Ombudsman. In turn, the neo-NCJ contributes to the politicization of the judiciary by promoting judges primarily according to their political loyalty, which could soon mean that the ruling camp will take control of the SC and the SAC.

Interference from the CJEU and European Commission turned out to be insufficient to hamper the political subordination of the Polish judiciary. Despite the initiation of the infringement proceedings before the CJEU regarding the new mode of disciplinary proceedings, central disciplinary commissioners are initiating increasingly more disciplinary proceedings against judges who try to defend the rule of law. The Disciplinary Chamber circumvented the interim measure imposed on it by prioritizing proceedings to lift judicial immunities, instead of typical disciplinary proceedings (including the suspension of judges Beata Morawiec and Igor Tuleya from office). The ability to question the legal status of judges appointed with the participation of the neo-NCJ arising from the ruling of the CJEU of 19 November 2019 and the resolution of the joint chambers of the SC of 23 January 2020, has been virtually eliminated by the provisions of the 'muzzle act'. On the one hand, the provisions of the 'muzzle act' prohibit judges from questioning the status of the neo-NCJ and the judges appointed with its participation under the threat of expulsion from the profession, whereas on the other, they grant the exclusive competence to examine the party's requests in this respect to the Extraordinary Control and Public Affairs Chamber, which was itself established in whole with the participation of the neo-NCJ.

It is absolutely imperative for the European Commission to take far more decisive steps to restore the independence of the NCJ and the CT, to completely eliminate the Disciplinary Chamber of the SC and politicized central disciplinary commissioners from legal circulation and to prevent the application of a number of solutions introduced by the 'muzzle act'.