

The Battle for Judicial Independence in Poland, 2017-2022

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1. *The Constitutional Tribunal – 2015-2016*

In order to understand the current situation for Polish judges, it is necessary to look back a couple of years¹. The deterioration of the rule of law in Poland began in late 2015, shortly after elections were won by the United Right (Zjednoczona Prawica, or ZP) coalition led by the Law and Justice (Prawo i Sprawiedliwość, or PiS) party. The first step of the new political majority's plan to subordinate all aspects of public and social life to politics involved taking over the Constitutional Tribunal. In December 2015, the lower chamber of the Parliament, the Sejm, elected three persons for judicial positions in the Constitutional Tribunal which were already occupied by judges who had been elected by the Sejm of the previous term. This marked the beginning of the constitutional crisis in Poland. The President of the Republic, Andrzej Duda, then breached the Constitution for the first time as he swore in the "doubles" instead of the lawfully elected Constitutional Tribunal judges.

From that moment on, the Constitutional Tribunal began to legalise the unconstitutional actions of the legislature instead of controlling them. This process sped up after Julia Przyłębska was elected President of the Constitutional Tribunal in December 2016.

2. *The new laws on the judiciary – July 2017*

Having prepared the ground for further changes, PiS then initiated the process of taking control over the judiciary. In this context, it has to be noted that the majority gained by the ZP coalition in 2015 was large enough to allow it to introduce changes in the law quickly, very often overnight. Further, it often used a holiday season (Christmas, summer holidays) to pass changes that might give rise to public protests.

This is exactly what it did in July 2017. On 12 July 2017, three bills were proposed

to the Sejm: one on the ordinary courts, one on the National Council of the Judiciary and one on the Supreme Court. All of them would subordinate the judiciary to the will of politicians. On that day the battle for the independence of the courts began, and it has continued until the present day.

The bill amending the Law on the Organisation of the Ordinary Courts and Certain Other Laws introduced changes that, among other things,

- increased the influence of the Minister of Justice on the appointment of court presidents and vice-presidents, including the possibility to revoke the appointment of court presidents without prior notice within six months of the bill's entering into force;

- introduced new tools for the external and internal supervision of the administrative activity of the courts;

- obliged judges to submit asset declarations, which would be published;

- introduced the possibility of seconding a judge to the Ministry of Foreign Affairs and the President's Chancellery; and

- brought about changes in the system used to appraise the work of judges and plan their professional development².

The methods used to select the members of the National Council of the Judiciary (NCJ) and to select the judges were changed such that

- the judges sitting on the NCJ were to be selected by politicians (depriving the judges of their former right to choose their own representatives);

- the terms of office of the incumbent judicial members of the NCJ were to be shortened; and

- the President of the Republic was entrusted with the power to select judges from

among the candidates presented by the NCJ³.

Finally, the most scandalous proposal was the one that would submit the Supreme Court to the sole will of the Minister of Justice (who is also the Prosecutor General): the Law on the Supreme Court. Under the bill presented, the Minister of Justice would have sole competence to specify the rules, the number of judges and the internal organisation of the Supreme Court. In addition, all of the staff serving on the Supreme Court would be replaced. If the bill entered into force, all existing Supreme Court judges would have to retire, with the exception of those chosen by the Minister of Justice. Moreover, the Minister of Justice would also appoint the First President of the Supreme Court if the judge holding that position retired. Finally, the new act also reduced the age of retirement for the judges. The bill was assessed very negatively. It was deemed to violate many provisions of the Constitution since it breached the separation of powers and the principles of a democratic State governed by the rule of law. The three bills were adopted by the Parliament on 20 July 2017⁴.

The proposals described above came as a shock both to society and to the judges themselves. They resulted in mass protests all over the country. The Polish Judges' Association *Iustitia* initiated an action called "Chain of Lights", calling upon all lawyers and citizens to surround the Supreme Court with a chain of candle lights; those who could not come to Warsaw should do the same in their own cities and towns. Over the next few days, hundreds of thousands of people protested in front of courthouses to show that they were not willing to give them up to politicians. Many of the demonstra-

tions were organised by the Committee for the Defence of Democracy (Komitet Obrony Demokracji, or KOD), an NGO that has been very active in the defence of constitutional freedoms ever since the ruling party began to take control of the Constitutional Tribunal.

These events also initiated a gradual transformation in the judges themselves. Before, as in most countries, they were not used to speaking in public outside the courtroom. They were trained to be restrained and reserved, to “speak through their judgments”. However, seeing the massive public support in defence of the independence of the judiciary, the judges realised how important it is to maintain a dialogue with society outside the courthouse as well. After standing in the midst of the crowd during the first days of protests, the judges gradually moved to the front, becoming a symbol of the defence of constitutional values and citizens’ rights.

As a result of the protests, on 25 July 2017 President Andrzej Duda vetoed two of the three bills. However, the one that remained – that on the ordinary courts – was enough for the politicians to gradually take administrative power over judges in ordinary courts. This is because the president of a court in Poland has a great deal of power – he or she decides on the place of work of each and every judge, supervises their work in terms of the speed of proceedings, and can check the files of all the judges at the court. The president of a court reports to the Minister of Justice, who is also Prosecutor General.

During the period provided for in the amending bill, the Minister of Justice/ Prosecutor General replaced 137 presidents and vice-presidents of courts. This proce-

dure was popularly referred to as “faxing off”, because the presidents of courts often found out that they had lost their position from a fax sent by the Ministry of Justice. The new presidents and vice-presidents, who were loyal to the ruling party, often participated later on in the repression of independent judges.

The attack on the judges continued in the autumn of 2017 with a billboard blackening campaign accusing judges of being untrustworthy common criminals, based on a few examples of judges or ex-judges prosecuted for minor theft. Reference was also made to unpopular judicial decisions. For example, one of the billboards said that a court had released a paedophile who hurt another child after he left prison. The campaign was organised and financed by an entity called the Polish National Foundation (Polska Fundacja Narodowa), founded by 17 state-owned companies, whose official goal was to promote Poland abroad. All of the billboards bore the same messages: «Let it stay as it was» and «Are you sure you want this?». The aim of this campaign was to prepare society for further actions against the independence of the judiciary⁵.

3. *The Supreme Court*

In December 2017, two more significant legal acts were adopted by the Parliament, closing the cycle of changes that were to subordinate the judiciary to the political power. The first of them was the Law on the Supreme Court. Among other things, it instituted an extraordinary complaint, namely the ability to file a complaint against any final judicial decision. Such complaints

were to be heard by a new chamber of the Supreme Court, the Chamber of Extraordinary Control and Public Affairs, whose jurisdiction also covered public-law cases as well as the confirmation of the validity of elections.

Even more importantly, this bill introduced a new model for disciplinary proceedings against judges and provided for the creation of a Disciplinary Chamber to hear disciplinary cases against judges and other legal professionals. The existence and functioning of this chamber has later been questioned by the Court of Justice of the European Union (CJEU), and it is one of the main issues in the dispute between the Polish government and the European Commission.

Further, the new law required Supreme Court judges to retire at the age of 65 years (instead of 70 as before) but allowed them to apply to the President of the Republic for an extension of their term of office. Judges who had already turned 65 years old would have to retire three months after the law entered into force.

This was yet another attempt to purge the most experienced Supreme Court judges, including First President Małgorzata Gersdorf. This law, alongside the lowering of the retirement age for ordinary-court judges, was examined by the CJEU in a case initiated by the European Commission (C-192/18). In its judgment of 5 November 2019, the CJEU found that the rules concerning the retirement age for both ordinary-court judges and Supreme Court judges were discriminatory. Following this decision, the judges who had been sent into mandatory retirement were finally allowed to resume their positions.

4. *The National Council of the Judiciary (NCJ)*

The second bill passed in December 2017 – which over the next few years would result in a state of legal uncertainty within the Polish judiciary – was the Law on the NCJ (in Polish, *Krajowa Rada Sądownictwa* or KRS).

Proposed to the Sejm on 8 December 2017, it was quickly passed and was signed by the President of the Republic on 20 December 2017. This controversial project subordinated the NCJ to the ruling political majority. The new law interrupted the tenure of the incumbent members of the NCJ and gave the Sejm the additional power to select fifteen of its new members. In the past, those fifteen members had been judges chosen by their peers. Since politicians already controlled a number of seats on the NCJ – there were four representatives of the Sejm and two representatives of the Senate (upper house of Parliament) as well as the Minister of Justice/Prosecutor General and a representative of the President of the Republic – this meant that politicians would control twenty-three of the twenty-five NCJ members.

The NCJ plays a crucial role in the process to evaluate candidates for judicial positions, selecting candidates to be presented for appointment by the President of Poland. The role of the NCJ has a direct impact on the independence of judges, in particular as regards promotion, transfer, disciplinary proceedings, dismissal and early retirement. For example, the promotion of a judge from a district court to a regional court requires the President of the Republic to appoint him or her to serve on the new court, meaning that the procedure for judi-

cial assessment and nomination involving the NCJ will have to be followed again.

By virtue of the Constitution, the NCJ also has a duty to safeguard judicial independence. However, after the introduction of the new law, the newly elected NCJ has never spoken in defence of the repressed judges or the independence of the judiciary as a whole.

The only remaining way for judges to influence, at least theoretically, the membership of the NCJ involved their competence to propose candidates to the Sejm. To become a candidate, a judge needed the signatures of 25 judges or 2,000 citizens. However, a parliamentary commission drew up the final list of 15 candidates to be voted upon by the Sejm. As the ruling party had a majority on this commission, it was able to select only the candidates who were loyal to that party, and the vote in the Sejm concerned not the individual candidates but the list as a whole.

This system to select candidates gave the judges no real influence on the selection of the NCJ members who would formally represent them. For this reason, they largely ignored the selection procedure: of the 10,000 judges in Poland, only 18 candidates entered the election procedure. On 6 March 2018, the Sejm elected the new judicial members of the NCJ, at the same time interrupting the tenure of the previous ones.

The lists of supporters of candidates to the NCJ were kept secret for a very long time. When they were revealed at last, upon orders from administrative courts, it turned out that many judges who had signed such lists worked at the Ministry of Justice, that candidates had signed each other's lists

and that many signatures appeared on more than one list.

Because of the above-mentioned flaws in the selection of the members of the NCJ, judges and other legal professionals began to refer to this unconstitutional body as the "neo-NCJ".

It should be noted that after the parliamentary elections in 2015, the Minister of Justice did not announce any new competitions for judicial positions, because the candidates would then have had to be evaluated by the old NCJ. It was only after the election of the politicised neo-NCJ that the Minister began to announce new competitions. As a result, at that point there were about 700 vacant judicial positions to be filled.

5. *The disciplinary system for judges*

The last element of the series of legal changes aimed at subordinating the judiciary to the political power was the new disciplinary system for judges, headed by the chief Disciplinary Prosecutor and his two deputies, appointed directly by the Minister of Justice/Prosecutor General.

The newly created Disciplinary Chamber became the court of last instance for all disciplinary cases. It was also the court of first instance for disciplinary matters potentially involving a crime. Here it should be pointed out that since there is a crime in the Polish legal system called "exceeding of authority", virtually any judicial decision that was not to the liking of the ruling party could be qualified as a disciplinary matter potentially involving a crime, meaning that it would be subject to immediate evaluation

by the Disciplinary Chamber instead of an independent disciplinary court.

As members of the new Disciplinary Chamber, the newly formed NCJ chose only people trusted by the Minister of Justice/Prosecutor General Zbigniew Ziobro, including many former prosecutors with bonds to him.

6. *The repression*

Having completed the legal framework required to subordinate the judiciary to the political power, it was now time to break the resistance within the judiciary itself.

The newly appointed Disciplinary Prosecutor Piotr Schab and his deputies Przemysław Radzik and Michał Lasota initiated numerous proceedings against judges, either “explanatory” or criminal. In “explanatory” proceedings, judges were interrogated on camera by the two deputy disciplinary prosecutors – under any pretext, such as participation in a rock festival, a public speech upon a certain subject, etc. The interrogations were aimed at finding new reasons to prosecute other judges. In particular, these actions targeted the judges who opposed the unconstitutional changes and defended judicial independence. They were also intended to create a freezing effect within the judicial environment.

The character of the repression against judges varied. Many judges were prosecuted by the deputy disciplinary prosecutors only to have the “explanatory” proceedings pending for years without any decision being made. In other cases, the Disciplinary Prosecutor pressed charges against a judge but then nothing happened for months.

The presidents of the courts also participated in the repression, such as by moving independent-minded judges to other departments within their courts or worsening their working conditions. For example, judge Łukasz Biliński, who served at a criminal-law department at a court in Warsaw and had acquitted many pro-democracy protesters, was transferred to the family-law department by the president of the court, Maciej Mitera – who was also the spokesperson of the neo-NCJ⁶.

7. *The CJEU judgment of 19 November 2019, the Muzzle Law and the March of a Thousand Robes*

When the law has been twisted and the Constitutional Tribunal has been warped, the one thing that lawyers can do is to refer to a higher instance. During the rule-of-law crisis in Poland, Polish lawyers, judges and courts referred many issues connected with the legal changes within the judiciary to the CJEU and to the European Court of Human Rights. Among other things, they questioned the appointment of the members of the NCJ and the shortening of the tenure of its previous members.

On 19 November 2019, the CJEU issued a historic judgment upon a referral for a preliminary ruling from the Polish Supreme Court. In joint cases C-585/18, C-624/18 and C-625/18, the CJEU specified certain conditions to be examined in order to evaluate whether the NCJ was an independent body. Those criteria were rather rhetorical in nature, as it was obvious that the NCJ did not meet any of them.



People hold placards 'Constitution' during their protest in front of the Supreme Court building in Warsaw, Poland, 11 October 2018

This judgment put into question the correctness of all judicial appointments made with the participation of the neo-NCJ. The Polish government, however, chose not to follow the CJEU's ruling. In a desperate attempt to prevent judges from examining judicial appointments made after 6 March 2018, it instead decided to introduce a new law forbidding judges to examine whether the members of a court have been properly appointed. As the composition of a court has fundamental importance for the validity of its decisions, judges controlling a judicial decision are in fact obliged by law to check that the court that issued the decision was properly composed when it did so. For this reason, judges referred to this new law as the "Muzzle Law". Ironically, the related bill was presented to the Sejm on the eve of the anniversary of the introduction of mar-

tial law in Poland in 1981, which resulted in massive abuses of human rights.

The new law touched the very core of judges' professional existence, destroying judicial independence and forbidding them to adjudicate in accordance with the law and their conscience. The judges realised that, since legal measures had proved ineffective against their oppressors, it was time for extreme measures. Accordingly, the Board of the Polish Judges' Association *Iustitia* decided that the only way to draw the attention of public opinion to the events in Poland was to organise a march of lawyers in the streets of Warsaw. We called it the "March of a Thousand Robes", although we were not sure whether that many lawyers would be willing to join the judges in protesting against the suppression of judicial independence in such a brutal way. *Iustitia* called upon all judges and lawyers to come

to the march, wearing their professional attire – that is, their robes. We also asked judges from all over Europe to express their solidarity by joining us in this unusual event. As the judges could always count on the support of citizens, we asked democratic society to support us and march alongside us in the streets of Warsaw.

As it turned out, about 30,000 people joined the march in Warsaw on 11 January 2000, including many foreign judges from all over Europe. In a historic speech in front of the Sejm, José Igreja Matos, who was at the time the President of the European Association of Judges, said, «This is the time. The judges have spoken.»

The March of a Thousand Robes was not a one-off expression of solidarity but marked the beginning of a new phase of European integration – judicial integration and identity. Judges from different countries began to understand their role as the guardians of the European values. They began to co-operate closely, intervening in all instances when judicial independence was threatened in one State or another (sadly, it tended to be in Poland). In addition, this march made judges realise at an even deeper level than before that, apart from being national judges, they are also European judges.

8. *Judges are suspended for applying EU law*

Unfortunately, the March of a Thousand Robes, even though it was very important from the point of view of the integrity and identity of the judges, did not prevent the Muzzle Law from coming into force.

In the wake of the CJEU judgment of 19 November 2019, Paweł Juszczyszyn, a judge

on the Olsztyn District Court, who was examining a decision issued by a judge appointed by the neo-NCJ, decided to check the process of the appointment of the NCJ. For this purpose, he asked the Marshal (speaker) of the Sejm to provide him with the lists of people having supported the candidatures of the NCJ members, but the Marshal refused to reveal the lists, even when penalised. Then the Disciplinary Prosecutor pressed charges against Juszczyszyn for “exceeding his authority” by demanding the lists. Upon his motion, the Disciplinary Chamber suspended Juszczyszyn on 4 February 2020 for attempting to examine the legality of the neo-NCJ and the status of a judge appointed by it. The Chamber acknowledged that he had no right to do this.

This suspension was to remain in force until a final disciplinary ruling was issued in the case. At the same time, the Disciplinary Chamber reduced Juszczyszyn’s salary by 40%. To this day, this disciplinary case is still pending and Juszczyszyn has not been allowed to return to work, even though he has obtained several final judicial decisions ordering the president of the Olsztyn District Court to allow him to perform his duties as a judge. As I am writing these words, judge Paweł Juszczyszyn has been suspended for two and a half years⁷.

On 8 April 2020, the CJEU issued an interim measure (in case C-791/19 R) by which it suspended the activity of the Disciplinary Chamber of the Supreme Court regarding disciplinary cases against judges, pending its ruling to end the proceedings on the system of disciplinary liability of judges in Poland initiated by a complaint from the European Commission. The Polish authorities still did not amend the law. In fact, the CJEU’s order resulted in an even worse practice – instead

of disciplinary proceedings, the Minister of Justice/Prosecutor General and his subordinate prosecutors began to initiate criminal proceedings against judges.

The second judge to fall victim to the revenge of the ruling party was Igor Tuleya of the Warsaw Regional Court, who had publicly pointed out the wrongdoings of the ruling coalition in the Parliament. On 18 November 2020, the Disciplinary Chamber lifted his immunity from criminal prosecution, suspended him from his duties as a judge and reduced his salary by 25%. The Prosecutor's Office wants to charge him for letting the media into the courtroom for the announcement in December 2017 of the ruling in the case regarding PiS's voting on the budget in the Sejm's Column Hall in December 2016.

On the very day of his suspension, as his last act as a judge, Igor Tuleya submitted four questions to the CJEU for preliminary rulings (case C-615/20). He wants the CJEU to assess whether the Disciplinary Chamber can lift the immunity of judges and suspend them, and whether its decisions are valid. Tuleya also remains suspended, which he has been since 18 November 2020. Judges gather in front of courts on the 18th day of each month to express their solidarity with judges who have been suspended or otherwise been subjected to repression.

9. *Further judgments prompting no reaction from the ruling party; more suspensions*

The CJEU issued two additional important decisions in the summer of 2021. The first of them was the decision of 14 July 2021 ordering interim measures to suspend all ac-

tions of the Disciplinary Chamber and the effects of the Muzzle Law (case C-204/21).

The second decision was the judgment of 15 July 2021 in case C-791/19. The CJEU ruled that Poland had failed to fulfil its obligations as a Member State by introducing a new model of disciplinary liability for judges and by creating a special Disciplinary Chamber in the Supreme Court. The case was based on a complaint filed by the European Commission regarding the disciplinary regime with respect to judges in Poland.

In Poland, the only public authorities that followed these decisions of the CJEU were the courts. Different panels of judges began to examine whether a judge whose decision they were to examine or execute had been properly appointed. By contrast, instead of abiding by the CJEU's decisions, the subordinates of the Minister of Justice/Prosecutor General, including presidents of courts, prosecutors and disciplinary prosecutors, began to harass judges even more for such judicial decisions.

At the present time, Polish judges who examine the proper composition of a court or refuse to adjudicate with neo-NCJ appointees:

- are suspended for 30 days, either by the president of a court (judge Piotr Gąciarek was suspended by Piotr Schab, the disciplinary prosecutor for judges and the newly appointed president of the Warsaw Regional Court) or by the Minister of Justice/Prosecutor General himself (judges Adam Synakiewicz, Maciej Rutkiewicz, Marta Pilśniak, Maciej Ferek, Agnieszka Niklas-Bibik, Joanna Hetnarowicz-Sikora); or

- are transferred to another department of the court, for example from criminal to civil cases (judges Maciej Czajka, Beata Morawiec, Katarzyna Wierzbicka).

The Disciplinary Chamber, even though it should not be working, between October and November 2021 suspended four more judges for an indefinite period of time: Warsaw Regional Court judges Krzysztof Chmielewski (salary reduced by 25%) and Piotr Gąciarek (salary reduced by 40%), Maciej Ferek of the Kraków Regional Court (salary reduced by 50%) and Maciej Rutkiewicz of the Elbląg District Court (salary reduced by 40%). Their only “crime” was that they had followed the judgments of the CJEU and examined the circumstances of the appointment of those whose judicial decisions they considered.

On 27 October 2021, the Vice-President of the CJEU imposed a penalty of €1,000,000 per day on Poland for failing to comply with the interim measures ordered by the CJEU in July 2021 regarding the functioning of the Disciplinary Chamber and the application of the Muzzle Law (case C-121/21 R). So far, the total amount of the penalty exceeds €161,000,000. The Polish government is still “negotiating”.

Meanwhile, there are new cases pending before the CJEU: C-181/21 and C-521/21, which are based on requests from Polish courts for preliminary rulings to establish the status of the ordinary-court judges appointed with the involvement of the neo-NCJ.

10. *Impact on other European States of the situation in Poland*

The EU legal system, in particular the system of mutual recognition of judicial decisions, is based on mutual trust. However, the irresponsible actions of the ruling co-

alition in Poland have led to a situation where a person may doubt not only whether a judicial decision is correct and just, but even whether it was issued by a real judge or rather by a pseudo-judge. This seriously undermines the functioning of the principles of European co-operation, because every authority applying EU law has to meet the same standards of independence, and this can no longer be automatically presumed with respect to Polish courts.

In fact, the chaos caused by the improper election of the NCJ may invalidate important judgments concerning, for example, parenthood, divorce or inheritance. For this reason, judges from other EU countries, when faced with judicial decisions issued by Polish courts, may wish to examine whether the judge having issued a certain decision had been properly appointed, so as to ensure the best possible protection of the rights of their own nationals⁸.

The tenure of the improperly elected neo-NCJ has now come to an end. So far, about 2,000 judges (one-fifth of the Polish judiciary) have been appointed with the involvement of this body. The process to elect a new NCJ has begun, this time with only 19 candidates – mostly the incumbent members of the neo-NCJ. If their candidatures are successful, the Polish judiciary, and as a consequence the European legal system, will collapse into a total chaos where nobody will know who is a judge and who is not. This is indeed a turning point, both for the judges and for the whole of society.

It is not easy to fit five years of struggle into one article. However, I find it extremely important to let judges and lawyers in the rest of Europe know what has been going on in Poland. This could happen in any other European country, and indeed it has

already happened in Hungary. I do believe that it is only by acting together that we have the power to preserve our common European values. In Poland, the judges turned out to be the true guardians of democracy and the legal state. This is a great honour and a great responsibility for us, reaching far beyond the courtroom. Because, when all the independent judges are gone, who will then protect the weak?

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² See *2000 Days of Lawlessness*, Free Courts initiative <<https://wolnesady.org>>, 13 April 2022.

³ *Ibidem*.

⁴ *Ibidem*.

⁵ See <<https://radioszczecin.pl/1,359859,niech-zostanie-tak-jak-bylo-kampania-takze-w-szc>>, 13 April 2022.

⁶ See *Justice under Pressure*, Polish Judges' Association Iustitia, <https://www.iustitia.pl/images/pliki/raport2020/Raport_EN.pdf>, 13 April 2022.

⁷ The Polish Judges' Association Iustitia has placed a special counter on its website (<<https://www.iustitia.pl/>>, 13 April 2022) in order to count the days of suspension of Paweł Juszczyszyn and Igor Tuleya.

⁸ A tool to find out whether the neo-NCJ has been involved in the appointment of a specific judge can be found at <<https://ruchkod.pl/neokrs/>>, 13 April 2022.