



**POLISH BAR COUNCIL**  
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**NATIONAL BAR**  
**OF ATTORNEYS-AT-LAW IN POLAND**  
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## **REPORT ON THE STATE OF RULE OF LAW IN POLAND IN 2020**

### **The National Council of the Judiciary**

On November 19th, 2019, the CJEU ruled on the joint cases regarding the independence of the Disciplinary Chamber of the Polish Supreme Court. *The Court highlighted the relevance of four issues: (1) the exclusive jurisdiction granted to that chamber especially on matters of retirement of judges of the Supreme Court; (2) the finding in Commission v Poland of an infringement of Article 19(1) TEU for violation of the guarantees of irremovability and independence of the judges, based on the same Polish law; (3) the disciplinary chamber being constituted “solely of newly appointed judges” (para.150);(4) the “particularly high degree of autonomy” (para.151) of that chamber within the Polish Supreme Court.*

*The Court emphasized that although any of the abovementioned facts, taken individually, is not capable of calling into question the independence of the chamber, this may change if they are taken together, especially if the assessment of the referring judge was to find that the NCJ lacked independence<sup>1</sup>. The Court the duty of the national judge to give full effect to provisions of Union law, “if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means” (para.160). Making a link between the principle of primacy and that of direct effect, the Court specifically recalled the obligation of any national judge to disapply national provisions contrary to directly effective provisions of Union law, such as Article 47 of the Charter (see Egenberger, discussed [here](#)), or Article 9(1) of Directive 2000/78 (para.163).*

*What followed was the recognition of the duty of the referring judge to ensure “within its jurisdiction the judicial protection for individuals flowing from Article 47 of the Charter and from Article 9(1) of Directive 2000/78, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law” (para.164). Thus, in order to avoid depriving the individual of any effective remedy and of the rights stemming from Union law, the referring judge should set aside any national provision granting exclusive jurisdiction to any non-independent body, according to Union law<sup>2</sup>.*

A day after the CJEU judgement in the A.K. v. the NCJ case (November 20<sup>th</sup>, 2019), the National Council of the Judiciary gathered to continue the defective nomination process for the Supreme Court, regardless of the CJEU’s judgment.

A member of the National Council of the Judiciary, judge Dagmara Pawełczyk-Woicka in conversation with Gazeta Wyborcza (a Polish newspaper) said that in her opinion the ENCJ is “not a significant organization”, and participation in this network (ENCJ) is not prestigious, but simply associated with high membership fee.

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<sup>1</sup> <https://europeanlawblog.eu/2019/12/02/the-independence-of-the-disciplinary-chamber-of-the-polish-supreme-court-or-how-to-forget-about-discipline/>

<sup>2</sup> Ibid.

The NCJ also eliminates inconvenient judges by initiating and supporting disciplinary proceedings against rebellious judges. The judges are harassed in various ways, including summons for interrogations issued by the Disciplinary Prosecutor. *More than 40 judges are being pursued (by people loyal to the Minister of Justice Zbigniew Ziobro) for their rulings, defence of judicial independence, meetings with citizens or implementation of CJEU judgments*<sup>3</sup>.

### **The Supreme Court**

On December 5, 2019 the Supreme Court (Labor and Social Insurance Chamber) ruled that the Disciplinary Chamber of the Supreme Court is not a court as defined by neither the EU nor the Polish law. Therefore, it was ruled that the Supreme Administrative Court judge Andrzej Kuba's case (forced to retire by the unconstitutional regulations introduced and voted by the current parliamentary majority) will not be adjudicated by the Disciplinary Chamber. Instead, the Labor and Social Insurance Chamber independently ruled on the case and revoked the neo-NCJ's decision regarding opposing the judge's continuance of ruling (in accordance with the CJEU's ruling from November 19, 2019, which established that it was within the Supreme Court's competence to determine whether the NCJ offers the necessary guarantees of independence).

The Supreme Court indicated, that the neo-NCJ and the Disciplinary Chamber do not meet the criteria of independence and impartiality and that – in accordance with the CJEU's ruling – every court and every authority is obligated to verify the independence of the National Council of Judiciary. The main conclusions of the judgement can be summarized in three points:

- (1) *the national court is authorized to assess whether it is to consider the case or even whether it is to be considered by an authority that is a court that is independent and impartial of the executive and legislative authorities in the meaning of European Union law;*
- (2) *when making that assessment, the national court has to take into account whether another body, the objective and statutory jurisdiction of which is to safeguard the independence of the courts and the impartiality of the judges, took part in the formation of that body, which is referred to as a 'court' under national law. Two more supporting criteria need to be considered to make this assessment. One being objective, namely whether there are verifiable facts giving rise to doubts as to the lack of independence of that body. The other being subjective, namely how the people who are members of that body actually behave, what their individual statements, acts or omissions are;*
- (3) *it arises from the judgment of the Court of Justice of the European Union that, when making this assessment, the outcome of the procedure is not about the validity of the act of nomination which the President handed to these people, but whether we are dealing with an independent and impartial court*<sup>4</sup>.

The First President of the Supreme Court requested that the combined composition of three chambers of the Supreme Court rule on the discrepancies in the Supreme Court's jurisprudence regarding the admissibility of ruling by judges nominated by the neo-NCJ. On January 23, 2020 the combined composition of three chambers of the Supreme Court (the Civil Chamber, the Penal Chamber and the Chamber of Labor and Social Insurance) will decide whether it is compliant with both the Polish and EU law as well as European Convention on Human Rights and the Charter of Fundamental Rights for the judges to rule. In connection to the described actions, the Disciplinary Chamber turned to the politicized Constitutional Tribunal to resolve a question of law regarding the admissibility of verification of judges' appointment by the President with the recommendation from the NCJ.

Nevertheless, on January 23<sup>rd</sup>, 2020 the Supreme Court published the requested resolution, stating that the judges elected by the neo-NCJ have been defectively appointed, but this does not call into question all of their judgments. In particular, all the past judgements cannot be appealed or reversed due to irregularities regarding

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<sup>3</sup> <https://oko.press/judges-under-fire-43-judges-already-targeted-by-disciplinary-officer-and-prosecutors/>

<sup>4</sup> <https://ruleoflaw.pl/oral-justification-of-the-supreme-court-judgment-in-connection-with-the-cjeu-ruling-regarding-the-disciplinary-chamber-and-the-national-council-of-the-judiciary/>

the neo-NCJ. Nevertheless, all the judgements issued by common and military courts after January 23<sup>rd</sup>, 2020 can be appealed on the abovementioned grounds.

However, in regard to the Supreme Court, whenever its compositions include a judge appointed at the request of the current NCJ, they are always considered defective.

### **Disciplinary proceedings against judges and prosecutors**

A new Bill on the amendment of the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other Acts has been introduced. The objective of the act is to apply disciplinary action to force judges not to apply the EU law (in particular the judgement of the CJEU of November 19, 2019) and to enable the office of the First President of the Supreme Court to be filled by the ruling camp (due to the approaching end of the current term of office of the First President prof. Małgorzata Gersdorf).

It is crucial to indicate that, by law, the First President of the Supreme Court chairs the Tribunal of State, before which the President of the Republic of Poland as well as other high officials and authorities (such as the Prime Minister, members of the Parliament, heads of Ministries etc.) may be brought for violating the Constitution or other legal acts.

The draft marginalizes the role of the judicial self-government, which use to hold a consultative and controlling role, transferring this role to the presidents of courts who are now politically and arbitrarily appointed by the Minister of Justice (the office combined with the Public Prosecutor General since March 2016).

The draft prohibits the judicial self-government from passing resolutions on all matters of systemic importance, which are of significance to civil rights and freedoms, while the capacious slogan of “political matters” is being used.

Therefore, a “centrally controlled and authoritarian method of managing the work of the Polish courts is being developed” (as stated in the opinion of the Supreme Court of December 17, 2019 on the bill), which will additionally result in the reduction in the efficiency of operation of the Polish justice system, to which the current parliamentary majority has repeatedly referred.

The definition of a judge is being introduced by the statute, as an attempt to remedy any possible defects in the election of judges by an act of appointment by the President of the Republic of Poland.

Constitutional regulations are being ignored, specifically Article 179 of the Polish Constitution, according to which judges are appointed by the president of the Republic of Poland but at a request of the National Council of Judiciary.

The bill directly stipulates that “it is inadmissible to negate or even examine the existence of the service record of a judge formed by a presidential act.” This means that the draft prohibits courts from requesting preliminary rulings, which is in conflict with Article 267 of the Treaty on the Functioning of the European Union. **The bill therefore has the objective of legalising every appointment to the office of judge, even a judge who is extremely defectively appointed** (even if a person is appointed who does not satisfy any conditions for being a judge). This is in conflict with the principle of legalism – the operation of state bodies on the basis and within the limits of the law and the principle of the separation of powers, as expressed in the Polish Constitution. The courts are even obliged to examine whether the members of the bench were appointed correctly at every stage of the proceedings. **An incorrectly appointed bench is a direct cause of invalidity** of the proceedings, as well as grounds for acknowledging that the body does not satisfy the criteria of an impartial and independent court in the meaning of European law. Meanwhile, according to the bill, questioning the status of a judge and a bench is now to be punished with disciplinary action, including with the penalty of removal from the office of judge.

**Additionally, the bill requires judges to submit declarations of their affiliation to associations and foundations, as well as regarding their activity in the Internet, which is an attempt to create the effect of control and pressure** and consequently disciplinary liability for positions which are inconsistent with the ruling party’s line. The bill simultaneously uses imprecise and broad concepts, which should be expected to be arbitrarily interpreted by the new disciplinary commissioner who is subordinated to the minister of justice.

**New disciplinary delicts are being introduced**, which are (intentionally) specified very vaguely (“obstructing the functioning of the judiciary”, “public activity”) **to be able to classify any conduct of a judge that the authorities do not like into this category**. The bizarre nature of such regulations can be easily illustrated on the basis of the provisions of criminal law (the procedure of which is similarly applicable to disciplinary proceedings) – it is easy to imagine the absurdity of a similarly broad formulation of the features of a crime.

The stricter disciplinary penalties that go hand in hand with the broader category of delicts are completely arbitrary **“and constitute a manifestation of the instrumentalisation of disciplinary proceedings inciting a chilling effect among judges**, as well as the removal of people from the office of judge if their views do not correspond to that of the ruling majority” (from the opinion of the Supreme Court of 17 December 2019 on the bill, form 69).

The powers of the Disciplinary Chamber of the Supreme Court are being increased by the bill (even though, in its judgment of 5 December 2019, in fulfilling the criteria specified by the CJEU in its judgment of 19 December 2019, the Supreme Court acknowledged that the Disciplinary Chamber is not a court in the meaning of EU law and consequently national law), and the powers of the new Chamber of Extraordinary Control and Public Affairs of the Supreme Court (also, like the Disciplinary Chamber, fully elected by the new NCJ and with respect to which preliminary ruling proceedings are pending before the CJEU regarding questioning its status in the meaning of EU law) are being very extensively increased.

The provisions of the Act on the Supreme Court are being changed very significantly to enable the so-called defectively appointed Supreme Court judges (who are in the minority in the Supreme Court), to elect the First President of the Supreme Court, at the end of prof. Małgorzata Gersdorf’s term of in April 2020.

On January 23<sup>rd</sup>, 2020, Sejm passed the bill.

### **Draft amendment to the Criminal Procedure Code**

The amendments introduced in 2018 entered into force in October 2019. One of the major changes is an addition allowing the court under certain circumstances to carry out the evidence proceedings in the absence of the accused or the defense counsel. If it occurs, the accused or defender may not at the next date of the hearing, while there were no procedural obstacles to their appearance, submit an application to carry out evidences supplementary to those carried out during such absence. This does not appertain if it turns out that the accused or the defense counsel was duly notified about the date of the hearing at which the evidentiary proceedings were conducted and his absence was unjustified. If the application is not filed within the referred period, the right to submit it expires and in the further proceedings it is not permissible to raise a plea of breach of procedural guarantees, in particular the right to defense.

### **The Constitutional Tribunal**

November 11<sup>th</sup>, 2019, Constitutional Tribunal judge Jarosław Wyrembak, sworn in by president Andrzej Duda in January 2018, published a letter accusing the President of the Constitutional Tribunal Julia Przyłębska of breaking the law by secretly removing documents out of his office, politically motivated manipulating compositions in the Tribunal and prohibiting judges from submitting dissenting opinions as well as asking Julia Przyłębska to resign. Judge Wyrembak used to be a member of the ruling political party.

In December 2019 two other ex-PiS members (Krystyna Pawłowicz, and Stanisław Piotrowicz) were sworn in as judges of the Constitutional Tribunal.

January 29<sup>th</sup>, 2020, Constitutional Tribunal issued a decision withholding the application of the resolution of combined Civil, Criminal and Labour and Social Insurance Chambers of the Supreme Court of 23 January 2020 from the date of its issue<sup>5</sup> without legal ground.

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<sup>5</sup> <https://ruleoflaw.pl/constitutional-cat-and-mouse-continues-with-tribunal-ruling/>



# Thousand Robes March

in defence of independence of courts and judges

WARSAW, POLAND, 11<sup>TH</sup> OF JANUARY 2020





# Demonstrations in defence of independence of courts and judges

WARSAW, POLAND, 2017-2020



ADWOKATURA  
POLSKA