Pseudo-reform of the Polish justice system in the context of EAW proceedings.

prepared by Dariusz Mazur
press officer of the Association of Judges ‘Themis’
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I. The general shape of the pseudo-reform of justice in Poland

One of the most important directions of the change of the political system in Poland is, pushed by the populist-Catholic-nationalist government supported by the majority in the parliament, the political subordination of the judiciary and law enforcement agencies, bombastically called the '**great reform of the judiciary**'. So far it consisted of:

- the political subordination of the prosecutor's office by merging the positions of Prosecutor General and Minister of Justice which was accompanied by creation of Internal Affairs Department of the State Prosecution Service at the very top of Prosecution Office, to '*conduct preparatory proceedings in cases of crimes committed by judges, prosecutors*' (April 2016);
- the unconstitutional assumption of political control over the Constitutional Tribunal (CT), which excluded real control of the constitutionality of legislation (December 2016),
- taking administrative control over the courts - carrying out a purge of court presidents and the arbitrary appointment of their successors by the Minister of Justice (Aug 2017 – Feb 2018),
- taking political control over the process of appointment and promotion of judges by transferring the right to elect 15 judges-members (who constitute the majority of the NCJ) from bodies of the judicial self-government to the parliament; the newly created NCJ is referred to as the **neo-NCJ** and the judges nominated or promoted with its participation are called **neo-judges** (March 2018),

The general shape of the pseudo-reform - continued

- the politicization of disciplinary proceedings against judges by granting very broad personal and procedural powers to the Minister of Justice-Prosecutor General, and the creation of a disciplinary court of last resort for judges and representatives of other legal professions by the neo-NCJ, i.e. the Disciplinary Chamber of the Supreme Court (SC) (2018),
- the gradual assumption of political control over the SC through the creation of two new chambers, i.e. the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber (2018), the politicization of the mode of election of the First President of the SC (2020) and the gradual pollution of the Supreme Court with neo-judges (from 2018 to present),
- preventing judges from challenging the legal status of the neo-NCJ, the Disciplinary Chamber and neo-judges through the introduction of the Muzzle Act, which enables expulsion from the judicial profession for such activities (Feb 2020),
- the gradual assumption of control over the ordinary judiciary by staffing the courts of appeal with neo-judges (from 2018 to present).

II. Main points of pseudo-reform in the evaluation of international courts.

- As the above-mentioned changes aimed at violating the tri-partition of power by limiting the systemic guarantees of the independence of the judiciary are contrary to the Polish Constitution, European law and the ECHR, they met with a strong response from the legal part of the Polish SC and the Supreme Administrative Court, the CJEU and the ECtHR.
- In 2021 / 2022, the ECtHR & CJEU issued a number of rulings indicating that the new NCJ is not independent from the political factor, which means that the neo-judges elected and promoted with its participation are not independent which is especially true for the neo-judges sitting in the Supreme Court, whose participation means that it is not an independent and impartial court established by law within the meaning of Article 6 of the ECHR, and the Disciplinary Chamber is not a court within the meaning of EU law.
- However, it should be noted that the rulings of the Polish and international courts have either not been enforced by the Polish authorities at all or have only been partially enforced. A total of more than 300 cases related to systemic violations of the independence of the Polish judiciary have been registered before the ECtHR alone.

III. Celmer test

- such weakening of the guarantee of the independence of the judiciary in one of the EU MSs had to significantly weaken the confidence in Polish courts in the field of EAW cooperation which is based on mutual trust,
- as early as in judgment of 25 July 2018 (LM, C-216/18), the CEJU established a **two-step test**, similar to introduced earlier in famous Aranyaosi & Căldăraru judgement (C-404/15 and C-659/15), which can be applied by the executing authority in the course of EAW proceedings in case of risk of breaching the independence of the judiciary in the issuing MS:
  - *„assess whether there is a real risk that the individual concerned will suffer a breach of his fundamental right to an independent tribunal/to a fair trial*"
    - general assessment of the legal system of issuing state,
  - *„that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that (…), the requested person will run that risk*"
    - a case by case assessment.

IV. Criteria of the potential assessment of the spoilt justice system – main risk factors

- They have already been formulated (almost certainly not exhaustively) in para 62–67 of above-mentioned judgment of 25 July 2018 (LM), which are rooted in art. 6 ECHR, art. 47 CFREU.
- They derive mainly from the **external aspect of judicial independence** – which means that courts shall be protected against external interventions or pressure, which require sufficient level of guarantees:
  - regarding the composition of the judicial body (participation of new judges),
  - regarding the way of appointment of judges (participation of neo NCJ),
  - against removal from office (in Poland – taking under consideration disciplinary proceedings and proceedings to waive judges' immunity),
  - against administrative pressure from the Presidents of courts (in Poland most of them are politically loyal as the appointees of the current Minister of Justice),

V. Problem of the legal status of neo-judges

1. Judgements regarding neo-judges of Polish SC before the CJEU

- In the preliminary ruling of **19 November 2019 (C-585/18, C-624/18 i C-625/18),** acting upon the request of the Polish SC, the ECJ stated that:
  - the Polish neo NCJ and the Disciplinary Chamber of the SC may not meet the requirement of independence under EU law,
  - entitled all Polish courts to determine whether judges appointed with participation of the neo NCJ are judges within the meaning of EU law,
  - provided criteria on how to assess independence of mentioned bodies,
- It was implemented by the **resolution of Joined Chambers of the Polish SC of 23 Jan 2020**:
  - the Disciplinary Chamber of the Polish SC does not constitute a court estabilished by law,
  - this ruling do not concern the status of neo-judges of ordinary courts, but the legal status of the judgments they have issued.
  - the SC decided that judgements of neo-judges sitting in the ordinary courts would not be automatically squashed, but examined at the request of a party. In each specific case, the 2-nd instance court will need to assess whether the procedure for choosing judge who issued the decision justifies presumption that he is not an independent judge within Art. 47 CFR EU and Art. 6 ECHR.

Resolution of joint chambers of the Polish Supreme Court of 23 January 2020 Disciplinary Chamber is not a court under Polish and EU law

Problem of the legal status of neo-judges – continued 1

2. Judgements regarding neo-judges of the Polish SC before the ECtHR

In each of the cases below, the ECtHR, following the 3-step test deriving from the ***Astradsson v Iceland*** case (appl. No 26374/18), ruled that the Polish SC did not have the status of a *'independent and impartial court established by law*' within the meaning of Article 6 of the ECHR due to the participation in the bench of judges appointed with the participation of the neo-NCJ, which does not guarantee independence from the political factor

- - judgment of 22 July 2021 in ***Reczkowicz v. Poland***, appl. no. 43447/19 - concerned the status of neo-judges of the Disciplinary Chamber of the SC,
- - judgment of 08 November 2021 in ***Dolińska-Ficek and Ozimek v. Poland***, appl. no. 49868/19 - concerned the status of neo-judges in the Extraordinary Control and Public Affairs Chamber of the SC,
- - judgment of 03 February 2022 in ***Advance Pharma Sp z o.o. v Poland***, appl. no. 1469/20 concerned the status of neo-judges in the Civil Chamber of the SC.

Problem of the legal status of neo-judges - continued 2

3. Legal status of neo-judges sitting in the ordinary courts

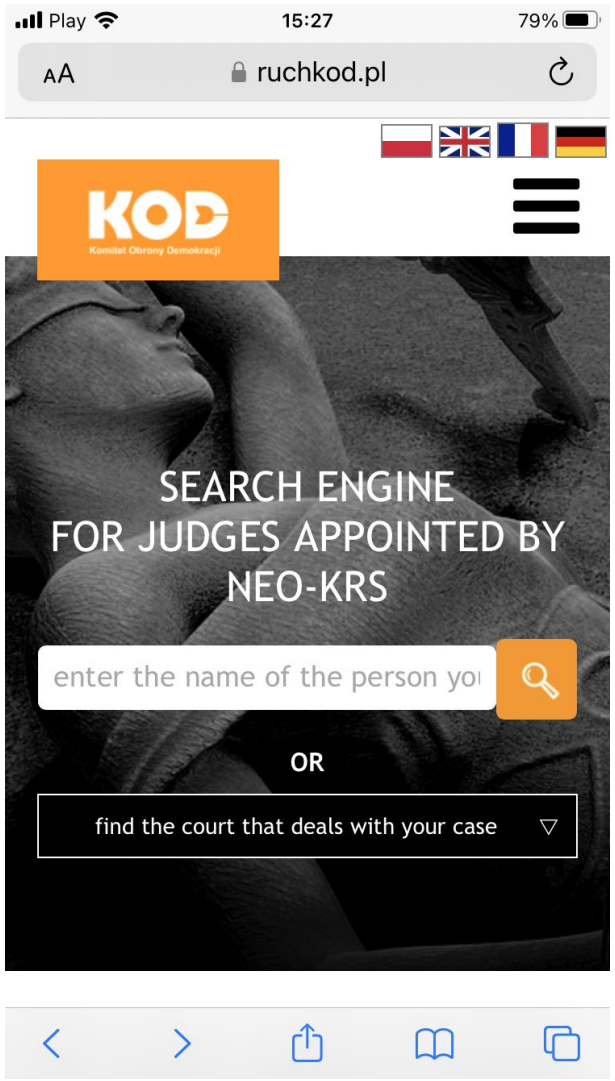
- there is no final ECtHR judgement regarding legal status of neo-judges sitting in Polish ordinary courts,
- very important from the point of view of the status of ordinary court judges is the pending case ***Zielińska and Others v. Poland*** (appl no. 48534/20), which concerns the preservation of the right to an independent and impartial court established by law within the meaning of Article 6 of the ECHR in a situation where a neo-judge rules in a case conducted by a ordinary court.

Problem of the legal status of neo-judges - continued 3

4. Legal status of neo-judges as a potential field of application of Celmer test:

- It seems that the requested court, before deciding upon the execution of Polish EAW, shall:
  - estabilish if the EAW was issued by the neo-judge (which means judge who, in the proces of nomination or promotion, was asessed by neo-NCJ),
  - estabilish which Polish court is going to be competent to hear the particular case in the 1-st and 2-nd instance and find out if there are neo-judges in this court,
- one Polish NGO, the Committee for the Defence of Democracy (Polish abbreviation: KOD), has created an online search engine for neo-judges, available in Polish, English, French and German at the following e-mail address: https://ruchkod.pl/neokrs/

Problem of the legal status of neo-judges - continued 4 - KOD search engine



VI. Problem of the administrative pressure from the presidents of courts and the Minister of Justice

- over the 6 months since the amendment of the Act on the Organization of Ordinary Courts entered into force (which means since 12 August 2017), the Minister of Justice arbitrarily, dismissed around 160 presidents and vice presidents of Courts before their terms of office expired,
- to date, almost all court presidents have been appointed according to the key of political loyalty, as - notwithstanding the purge of presidents carried out in 2017/2018 - there has been a replacement of presidents in the subsequent period as their terms of office have expired
- the main criteria for appointing their successors was the degree of their loyalty to the Minister of Justice.
- the presidents of courts and the Minister of justice apply soft administrative measures of repression:
  - suspension of judges for 30 days (applied by Presidents or Minister of Justice),
  - revocation of judges from the delegation to the upper level court (applied by the Minister of Justice),
  - unjustified transfer of judges between divisions (applied by the presidents of courts),
  - deteriorating of working conditions by depriving judge of proper administ service,

Problem of the administrative pressure from the presidents of court and the Minister of Justice – continued 1

- the case of ***Broda and Bojara v. Poland*** concerned a situation in which two judges before the expiry of their term of office were dismissed from their functions as vice-presidents of a court by the Minister of Justice on the basis of transitional provisions to the Act on Amendments to the Act on the Organization of Ordinary Courts, their dismissal being carried out in a completely arbitrary manner and without the possibility of judicial review.
  - it was found by the Strasbourg Court as a violation of Article 6(1) ECHR,
- In the pending case ***Synakiewicz and Others v. Poland*** (appl. no.46453/21), the ECtHR is to examine whether the suspension of judges for a period of 30 days by an administrative decision of the court president or the Minister of Justice constitutes a civil matter within the meaning of Article 6 of the ECHR and therefore whether the applicants are entitled to access to a court and whether such a decision violates their right to respect for private life within the meaning of Article 8 of the ECHR,

Problem of the administrative pressure from the presidents of court and the Minister of Justice – continued 2

- according to CJEU judgement of 16 Nov 2021 (**C-748/19 to C-754/19**) - EU law precludes a system in Poland under which the Minister of Justice may second judges to higher criminal courts, from which he may remove a judge at any time and without justification. The requirement of judicial independence requires that the rules governing such secondment should provide for the necessary safeguards in order to avoid the risk of such secondment being used to exercise political control over the content of judicial decisions, particularly in the area of criminal law.
- In its judgment of 6 Oct 2021 (**C-487/19**) ruling in the context of Judge Żurek's situation, the CJEU stated *"(...) the transfer of a judge without his consent between two divisions of the same court may also infringe the principles of irremovability and independence of judges*" (para. 114) and "*Such transfers may in fact constitute a means of controlling the content of judicial decisions (...), but they may also have significant consequences for the lives and careers of these judges and have effects analogous to those involving disciplinary penalties*" (para. 115),
- in the pending case of ***Leszczyńska Furtak and Others v. Poland***, the subject of the ECtHR's examination will be whether the arbitrary transfer of judges by the president of the court from the criminal division to the labor division without the possibility of judicial review violates Article 6 of the ECHR and the right to family life within the meaning of Article 8 of the ECHR

VII. The possibility of exerting pressure on judges using criminal proceedings

- Internal Affairs Department of the State Prosec. Service (at the very top of Prosecution) was established in 2016 to conduct investigations in case of crimes committed by judges or prosecutors
- its crew is established in whole by MoJ-Prosecutor General, bound by his orders, it employs young prosecutors temporarily posted there by MoJ who may be degraded with his one signature.
- the Department showed political usefulness after the ECJ suspended the activity of the Disciplinary Chamber in disciplinary proceedings in April 2020.
- it was Internal Affairs Department which pressed absurd charges against icons of judicial resistance - judges Morawiec and Tuleya and requested Disciplinary Chamber to waive their immunities; subsequently both judges were suspended by the Disciplinary Chamber of the S.C. for many months.
- in the light of the in the light of the CJEU judgement of 18 May 2021 (**in joined cases C-83/19, C-127/19, C195 / 19, C-291/19, C-291/19, and C397/19**), EU law must be understood as precluding creation of a specialised section of the Public Prosecutor's Office with exclusive competence regarding crimes of judges and prosecutors, where the creation of such a section:
  - is not justified by objective and verifiable requirements relating to the sound administration of justice,
  - is not accompanied by specific guarantees to prevent any risk of that unit being used as an instrument of political control over the activity of judges and prosecutors likely to undermine their independence

VIII. The introduction of absolute life imprisonment - contrary to Article 3 of the ECHR.

- according to an amendment to the Penal Code, which is due to enter into force in October 2023, a life sentence without the possibility of early release is to be introduced,
- such a solution is profoundly contrary to the spirit of numerous ECtHR rulings (a.o. ***Kafkaris v Cyprus, Vinter and Others v. UK***), as it violates Article 3 of the European Convention on Human Rights, i.e. the prohibition of degrading and inhuman treatment,
- although the President of Poland has the right to pardon any person convicted with a final sentence, in relation to murder cases in which life imprisonment is imposed in practice, pardon is so rarely used that the right to early release based on it cannot be considered practical and effective,
- the system of Polish criminal law, from the point of view of international law, is becoming unpredictable and substandard, which may contribute to European countries refusing to surrender perpetrators of the most serious crimes to Poland,

IX. Disciplinary proceedings as tools to put pressure on judges

- In 2018, alongside with the Disciplinary Chamber of the SC (politicized, top disciplinary court for judges) the new mode of disciplinary proceedings in respect of judges was introduced:
  - MoJ appoints Main Disc. Commissioner for Judges + 2 deputies + all judges of 1-st instance discilinary courts,
  - MoJ can appoint a disciplinary commissioner for a particular judge,
  - MoJ is also empowered to object decision of a disciplinary commissioner on a refusal to initiate proceedings and this objection can be repeated - judge can become perpetual suspect,
  - It is permissible to carry out a hearing in disciplinary proceedings in justified absence of a judge or his counsel (undermines right to defence),
  - possibility to apply evidence obtained without judicial control + in violation of law (incl. evidence from operational telephone tapping),
- an inquisitional model of disciplinary proceedings against judges which politicizes proceedings + restricts procedural rights of defendants,
- on 14 Feb 2020 **the Muzzle Act** entered into force which added fuel to the fire as it:
  - introduced new types of disciplinary torts for judges; questioning the legal status of the neo NCJ, or judges appointed with its participation or other constitutional bodies became a serious disciplinary offence, punishable by expulsion from the profession.

Disciplinary proceedings as tools to put pressure on judges – continued 1

- State of play after **ECJ rulings of 14, 15 July 2021** (which respectively suspended application of the Muzzle Act and delegalized the Disciplinary Chamber):
  - the Disciplinary Chamber was still operating (with over 150 hearings held over 50 working days within 7 months), Muzzle Act was still in force,
  - 10 Polish judges were temporarily removed from adjudicating for applying ECJ and ECtHR rulings, on the basis of administrative decisions of the Minister of Justice or court presidents appointed by him; disciplinary proceedings have been taken against all these judges on the basis of the Muzzle Act,
  - 4 of these judges were subsequently suspended indefinitely from their judicial duties under the Muzzle Act and deprived of part of their remuneration by the Disc. Chamber,
  - in December 2021, the Polish prosecutor's office initiated an investigation into the possibility of the judges of the ECJ who issued rulings in cases regarding Poland having committed the crime of overstepping their powers
- As a result of described breach of ECJ decision of 14 July 2021, on 27 October 2021 ECJ imposed a **daily penalty payment on Poland in an amount of €1 000 000**

X. Polish authorities' sham implementation of CJEU & ECtHR judgements

X.1 Institutional factor - Chamber of Professional Responsibility of the SC

In July 2022, by an act proposed by the President of Poland, the Disciplinary Chamber was abolished and replaced by the Chamber of Professional Responsibility of the SC, which is only an illusory concession to the EC, since:

- although the 33 candidates for this chamber were selected at random from among all the judges of the SC, it was the active politicians of the ruling camp, i.e. the President and the Prime Minister, who selected 11 members of the chamber from among the candidates,
- of the 11 judges of the Chamber of Disciplinary Responsibility, as many as 6 were selected with the participation of the neo-NCJ,

As can be seen from the above summary, the degree of politicization of the Professional Responsibility Chamber is comparable to that of the Disciplinary Chamber, making it incompatible with EU law.

Polish authorities' sham implementation of CJEU & ECtHR judgements – continued

X.2 Procedural factor – disfunctional test of independence and upholding the Muzzle Act

- along with the Professional Responsibility Chamber, the possibility of a so-called test of the independence of judges at the request of the parties was introduced, but this too does not meet the requirements of EU law, as it:
  - the independence test can not be based solely on the circumstances of judge's appointment, thereby undermining the applicability of ECtHR and ECJ case law in practice,
  - does not exclude from exercising test procedure neo-judges who are inherently infected with lack of impartiality in this context, as their own legal status is affected by the same defect,
- the provisions of the Muzzle Act were upheld that allow a judge to be removed from the profession for:
  - refusing to administer justice (this was applied to judges who refused to sit on panels with neo-judges),
  - questioning the legal status of a judge or the legitimacy of a constitutional body (this was in turn applied to judges who questioned the legal status of the neo-NCJ, or neo-judges), have not been repealed.
- Therefore, the pseudo-reform proposed by the President is still contrary to EU law, in spite of that the Professional Responsibility Chamber has reinstated 6 suspended judges. That is why ECJ decision of 21 April 2023 to that halved daily penalty in respect of Poland by does not seem to be justified.

Thanks for the attention