

The real objective and the results of the so called ‘great reform’ of the Polish justice system

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What is the real objective of the so-called ‘great reform of the justice system’ in Poland and what are the results of the numerous legislative changes of this system? The actual achievements of this ‘great reform’ of the judiciary are the new method of conducting disciplinary proceedings combined with full control of the Minister of Justice over the Prosecutors’ Office and his excessive administrative control over the judiciary, as well as the lack of effective constitutional control of a new law which constitute a real chilling effect generator. Judges are exposed to constant attacks, including black PR campaigns in public media. The conclusion drawn is depressing. The only 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 is built on spreading fear among citizens who are deprived of effective legal protection.

1. Introduction

For the past five years, we have been witnessing the so-called ‘great reform’ of the justice system in Poland, which includes hundreds of amendments to a acts of law, including basic laws, such as the Act on the Organization of Ordinary Courts, the Act on the National Council of the Judiciary as well as an entirely new Act on the Supreme Court. In this landmark for the justice system, it is worth asking whether the objective of implementing the ‘great reform of the justice system’ is – as representatives of the executive authority say – to contribute to an increase in the independence of the courts, expedite court proceedings, ensure the effectiveness of disciplinary proceedings against judges, de-communize the courts and remove corruption, which is allegedly common among the Polish judiciary. Unfortunately, the answer to these questions is unequivocally negative.

The wording of the said statutes does not even contain one provision that could contribute to expediting the proceedings. After all, it should be noted that, although much remains to be improved with regard to the effecti-

veness of court proceedings in Poland, the average effectiveness of these court proceedings is at the European average level.

The effectiveness of disciplinary proceedings against judges has always been at an incomparably higher level than the effectiveness of actions to waive parliamentary immunity, not to mention proceedings against politicians before the State Tribunal.

Given that the judges of the Supreme Court had verification conducted many years ago and, thirty years after the transformation of the state system, the average age of a Polish judge is approximately 42 there cannot be any actual talk of a real need to decommunize the judiciary. The assertions of general corruption in the Polish justice administration are simply unfounded. According to the official information in a period of ten years (2007 - 2017) there was one proceeding concerning taking a bribe by a judge for 10.000 judges so it is not a structural problem.

Finally, I would give half my kingdom to anyone who can find even one solution in the above legislation which increases the independence of the Polish judiciary.

What, therefore, is the real objective and what are the results of the so-called 'great reform of the Polish justice system'?

To answer the question let's look at the most important changes of the system.

2. Constitutional Tribunal

In December 2016, the ruling party took political control over the Constitutional Tribunal (CT) which was achieved in a way of illegal and even unconstitutional hostile takeover, by not admitting to the bench three legally elected judges and the refusal of publication of three rulings of the 'old' constitutional court in the Official Journal of Law. It is commonly known that Julia Przyłęcka, who is currently the President of the Tribunal, regularly invites the President of the Law and Justice party to dinner, and then she adjudicates according to the political needs of the ruling camp, juggling arbitrarily judges adjudicating in the tribunal in important cases. What does such a political subordination to the constitutional court mean in practice?

1. the very small Law and Justice (L&J) majority of seats in Parliament is able to adopt any law, even unconstitutional;
2. it is even worse, the CT was turned from 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 governing party.

Examples of the most spectacular and harmful actions of the politicized Constitutional Tribunal include:

- the decision of 21 June 2017 declaring the method of electing members of the old National Council of the Judiciary to be inconsistent with the constitution;
- the judgment of 24 October 2017 stating the alleged inconsistency with the constitution of the provisions on the basis of which Małgorzata Gersdorf was elected the first president of the Supreme Court;
- the decision originally scheduled for 20 October 2020 on depriving Adam Bodnar of the ability to perform the duties of the Ombudsman until his successor is elected by the parliament (the hearing was postponed due to the illness of the member of an adjudicating panel).

In all the above cases, it seems obvious that the requests submitted to the 'new' Constitutional Tribunal were based on artificially created problems to achieve specific political objectives, which are to end the mandates of fifteen

judges-members of the 'old' National Council of the Judiciary, the former First President of Supreme Court 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 Tribunal 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, finding that abortion in the event of irreversible damage to the fetus is inconsistent with the constitution. This means the introduction of a practically total ban on abortion in Poland (the situation ruled by the Tribunal covered 98% of abortions). This ruling is currently very useful to the ruling camp, which prefers to unleash a domestic ideological war rather than be held accountable for its inefficiency in fighting the COVID-19 pandemic.

3. The Public Prosecutor's Office

In April 2016 the governing camp took political control over the Public Prosecutor's Office which was achieved by combining functions of the Minister of Justice and Public Prosecutor General, which has been accompanied by a significant increase of his investigative powers. Currently, the Public Prosecutor General has, in particular, the power to:

- issue binding commands with regard to the particular procedural steps in individual cases;
- overrule or change a decision of a subordinate prosecutor;
- take over the cases conducted by subordinate prosecutors;
- appoint the superior prosecutors (instead of the competition procedure applied before), which was accompanied by exchange of the top prosecutors under pretext of reorganization.

The result is an image of the Public Prosecutor's Office as potentially entirely disposed to the Law and Justice party. For this reason, the legitimacy of the actions of the prosecutors raises great 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 governing camp, who represents several politicians from the current opposition in court proceedings, was arrested

The Constitutional Tribunal was turned from the effective guardian of the Constitution into one of the most active instruments of destruction of the rule of law in Poland

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Warsaw, Poland - January 11, 2020, March of a Thousand Robes. Judges from across Europe protest in Warsaw against controversial judicial reforms © Cinematographer / Shutterstock

on a charge of allegedly committing economic crimes. 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.

The extension of the powers of the Prosecutor General is accompanied by solutions such as:

- the extensive admissibility of evidence collected illegally (including from telephone tapping), which gives rise to tremendous concern from the point of view of protecting freedom and civil rights;
- in 2019, the independent media revealed that the Minister of Justice has bought the Israeli 'Pegasus' system, which enables any phone or internet communication to be intercepted without judicial control. The system was purchased with money illegally taken from the Victim Support Fund.
- Creation of the Internal Affairs Department of the State Prosecution Service at the very top of Public Prosecution Office, the aim of which is to 'conduct and supervise preparatory proceedings in cases of intentional crimes prosecuted by public indictment, committed by judges, prosecutors, trainee judges or trainee prosecutors'. This department was established in whole by an active politician from the current ruling coalition, 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 be degraded with one signature, losing their function and the associated higher salary. Until July 2018, during more than two years of its operation, having examined over 1100 complaints and files, the Department commenced only seven proceedings against a specific individual, five of which apply to prosecutors and two to judges. Given that Poland has approximately 10.000 active judges and over 6.000 prosecutors, such a number of proceedings should be considered as insignificant. Establishment of such a body, lacks substantive justification.

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 Supreme Court in disciplinary proceedings against judges in April 2020. In order to circumvent the interim measure applied by the CJEU in Luxembourg and 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 cover proceedings conducted by the Disciplinary Chamber waiving 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, Igor Tuleya, and Irena Majcher of having committed criminal offences in connection with their judicial activity. As soon as the Disciplinary Chamber revoked the immunity of

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judge Morawiec on 12 October 2020, it simultaneously suspended her from judicial activity and reduced her salary after the hearing that grossly breached her right to a fair trial. It was no accident that these victims of this legal persecution were chosen, because both Judge Morawiec, as President of the Association of Judges ‘Themis’, 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.

4. Act on the Organization of Ordinary Courts

Over the six months since the amendment of the Act on the Organization of Ordinary Courts entered into force, the Minister of Justice arbitrarily and often by using untrue or fabricated statistical data on the effectiveness of the courts, dismissed around 160 presidents and vice presidents of the Ordinary Courts before their terms of office expired. Worse still, it seems that the main criteria for appointing their successors were not their merits but the degree of their loyalty to the Minister of Justice. Many of them exercise their power by applying soft administrative measures of repression with respect to defiant judges. They are assisted in these activities by court directors arbitrarily appointed by Minister Zbigniew Ziobro, according to their political loyalty. Such repression includes refusing to allow judges to undertake additional employment, or the unjustifiable transfer of judges from one division to another, where they are deliberately overburdened with new duties and deprived of qualified administrative services. As shown by the example of the former press officer of the ‘old’ National Council of the Judiciary, Waldemar Żurek, such activities are undertaken to prevent an inconvenient judge from efficiently performing his judicial duties after which disciplinary proceedings are instituted against him.

5. The neo National Council of the Judiciary

A complete ‘purge’ was conducted in the National Council of the Judiciary (NCJ), which had previously played a fundamental role in safeguarding the independence of the judiciary. Contrary to article 187 of the Constitution, as well as the recommendations of the authorities of the Council of Europe, the principle of appointing fifteen judges – Council members – by the judges was waived, transferring this prerogative to the Polish parliament, simultaneously terminating the terms of office of members of the Council to date. Furthermore, as disclosed by the media, a number of personal and private connections between judges – members of the new Council – and the Ministry of Justice are so significant that this can be

easily regarded as an additional authority of the executive.

Like the Constitutional Tribunal previously, the new 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 new NCJ often rejects judges who apply for promotion who are the best assessed and recommended by judge-inspectors and assemblies of local courts; instead the new NCJ promotes judges with poor professional achievements, who offer a guarantee of being loyal to the newly nominated presidents of the courts. In one of its opinions regarding such a loyal candidate for promotion, the new 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’. It could be rather added that: he thinks independently of professional knowledge and logical thinking. Recently, the Polish judicial community was surprised to learn that a candidate was chosen in the recruitment to the position of judge of the Regional Court in Olsztyn before the neo-NCJ whose only advantage over the other applicants was that he paid PLN 12.500 (approximately € 3.000) in 2019 to the Law and Justice party’s election fund and openly supported this party with his entries in the Internet. Neither the neo-NCJ nor President Duda saw a manifestation 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. Other ‘achievements’ of the new NCJ include the passage of a resolution condemning Stanisław Zabłocki, judge of the Supreme Court, for the fact that, while implementing the CJEU’s interim measure in October 2018, he returned from compulsory retirement to the position of President of the Criminal Chamber of the Supreme Court, as well as a resolution allowing for judges wearing T-shirts with the inscription ‘constitution’ to be held liable on disciplinary charges. Needless to say, during the two and a half years of its existence, the neo-NCJ has not defended any of the unjustifiably persecuted judges, nor has it objected to any of the new judicial acts that violate the separation of powers, including with the famous ‘muzzle act’.

6. The new Act on the Supreme Court

The new Act on the Supreme Court was originally drawn up to enable a purge in the personnel of Poland’s highest judicial authority. The reduction in the retirement age for judges alone was intended to replace around 40% of the judges and, simultaneously, lead to the termination of the

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constitutionally guaranteed term of office of the First President of the Supreme Court, which was prevented by the Order of CJEU, of October 2018. This partial failure of the pseudo-reform of the justice system does not change the fact that the National Council of the Judiciary has become politicized, after which it appointed judges to the Extraordinary Complaint and Public Affairs Chamber which guarantees politicians influence on the control of the validity of parliamentary elections, as well as the Disciplinary Chamber which gives Law and Justice control over disciplinary proceedings against judges and representatives of other legal professionals. Both new chambers of the Supreme Court were established as a result of what constituted a parody of the recruitment procedure, as it was limited to a 15-minute interview, waiving the requirement of a written appraisal of the achievements of the candidates to date, and preventing judicial control of the correctness of the recruitment.

It should be added that the Disciplinary Chamber is, in fact, an entirely new court, which is completely independent of the First President of the Supreme Court, with its own budget, office and regulations. In fact, the Polish Constitution only allows for the establishment of such a special court in wartime. Moreover, it is mainly former prosecutors or other people closely related to the Minister of Justice-Prosecutor General, who are not only loyal to him, but also do not have any judicial experience, and therefore have not developed a habit of judicial independence, who were appointed to the positions of judges of the Disciplinary Chamber. The Disciplinary Chamber is currently continuing to operate, even though it was suspended under the CJEU's interim measure of 8 April 2020 and, in accordance with the resolution of the combined chambers of the Supreme Court of 23 January 2020 (issued on the basis of the guidelines contained in the ruling CJEU of 19 November 2019), it does not constitute a court in the meaning of the Polish Constitution and European law.

7. The new mode of disciplinary proceedings

Simultaneously the new mode of disciplinary proceedings in respect of judges was introduced which limits the right to the defense and furnishes the Minister of Justice-General Prosecutor with overwhelming competences including appointment of main disciplinary commissioners for judges, and all judges of the first instance disciplinary courts, and indirectly the composition of the Disciplinary Chamber which was appointed by new, politicized neo-NCJ. Under the new manner of disciplinary proceedings, it is permissible to conduct a hearing in disciplinary proceedings in the justified absence of a judge or his counsel, which undermines the right to a defense. The new law

explicitly enables the use of evidence collected without judicial control and in breach of the law, including evidence obtained from bugging telephones. After about two years from its activation there are numerous examples that the new mode of disciplinary proceedings is applied in order to accuse and punish defiant judges, including for the content of purely judicial decisions. One of the Judges (Czubieniak) was punished by the disciplinary chamber of the Supreme Court for interpretation of Polish law in accordance with the ECtHR judgements and EU Directives concerning protection of especially vulnerable persons in the criminal proceedings.

Other examples of politically motivated disciplinary proceedings against judges relate to:

- judges who refer preliminary requests to CJEU, or to the Supreme Court, in which they contest the legal status of the new Chambers of the Supreme Court, neo-NCJ or judges appointed with its participation;
- judges who refuse prosecutors' motions to apply preliminary detention;
- judges who decide directly on the basis of the constitution or international law;
- judges protesting against a breach of the constitution, politicization of the judiciary, criticize new disciplinary authorities;
- judges involved in legal education of children and young people;
- judges who are members of the boards of judicial organizations;
- judges-signatories of the OSCE letter regarding the legality of the parliamentary elections originally scheduled for May 2020.

It is difficult to predict which case has such potential, so every judge can feel threatened. Currently more than 80 Polish judges are disciplinary harassed due to political reasons.

8. The black PR campaign against the judiciary

All this pseudo reform of the system of justice is accompanied by very intense, Putin-like style black PR campaign in the state owned media and the internet including defamation and personal attacks on defiant judges who protect the rule of law.

The most spectacular manifestation of defaming judges in the media was conducted in September 2017 in the so-called 'billboard campaign' involving television, the press and the Internet. The campaign was handled by the Polish National Foundation, an institution established under the auspices of the Law and Justice party and is financed by the seventeen largest state-owned enterprises controlled by the ruling party's nominees. It was a black PR campaign presenting a distorted picture

of the Polish judiciary, generally describing disciplinary proceedings with regard to some judges in a very biased way, as well as their alleged or actual judicial errors. Although some of those situations were true, others were presented in a distorted or even completely false manner. Judges were depicted as classical examples of corruption, a lack of competence and indolence. One of the judges aptly commented on the 'billboard campaign' as follows:

'The situation, in which one branch of branches of state authority pays to organize a negative campaign against another branch of state authority of the same state, is so peculiar that even George Orwell or Monty Python could not have come up with that'.

Afterwards there were a few international appearances of our Prime Minister, Mr. Morawiecki in which he presented Polish judiciary as a part of a post-communist pact, portrayed Polish judges as corrupted and compared Polish courts to courts of Vichy France collaborating with the Nazis. All of this without providing any examples of what he was talking about.

And the 2019 independent media investigations revealed the existence of a special task force group rooted in the Ministry of Justice with the deputy Minister of Justice, Mr. Piebiak as its head, which is called in the media 'troll farm in the Ministry of Justice'. The group was kind of a think-tank organizing of a smear Internet black PR campaign against defiant judges, especially activists of associations of judges. The group consisted of twelve persons including four members of neo-NCJ, two deputies of Main Disciplinary Commissioner and one judge of the newly created Disciplinary Chamber of the Supreme Court. Presence of this persons in a group of haters confirms that the most important new institutions created under the so-called 'great reform' of the justice system are politically corrupt and morally compromised. The group cooperated with internet haters providing them with information about alleged details of private life of judges, their personal data, classified or semi-classified documents from personal files and files of disciplinary proceedings. In spite of the fact that the slanderous online campaign against judges could realize a number of types of crimes, including stalking, illegal disclosure of information on criminal and disciplinary proceedings, insulting a public official, slander in the mass media, illegal personal data processing and perhaps even operating within an organized criminal group no effective investigative measures were taken so far. It

is not surprising if we take under consideration that there are clues that the Minister of Justice Zbigniew Ziobro knew about the smear activity and fully accepted, if not inspired it.

9. The 'muzzle law'

The crowning achievement of the government's actions intended to politically subordinate the judiciary is the famous 'muzzle act' which:

- introduced new types of disciplinary torts for judges (a request for a preliminary ruling submitted to the CJEU or the Polish Supreme Court regarding the status of judges appointed with the participation of the neo-NCJ, or questioning the legal status of the neo-NCJ became a serious disciplinary offence, punishable by expulsion from the profession. It is striking that the obvious purpose of introducing this disciplinary tort is to prevent Polish judges from implementing the recommendations contained in the CJEU judgment of 19 November 2019 (C-585/18, C-624/18, C-625-18));
- deprived the bodies of the judicial self-government organization of any significance (e.g. they have lost the right to give 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 new disciplinary proceedings against judges even more (e.g. decisions on waiving a judge's immunity and the temporary detention of a judge will only be made by the Disciplinary Chamber of the Supreme Court);
- imposed the obligation on judges to disclose their affiliation to judicial associations (information on this is posted in the Internet);
- gave the President of Poland the right to correct the defectiveness of the nomination procedure of judges in conflict with the Constitution;
- enabled the ruling party to take over the position of the First President of the Supreme Court 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 the temporary president of the Supreme Court for the election period. These amendments made it possible for President Andrzej Duda to elect Małgorzata Manowska as the First President of the Supreme Court on 25 May 2020. She is loyal to the ruling camp, but only received fifteen votes in support, even though her independent counter-can-

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didate, Professor Andrzej Wróbel, received as many as fifty votes, which constituted the majority of the members of the assembly of judges of the Supreme Court.

- The muzzle act has become the basis for disciplinary action against all Polish judges who, implementing the guidelines contained in the CJEU ruling of 19 November 2019, question the legal status of the neo-NCJ, or the judges elected with its participation in their rulings. The first person punished through disciplinary action for such acts was Judge Paweł Juszczyszyn, who was suspended from his judicial duties for this reason by the Disciplinary Chamber of the Supreme Court, and his salary was cut. It is significant that the decision of the Disciplinary Chamber against Judge Juszczyszyn was issued on 4 February 2020, which was before the ‘muzzle act’ entered into force (14 February 2020), namely in breach of the principle of ‘nullum crimen sine lege anteriori’.

10. Bitter conclusions

Now, returning to the initial question: what is the real objective of the so-called ‘great reform of the justice system’ and what are the results of the numerous legislative changes of this system?

First, the question of what has been achieved over the five years of reformation of the justice system in Poland needs to be answered. No progress has been made with regard to accelerating court proceedings. Although the Ministry of Justice is hiding the statistical data of the judiciary for 2019 under the pretext of difficulties arising from the pandemic, it is estimated that the average duration of court proceedings before the lowest-level courts has increased by around 20%. It would be difficult for it to be otherwise, if only because of the replacement of many presidents of courts with people with no management experience and constant changes in the law that destabilize the justice system (the law on the Supreme Court itself was amended nine times within sixteen months of being passed by the parliament). Contrary to the announcements, no decommunization of the Polish judiciary has been conducted, nor have there been any signs of combating corruption, because none of these alleged phenomena constituted a real problem that would require structural solutions.

So the actual achievements of the ‘great reform’ of the judiciary are the new method of conducting disciplinary proceedings combined with full control of the Minis-

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ter of Justice over the Prosecutors’ Office (including the Internal Affairs Department of the State Prosecution Office) and his excessive administrative control over the judiciary, as well as the lack of effective constitutional control of a new law which, all in all, constitute a real ‘chilling effect generator’. Judges are exposed to constant attacks, including black PR campaign in public media. The conclusion drawn from the above arguments is indeed depressing. The only 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. A side effect of the systemic changes that have been introduced is several infringement proceedings by the CJEU against Poland due to changes that pose a threat to the independence of the judiciary (e.g. in connection with the reduction of the retirement age of judges, the new model of disciplinary proceedings and the muzzle act), the risk of reducing European funds paid to Poland in connection with the introduction of the ‘rule of conditionality’, and the collapse of the authority of the Polish judiciary on the international arena, which is visible, inter alia, in numerous refusals to surrender people wanted under European Arrest Warrants to Poland. One thing is certain: the government will find it increasingly more difficult to explain both to Polish citizens and EU institutions what purpose the pseudo-reforms of the judiciary are to serve. •