



FREECOURTS NEWSLETTER

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Introduction

We are pleased to be able to present to you the fourth issue of the Free Courts Newsletter, a regular publication in which we continuously bring to you the most important events in Poland on the justice system and breaches of the rule of law. We are lawyers defending the rule of law in Poland; we watch the activities of the ruling party closely day by day and speak out about all irregularities. We do not want any injustice to escape public attention.

This will be a crucial year. Parliamentary elections will be held in Poland in October, which will be an opportunity to change the political situation and start the process of restoring the rule of law in Poland.

In recent weeks, the main topics of discussion in Poland regarding the rule of law were a further attempt to unblock funds from the Recovery Fund by amending the Act on the Supreme Court, the response of the European Court of Human Rights on the rule of law crisis in Poland and the European Commission's decision to refer Poland to the Court of Justice of the European Union because of the adjudication activities of so-called Julia Przyłębska's Constitutional Tribunal.

Top story: Let's start with an update on the National Recovery Plan

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How the ruling party tries to fulfil the milestones?

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The European Commission takes firm steps

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Let's start with an update on the National Recovery Plan

The Polish government consistently claims that it can shape the justice administration as it pleases. Meanwhile, the EU treaties and Charter of Fundamental Rights do indeed entrust the shaping and administration of the judiciary to the individual EU Member States, but on one condition: the courts must absolutely be independent of the other authorities and must give every citizen guarantees of independence and impartiality. This arises from the principle of the rule of law and effective judicial protection. And the conflict between Poland and Brussels about this is continuing.

The Polish government is disregarding these guarantees and the whole of the European legal order. It is also disregarding the rulings of the Court of Justice of the European Union – two of which, in July 2021, identified the directions of the necessary changes. In accordance with these rulings, the Disciplinary Chamber in the Supreme Court was to be liquidated and disciplinary cases of judges were to be transferred to another, but legal, chamber of the Supreme Court. The so-called Muzzle Act, an act preventing Polish judges from questioning the political status of the neo-NCJ and the correctness of the appointments made with its involvement, for which disciplinary action can be taken, was supposed to disappear from the legal order. And finally, the CJEU ordered that judges who had been removed from adjudication by the illegal Disciplinary Chamber are to be reinstated. These are the so-called milestones written into the National Recovery Plan, a document signed by the Polish government. They have to be satisfied in order for the European Commission to release billions from the Recovery Fund. What is the status of fulfilling the milestones? Well... the Disciplinary Chamber has seemingly been liquidated. The cases it dealt with went to the Professional Liability Chamber, which is largely made up of neo-judges. As for the second milestone, not all judges have been re-

instated to this day. After Judge Tuleya's unexpected reinstatement, which we wrote about in the November edition of our Newsletter, Judge Piotr Gąciarek and Judge Maciej Ferek remained suspended. Judge Gąciarek was reinstated by the Professional Liability Chamber on 18 January 2023 after a break of 450 days (he had been removed from adjudication by a decision of the then President of the Regional Court, Piotr Schab for 30 days and then suspended for a total of 420 days by the illegal Disciplinary Chamber). Therefore, the only judge still not adjudicating is Judge Maciej Ferek from the Regional Court in Kraków. He has become the victim of a hate campaign conducted in recent weeks mainly by the neo-NCJ. The third milestone, is also not fulfilled. The legal system still has the so-called 'Muzzle Act', which breaches judicial independence by allowing judges to be punished on disciplinary charges for questioning the status of 'neo-judges' or the politically subordinated neo-NCJ as they directly implement the rulings of European tribunals.



Neo-judges are intensively being pumped into the justice system all the time. This process has accelerated considerably. The ruling party is not hiding the fact and Minister Ziobro has openly stated that this is also about the policy of fait accompli, namely filling the judiciary with neo-judges to such an extent that it will not be possible to reverse this process and therefore that a huge group of people who are loyal to the political formation currently in power will remain in the courts, including the most important ones, for decades.

Maria Ejchart-Dubois

Therefore, none of the changes specified by the European institutions have been implemented and, as a result, we are paying the fines ordered by the Court in Luxembourg. This is already 482 million euros, which is almost 2 billion zlotys. That is also why money from the modern Marshall Plan, the EU Recovery Fund, is still blocked. It is 58 billion euros, which is at Poland's disposal, namely almost 270 billion zlotys, which Polish citizens and businesses, as well as local authorities, cannot benefit from.

How the ruling party tries to fulfil the milestones?

Just before Christmas, a group of PiS MPs (or, in fact, the government) submitted a new bill amending the Act on the Supreme Court to the Sejm, leaving the Muzzle Act in place and providing for the unconstitutional solution of transferring judicial disciplinary matters to the Supreme Administrative Court (SAC). The bill did not solve any major problems with the rule of law in Poland.

One month later – on 13 January 2023 – PiS passed an amendment to the Act on the Supreme Court in the Sejm. The ruling parliamentary majority rejected the opposition's amendments. Lawyers defending the standards of the rule of law and social organisations from the Justice Defence Committee (KOS) presented a position paper (KOS's position paper of 12 January 2023), in which they pointed out that the Act is not leading to the solution of the problems with the procedure of appointing and promoting judges (the core of which is the National Council of the Judiciary) and breaches the Constitution by transferring the consideration of disciplinary cases of judges to the Supreme Administrative Court. Then, KOS sent a letter to the Senate with an appeal to approach the Venice Commission to request an urgent opinion on the amendment to the Act on the Supreme Court that was adopted.

The OSCE/ODIHR presented an opinion on the Act to the Senate. 'While the Bill introduces mechanisms to address some of the existing issues in the justice system, the efficiency and effectiveness of the proposed solution, as it is, remains doubtful. It offers no safeguards that would preclude disciplinary decisions of the SAC issued by panels composed of judges appointed by the reformed NCJ being questioned in the same way as the decisions of the newly established Supreme Court's Chambers. More importantly, the proposed amendments do not address the root causes by leaving unchanged the fundamental systemic deficiencies of the legislation undermining the inde-

pendence of the judiciary and of individual judges, as established by the CJEU and the ECtHR,' the report concludes.

The Sejm rejected all 14 of the Senate's amendments submitted by the opposition on 8 February 2023. It then went to President Andrzej Duda, who announced in an address to the nation that he had referred the Act without signing it to Julia Przylebska's so-called Constitutional Tribunal. The Act will not enter into force until the so-called Constitutional Tribunal rules on its constitutionality. President Andrzej Duda said that the act, which he himself drafted a year ago, was a good compromise between Poland and the European Commission. 'The opposition's attitude and that of part of the ruling camp meant that this opportunity had not been seized,' he said. 'The government entered into a new agreement; it is good that it happened, but this agreement gives rise to serious constitutional controversies,' Duda continued.

The Justice Defence Committee (KOS) took a position on the issue, submitting an appeal to the European Commission and the European Parliament. In its position, lawyers and social organisations point out:

'The Act allegedly implements the so-called "milestones" attached to Poland's Recovery and Resilience Plan regarding the improvement of judicial independence. It was itself adopted in a procedure breaching good law-making principles, the implementation of which is a separate "milestone" and is still not even close to being reached. The Justice Defence Committee, KOS, unequivocally states that the Act is incompatible with EU law and the Polish Constitution and does not contribute to reaching the so-called "milestones". Furthermore, it devastates the Supreme Administrative Court (SAC), which has the task of controlling the administration. This court will be compromised with unconstitutional tasks and blocked with disciplinary cases, while cases of citizens against public administration will wait for years to be addressed.'

The European Commission takes firm steps

On 15 February 2023, the European Commission announced that it is filing a complaint against Poland with the CJEU.

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This is now the fifth time that the European Commission has filed a complaint with the Luxembourg court against the Polish government for breaching EU standards on the independence of the judiciary. Each time, the Court of Justice of the European Union has found for the Commission. Every major change to the judiciary by the ruling party has been an assault on the European Union principles of the rule of law. As early as in December 2017, when the European Commission initiated a procedure under Article 7 of the EU Treaty regarding the risk of a serious breach of the rule of law for the first time in the history of the European Union, one of the five charges against Poland was the functioning of a politically subordinated Constitutional Tribunal. It was clear from the outset, both from the point of view of the Polish Constitution and European law that the changes to the Constitutional Tribunal made in an extremely brutal and even forceful manner between 2015 and 2016 constituted a violation of all the rules of the civilised world. Not only did the EU speak out on this at that time, but so did Polish experts, legal organisations and associations, independent bodies that still existed in Poland at that time, such as the Supreme Court, the National Council of the Judiciary and the Ombudsman, as well as abroad, including the United Nations, the Venice Commission, the American Bar Association and other major legal associations and international organisations. No one had any doubts.

However, of course, none of those in power heeded these opinions, the indignation of the citizens protesting in the streets and the alarms raised by the institutions of the Western world. The Constitutional Tribunal operated to political order and Julia Przylebska, acting as its President, graced the halls of the ruling camp, applauded and complimented by the head of the ruling party himself. Among other things, this body 'legalised' the politically subservient neo-NCJ in 2019, issued the famous decision prohibiting abortion in 2020 (which incited a huge wave of protests), and for the first time in the history of the EU, held in 2021 that the EU Treaty is, to a certain extent, incompatible with the constitution of a Member State (Poland) and that our authorities do not have to recognise the principle

of autonomy, primacy and direct effectiveness of EU law. In other words: they do not have to comply with the rulings of the Court in Luxembourg. Then, by analogy, it arrived at the conviction that the European Convention on Human Rights is also incompatible with our Constitution, which means that the Polish government does not have to implement the judgments of the ECtHR in Strasbourg (if they do not suit it). These are only the most famous actions of this quasi-court.

In 2021, the 'contested' Strasbourg court hearing the complaint of the Polish company, Xero Flor, definitively pre-judged the status of Julia Przylebska's tribunal by issuing a ruling from which it arises that the Polish Constitutional Tribunal with stand-ins on board breaches the Convention by failing to meet the requirements of an independent and impartial court established by law. This alone gives undeniable legal grounds for challenging almost everything that the 'Constitutional Tribunal' has issued to date.

So now, in filing the complaint with the CJEU, the European Commission is referring directly to the Strasbourg ruling. It is accusing the current Constitutional Tribunal of not being independent and, as such, being unable to provide effective judicial protection in areas encompassed by EU law (to which we are obliged under Article 19 of the Treaty). The EC also considers that the "Constitutional Tribunal" no longer meets the requirements of an independent and impartial tribunal established by law. This is due to the irregularities in the appointment procedures of three judges in December 2015 and in the selection of its President in December 2016. Furthermore, this pseudotribunal has issued 'rulings' that directly contradict the fundamental principles of EU law, including the primacy of EU law and the binding force of CJEU judgments.



The Commission, as the guardian of the Treaties, cannot allow such ideas to develop, as this could soon

undermine the whole of the legal order in the community and lead to its disintegration. This is therefore a critical moment in the history of European integration, and the EC is clearly aware of this.

Michał Wawrykiewicz

Moving from Brussels to Strasbourg

The European Court of Human Rights in Strasbourg has responded decisively to the rule of law crisis in Poland. Certainly, 2022 was a landmark year, because the Court issued four fundamental judgments on the functioning of the justice administration in Poland. They all unequivocally address the 'reforms' of the last seven years, highlighting individual and systemic breaches. They all mark a defeat for the Polish government and impose an obligation on it to implement them. And although, for the time being, the government is refusing even to pay the compensation awarded to the applicants, we can expect further rulings in 2023 on further areas of the justice administration that are subjected to changes by the united right group.

Just to reiterate:

Advance Pharma v. Poland — considered the judgments of the Civil Chamber of the Supreme Court issued by a bench containing people selected by the politicised neo-NCJ nominated after 6 March 2018, to the exclusion of the judicial community, namely neo-judges. The Court held that such judgments can be challenged, as the benches formed in this way do not satisfy the criterion of an independent and impartial court in the meaning of the European Convention.

Grzęda v. Poland — the Court pointed out explicitly that the shortening of the four-year term of office of the members of the last legal NCJ was incompatible with the European Convention, while the method of its appointment, with the excessive involvement of the executive, means that the NCJ and, as a result, the judges appointed by it, do not give citizens a guarantee that a case will be heard by an impartial court established by law.

Żurek v. Poland — this is a landmark ruling from the point of view of the protection of judicial freedom of expression. The Court ruled that judges not only have the right but even the duty to stand up in public in defence of the independence of the judiciary and judges.

Juszczyszyn v. Poland — this was key ruling because the ECtHR held that Judge Juszczyszyn's suspension was not only unlawful, but also an abuse of the law by the authorities, while that the decisions made with respect to him were political and not based on their merits.

Regardless of the judgments, the European Court of Human Rights also issued interim measures in 2022, which were precedent-setting for the European legal order, in the cases of specific judges, thereby protecting them from repressive actions by the authorities in Poland. In a press release published on 16 February 2023, the ECtHR pointed out that, since January 2022, the Court has received a total of 60 requests for interim measures from Polish judges in 29 cases concerning the independence of the Polish judiciary. Requests in 17 of the cases have been granted or partly granted. There are currently 323 applications pending before the Court which raise issues relating to various aspects of the reorganisation of the judicial system in Poland under laws that mainly entered into force in 2017 and 2018.

The first category of interim measures applied to the operation of the Disciplinary Chamber. The Court prohibited the illegally operating Disciplinary Chamber from taking any action with respect to judges (the first interim measure for a judge of the Supreme Court Professor Włodzimierz Wróbel) because the manner in which this Chamber was appointed and operated did not satisfy the attributes of a court established by law in the meaning of the European Convention on Human Rights. Such interim measures effectively protected the judges from having their immunities lifted, from being charged with absurd criminal charges and from being suspended from their professional activities.

The second category of interim measures applied to the Chamber of Extraordinary Control and Public Affairs (which was established in 2018 in the Supreme Court, in the same manner as the Disciplinary Chamber, 100% made up of neo-NCJ nominees), which the Strasbourg Court ordered not to take any action in Judge Waldemar Żurek's cases until the ECtHR ends its case and issues its judgment. These are the two cases that are pending before the Chamber of Extraordinary Control and Public Affairs in connection with the extraordinary complaints filed by Minister of Justice Zbigniew Ziobro in Judge Żurek's cases. The objective of the complaints was to undermine final judgments that were favourable for the judge, which were passed several years ago in the judge's entirely private cases, so as to oppress him financially. We wrote about this in the November edition of our Newsletter.

The interim measure from 18 October 2022

was breached on 31 January 2023 by the Chamber of Extraordinary Control and Public Affairs, which dismissed the Prosecutor General's extraordinary complaint against the final judgment of the Court of Appeal in Wrocław in Judge Żurek's case. The judgment was passed by the bench: Neo-Judge of the Supreme Court Mirosław Sadowski (presiding judge and rapporteur in the case), Neo-Judge of the Supreme Court Paweł Księżak and Lay Judge Radosław Jeż. The judgment was passed in camera, without the parties being present. Furthermore, neither Judge Żurek nor his proxies – Attorneys-at-Law Sylwia Gregorczyk-Abram and Michał Wawrykiewicz – were notified of the date of the hearing.



It is irrelevant that the judgment is in the judge's favour. The ECtHR has forbidden this case from being

handled by neo-judges.

Sylwia Gregorczyk-Abram

Finally, the third category of interim measures – the Court in Strasbourg stopped the implementation of a decision to repressively transfer three criminal judges from the Warsaw Court of Appeal to the labour division. The decision regarding the transfer was a retaliatory action for the fact that the judges had refused to adjudicate in the same bench as neo-judges and had challenged judgments passed by neo-judges, thereby implementing the judgments of the European Courts.

This interim measure has also been breached. The European Court of Human Rights announced on 16 February 2023 that the Polish Government has recently informed the Registry of the Court that the interim measure indicated by the European Court of Human Rights on 6 December 2022 under Rule 39 of the Rules of Court in the cases *Leszczyńska-Furtak v. Poland* (application no. 39471/22), *Gregajtys v. Poland* (no. 39477/22) and *Piekarska-Drzążek v. Poland* (no. 44068/22) will not be respected. The Government referred to a statement by the President of the Warsaw Court of Appeal finding that there were no factual or legal grounds for doing so and pointing to a Constitutional Court judgment of March 2022 questioning the authority of the European Court to intervene in cases concerning the judiciary. **This is the first time that Poland has refused to comply with a Rule 39 interim measure in such cases.**

About the Free Courts Foundation

The Free Courts Foundation is a non-governmental and non-profit organisation founded by a group of Polish lawyers: Maria Ejchart-Dubois, Sylwia Gregorczyk-Abram, Paulina Kieszkowska-Knapik and Michał Wawrykiewicz. As professionals, realising the significance of the harmful changes being introduced into the Polish legal system leading to the politicisation of the independent courts, we undertake various activities of upholding the rule of law in Poland. Katarzyna Wiśniewska, PhD became a new member of the Free Courts in October 2022. 5 junior lawyers are also part of the Foundation's team. The Foundation's objective is to increase knowledge and strengthen the independence of the courts and judges, as well as to conduct activities in support of the rule of law and the broadly-

understood protection of human rights, civil liberties and to counteract discrimination. The Free Courts co-founded the Justice Defence Committee (KOS) in 2018, the organisation that represents and helps repressed judges of the ordinary courts, judges of the Supreme Court and the Supreme Administrative Court, as well as prosecutors.

Also on our channels:

The Free Courts report named '2500 Days of Lawlessness', which presents, step by step, how the political authority has brought about the destruction of the rule of law. It is a record of all legislative changes and other decisions taken by the executive and legislative authorities to politicise the judiciary. The report was originally issued in June 2021 under the name '2000 days of lawlessness' and we keep it updated on an ongoing basis. The report also shows that none of the steps taken since 2015 were intended to implement a genuine and

credible reform of the judiciary. Knowing what work has been done will be crucial when the time comes to repair what has been destroyed.

Polish lawyers demand accountability for war crimes – as part of the objection to Russia's unlawful aggression against Ukraine, the #FreeCourts Initiative has prepared a video featuring representatives of the legal community (available on our YouTube channel with English and Ukrainian subtitles).

Worth reading:

- Professor Laurent Pech 7 Years Later: Poland as a Legal Black Hole
- Professor Laurent Pech, Jakub Jaraczewski: Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations
- Democracy Reporting International (DRI) and Meijers Committee paired up to create the Rule of Law FAQs. These handy cards will help you get your facts straight and be ready to bust the myths that have been built around the rule of law.

JUSTICE 24

Justice24 is an international project that aims to document the war crimes committed by the Russian State in Ukraine and to compensate the victims of Russian aggression. The Free Courts and the Ukrainian Helsinki Human Rights Union (UHHRU) are helping the citizens of Ukraine with their applications against Russia before the European Court of Human Rights in Strasbourg.

For today's Ukraine, filing statements of claim regarding human rights violations is not only hope for the restoration of justice, but also an opportunity to register Russian crimes in the international arena. The ECtHR's decision is a decision of a judicial institution that has legal consequences. These include holding Russia legally accountable, the obligation to make reparations for the damage caused to the people and a blow to Russia's international authority as a state.

In February, on our social media channels, we published interviews conducted by Ukrainian lawyers involved in the Justice 24 project, which is coordinated by the Free Courts Foundation. We wanted the voices of victims of the war in Ukraine and Ukrainian lawyers to be heard.

The Free Courts newsletter is sent out several times a year, at least once every three months. If you do not want to receive it, please send an email to kontakt@wolnesady.org.

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