

Warsaw, 15 January 2023

**Prof. Dr Hab. Tomasz GRODZKI**  
Marshal of the Senate

**Krzysztof KWIATKOWSKI**  
Chair of the Legislative Committee  
of the Senate

**Aleksander POCIEJ**  
Chair of the Human Rights, the Rule of Law  
and Petitions Committee of the Senate

*Dear Sirs,*

The Justice Defence Committee (KOS) is an initiative of thirteen civic society organisations committed to protecting the rule of law and human rights. Its main task is to defend judges, prosecutors and members of other legal professions against reprisals from the state authorities. KOS's activities have resulted in multiple judgments of Polish and European courts setting the standards of protection of the rule of law and the independence of the judiciary.

We are writing to you in connection with the passage by the Sejm of *the Act amending the Act on the Supreme Court and certain other Acts* (Sejm forms nos. 2870, 2925 and 2925-A). It is public knowledge that the main objective of this bill, which has been clearly expressed by the government, is to obtain a positive opinion from the European Commission on the 'milestones' regarding the judiciary, as presented in Poland's Recovery and Resilience Plan – and, as a result, for Poland to receive the first instalment from the so-called Recovery and Resilience Facility.

Given the importance of these funds to the Polish economy during the crisis, especially to businesses, households and local authorities, we would like to draw your attention to the threats related to the enactment of this law and suggest a solution that could dispel our concerns. That is because we believe that the Polish authorities are able to receive the EU funds and simultaneously pass such legislation, as is required for gaining access to these funds, which is compatible with the standards of the rule of law and 'improves Poland's investment climate, especially by protecting the independence of the judiciary', which was a recommendation constituting the basis of these 'milestones'.

We would primarily like to point out that the subject matter of the Act falls within the scope of EU law (Article 2 TEU, second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights) and the European Convention on Human Rights (Article 1, Article 6(1) and (2), and Article 13 ECHR). Furthermore, in the established case law of the Court of Justice and the European Court of Human Rights, Member States, including Poland, are required in particular to:

- guarantee everyone effective judicial protection, including the right to a fair hearing within a reasonable time;
- ensure that every national court is obliged to check, *ex officio*, whether its bench constitutes a tribunal established by law, which includes the procedure of appointing judges,

because such a check constitutes the cornerstone of the right to a fair trial and an essential procedural requirement, compliance with which is a matter of public policy;

- prevent cases being heard by courts composed of people appointed to judicial office on the motion of the National Council of the Judiciary (NCJ) established under the currently applicable rules;
- ensure that the disciplinary regime that applies to judges cannot be used as a system of political control of the content of judicial decisions.

Simultaneously, the subject matter of the Act is encompassed by two procedures initiated in respect of the Polish authorities: Article 7(1) TEU, according to which the Council may determine that there is a clear risk of a serious breach of the value of the rule of law, and the special monitoring procedure of the Parliamentary Assembly of the Council of Europe verifying the fulfilment of the obligations and commitments of membership of the Council of Europe.

In view of this, the Justice Defence Committee is deeply concerned about the compliance of the said bill with the Constitution of the Republic of Poland, EU law and the ECHR, as well as the possibility of bringing an end to these procedures to the benefit of Polish citizens, the rule of law, and human rights and freedoms.

Our concerns primarily relate to the following issues encompassed by the Act.

First, the so-called 'test of judicial independence and impartiality' has been retained with minor modifications. The functioning of this mechanism prevents national courts from genuinely examining, *ex officio*, the legitimacy of court benches, including the procedure of appointing judges. Additionally, the 'test' does not allow parties to the proceedings to effectively raise the claim of a breach of their right to a fair trial. At the same time, the effectiveness of this procedure is undermined as it allows people nominated to judicial office on the motion of the politicised NCJ to be involved in conducting these 'tests'. This is because these people have a personal interest in upholding defective judicial appointments and allowing people nominated in the same circumstances to continue to adjudicate.

Second, the Sejm decided to give the Supreme Administrative Court the jurisdiction to rule on disciplinary cases of all national judges and to conduct 'tests of judicial independence and impartiality'. Such a solution is in breach of the constitutional principle of the separation of powers (Article 10 and Article 175), as well as the autonomy of the administrative courts (Article 184 of the Polish Constitution). By giving the Supreme Administrative Court the jurisdiction to hear disciplinary cases of judges of ordinary and military courts, as well as the Supreme Court, and to conduct the so-called 'tests', this bill fails to respect the separateness of the individual judicial branches and extends beyond the constitutional mandate of the Supreme Administrative Court to exercise control over the activities of the state administration. Simultaneously, given the significant differences in the specificity of hearing disciplinary and administrative cases, the Act will breach the right of judges of these courts to have their cases properly examined by a competent tribunal.

Similarly, given that about a third of the judicial posts in the Supreme Administrative Court are held by people appointed to that court on the motion of the politicised NCJ, the enactment of the bill will further breach the 'right to a tribunal previously established by law' and will increase the already considerable risk that the disciplinary regime of judges could be used as a system of political control of the content of judicial decisions. It should also be noted that, as in the case of the individual chambers of the Supreme Court, including the disbanded Disciplinary Chamber, the European Court of Human Rights is currently examining applications referred to it by Polish citizens which concern their cases that were examined by the Supreme Administrative Court, the benches of which contained people nominated to that court by the politicised NCJ. We have no reason to expect that the outcome of these proceedings will differ from the already established case law of the European Court of Human Rights.

Finally, the sudden transfer of thousands of cases to the Supreme Administrative Court will paralyse this court and reduce the rights of parties to administrative proceedings to have their cases examined within a reasonable time. As a result, the new Act will reduce the level

of protection of citizens and businesses against the actions of the state authorities, which should be guaranteed by the administrative courts.

Third, the enactment of the bill in its current form will breach the principle of equal treatment expressed in Article 32(1) and (2) of the Constitution of the Republic of Poland and Article 20 of the Charter of Fundamental Rights. This is because the objective of transferring disciplinary cases of judges to the Supreme Administrative Court and granting these judges the right to have their cases re-examined by that court was based on the premise that the Professional Liability Chamber, which currently has the jurisdiction to hear these cases, is not a 'tribunal' within the meaning of national and European criteria, because of the way in which it was established. However, the bill upholds the jurisdiction of the Professional Liability Chamber to examine disciplinary cases of members of other professions, such as prosecutors, advocates, attorneys-at-law and physicians. This is unjustified discrimination of the legal situation of citizens, which is prohibited in a state governed by the rule of law, and will expose the people whose cases will be examined by the Professional Liability Chamber to the risk of a breach of their right to a fair trial.

Fourth, the Act will not repeal the provisions of the so-called 'Muzzle Act' which provides, among other things, for severe disciplinary penalties for judges, including removal from office, for their attempts to ensure that the membership of a tribunal is brought into compliance with the law, including ensuring that cases are not heard by benches containing people recommended by the politicised NCJ. Also, this Act upholds an unclear and imprecise disciplinary offence of 'refusing to administer justice' which is to be used as an instrument of repression of judges refusing to adjudicate in benches which are known in advance to breach the 'right to a tribunal previously established by law'.

Fifth, the authors of the bill have failed to consider the most central problem, which lies at the root of all the above breaches, namely the functioning of the politicised NCJ and its involvement in judicial appointments. This bill reinforces the situation of non-compliance with the law and, furthermore, upholds the situation in which the cases referred to in the Act could still be examined by people nominated to the Supreme Administrative Court on the motion of the politicised NCJ.

The numerous examples of breaches of the Constitution of the Republic of Poland, EU law and the ECHR which we have mentioned mean that this bill will not increase the level of protection of the rule of law, as well as human rights and freedoms. It will maintain the situation in which, after having their cases examined by people nominated on the motion of the NCJ, which is dependent on the political authorities, Polish citizens will be referring applications to the European Court of Human Rights which is highly likely to once again declare, for the very same reasons, that their right to a fair trial has been breached and award them financial compensation. From the point of view of the role of the courts in European legal relations, the Act will reduce mutual trust between the Member States of the EU and the Council of Europe, and Poland, which will adversely affect the recognition and execution of judgments of the Polish courts in cross-border matters and the effectiveness of the preliminary-ruling mechanism.

Therefore, in accordance with the legislative proceedings regarding the so-called 'Muzzle Act' in 2020, but also because the subject matter of the bill clearly falls within the scope of European law, we would like to ask you to consider requesting an urgent opinion from the European Commission for Democracy through Law (the Venice Commission) on the bill in question, including in particular the provisions we have specified.

KOS is convinced that obtaining the urgent opinion of the Venice Commission will have a significant impact on the content of any amendments proposed by the Senate and, as a result, the possibility of bringing the Act into compliance with the Constitution of the Republic of Poland and the standards of the EU and the Council of Europe. We also have no doubt that following the recommendations of the Venice Commission expressed in its opinion will lead to the 'improvement of Poland's investment climate, including by protecting the independence of the judiciary' to the benefit of Polish businesses, households and local authorities.

We remain at your disposal should our assistance be required in preparing the request to the Venice Commission and we would like to offer our active support in the work on the opinion and the final content of the amendments proposed by the Senate.

We believe that, as in the case of other Acts which breached the rule of law, the Polish Senate will once again stand up in defence of the fundamental values, as well as human rights and freedoms.

Yours faithfully,

**Partners of the Justice Defence Committee (KOS):**

Professor Zbigniew Hołda Association  
Polish Judges' Association "Iustitia"  
Association of Judges "THEMIS"  
"Lex Super Omnia" Association of Prosecutors  
Free Courts Initiative  
Helsinki Foundation for Human Rights  
Institute for Law and Society INPRIS  
Wiktor Osiatyński Archive  
Amnesty International Poland  
Civil Development Forum (FOR)  
Polish National Association of Judges of Administrative Courts  
Presidium of the Judges' Cooperation Forum  
Bar Association "Defensor Iuris"