A Chamber of Certain Liability

A Story of Latest Reforms in the Polish Supreme Court

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Setting the stage

The establishment of the Chamber of Professional Liability is the latest installment in the saga, in which the Polish Law & Justice government tries to 'reform' the Supreme Court. It shows, in a nutshell, all the major issues of the rule of law crisis in Poland: conflict with the European Commission and loss of EU funds; apparent concessions and leaving old issues intact; split in the Polish legal community between lawful and unlawful judges. All the elements of drama are here and it all begins with the Disciplinary Chamber of the Supreme Court.

The Disciplinary Chamber was established in the Supreme Court as a part of broader Law & Justice reforms of the judiciary, accused of aiming at subduing judges and limiting judicial independence. The Chamber was tasked, among others, with deciding on disciplinary liability of lawyers, including judges, and staffed solely with members elected by the new National Council for the Judiciary, dominated by the Law & Justice appointees. Therefore, it did not come as a surprise that the Court of Justice found the Disciplinary Chamber to infringe on Article 19(1) TEU (C-791/19). Moreover, in another case (C-204/21) the Court ordered Poland, among other things, to cease the operation of the Disciplinary Chamber as an interim measure, and then imposed a million Euro per day of a penalty for non-compliance with this order.

The failure to comply with these decisions and the continuous functioning of the Chamber led to a major clash with the Commission and is said to be one of the major reasons the Commission withheld funds to Poland under the Recovery Plan. This was considered a significant political liability and therefore President Duda came with a plan of replacing the Disciplinary Chamber with a new and shiny Chamber of Professional Liability. The circumstances of the reform were discussed in the Verfassungsblog (here and here). The statute went into force in July 2022.

Setting the Chamber

Immediately after its creation the Chamber of Professional Liability was functioning, manned by a temporary staff of five judges nominated by the First President of the Supreme Court (Małgorzata Manowska, elected by the new National Council for the Judiciary). Subsequently, 33 judges were randomly selected from the whole Supreme Court (both old and new) and in September President Duda chose 11 of them to serve in the Chamber. The judges are supposed to serve in the new Chamber for five years and they should at the same time adjudicate cases in their original chambers. Both the election by politicians (president, with a countersignature of the prime minister), the limited period in office, and the eligibility for new judges (selected by the improper Council) give rise to the criticism that the new Chamber is just as unlawful as the previous one. It is especially worth noting that seven judges of the Supreme Court issued a declaration that the system of appointment of judges to the new Chamber, by political actors, infringes on the European standard of a 'court established by the law'.

The current composition of the Chamber of Professional Liability is rather interesting. Among 11 judges, six were chosen by the new National Council for the Judiciary whereas the remaining five – by the old one. However, among these five, three dissented from the Supreme Court resolution, declaring nominees of the new Council illegal. Therefore, they are out of the mainstream of the Polish legal community and, certainly, of the old Supreme Court judges. One of the

three, Wiesław Kozielewicz, was appointed by President Duda to be the Chamber's president. He remains a controversial choice, not least because of his refusal to recuse 'new' judges from adjudicating. The presence of these judges (elected by the new National Council) in the Chamber remains a thorny issue. The statute that established the Chamber introduced a so-called test of judicial independence and impartiality for the Supreme Court judges, ostensibly to ensure that the European standards are satisfied. However, the test does not provide for recusing judges based on their wrongful appointment alone; instead, it allows taking into account all relevant circumstances and, on top of that, requires that any breach of standards must be able to affect the outcome of a given case in which the test is being performed.

We are now at the very outset of the new Chamber's activity but so far it acted independently, even surprisingly so. It issued a couple of decisions clearly against the wishes of the government (and the disciplinary attorneys in its services). First, it refused to waive the judicial immunity of the former vice-president of the National Council for the Judiciary. Interestingly, the case was decided by Judge Kozielewicz. Then it refused to suspend three judges, ruling against the motion by the Minister of Justice. In these cases it held that applying case-law of the Court of Justice or the European Court of Human Rights may not be a disciplinary offence (which sounds trivial but goes against the government's thinking). Finally, the suspension of another judge was lifted.

Epilogue

The initial aim of replacing the Disciplinary Chamber was to deescalate the conflict with the European Commission and hence get funds under the National Recovery Plan. By this measure, the reform failed miserably. After some initial last-minute changes made to the law, the Commission decided that it did not fulfil its milestones (being prerequisites for getting any National Recovery money). This caused a lot of sound and fury in the Polish governing circles, including accusations that President Duda was cheated by President von der Leyen, and plans to double down on further reforming the judiciary.

Overall, it is fair to say that the new Chamber does not address the old problems in general and in particular the glaring issue of the unlawful composition of the National Council for the Judiciary, poisoning any new judicial appointments. The European Court of Human Rights has already issued interim measures for at least five judges being investigating in Poland, preventing their cases from being decided by the new Chamber.

Other developments in the Polish judiciary are also likely to affect the function of the new Chamber. According to media reports, two of its old judges have already refused to recognize its legality and to adjudicate. Moreover, on 17 October, 30 old Supreme Court judges issued a declaration, in which they find judges elected by the new National Council for the Judiciary unlawfully appointed. They also refused to decide cases with such judges.

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