



1. Appointment and selection of judges, prosecutors and court presidents

The changes in Poland's judiciary system, ranging from the crisis surrounding the Constitutional Tribunal (CT), through the appointment of a new National Judicial Council (NCJ), to the reform of common courts and the Supreme Court and the tightening of disciplinary rules for judges,¹ continue to raise concerns about the lack of respect for the rule of law and judicial independence in the country among international institutions and other stakeholders.

A number of cases related to the appointment and selection of judges, prosecutors and court presidents are already under the consideration of both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR):

Case before the ECtHR of Xero Flor v Poland (no. 4907/18) - concerning the defectiveness of the appointment of the Constitutional Tribunal's judges, the so-called 'double judges'.

The company appealed against the decision of the Constitutional Tribunal discontinuing the constitutional complaint proceedings. Mariusz Muszyński sat in the composition of the Constitutional Tribunal that made such a decision. The company indicated that he had been elected to the Constitutional Tribunal in violation of the constitutional provisions. In the applicants' opinion, this leads to a violation of Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, and due to the participation of an unauthorised person in the bench, the right to fair trial before a court established by law has been violated.²

If it is considered that Article 6 ECHR can be applied to the proceedings before the Constitutional Court on a constitutional complaint, the probability of the ECtHR finding a violation of this provision is quite high. Indeed, there are arguments showing that the election of three persons to the position of judges of the Constitutional Tribunal in December 2015 was flawed. These persons were elected to positions already filled by judges elected by the Sejm (the lower chamber of Polish Parliament) of the previous term. The case is pending.

The European Commission and the UN Special Rapporteur on the independence of judges and lawyers also indicate that these persons were not legitimately elected and should not participate in the adjudication of cases.³

Case before the ECtHR of Advance Pharma v Poland (1469/2074) - concerning the appointment of judges to the Civil Chamber of the Supreme Court by the NCJ in its current form.

The Human Rights Commissioner on 4 February 2021 submitted a third-party intervention before the European Court of Human Rights in *Advance Pharma v. Poland* relating to yet another case of alleged lack of independence of the Supreme Court

In his submission to the ECtHR, the Human Rights Commissioner indicated that the process of appointing Supreme Court judges in 2018 did not meet the requirements of the law. The irregularities were so serious that they nullified the effect of the appointment process. It was not about ensuring the independence and impartiality of the appointees, but about ensuring that the Supreme Court met the expectations of the authorities. The involvement of the National Council of the Judiciary in this disqualifies it as an independent, objective initiator of proposals to the President of the Republic of Poland regarding appointments to judicial positions.⁴

The Ombudsman made the following main conclusions⁵:

- 1) The persons nominated from 2018 to both the two newly created and the "old" chambers of the Supreme Court were not appointed in accordance with national law, but in clear and flagrant violation of it. These violations concerned fundamental principles of the judicial appointment procedure. Their gravity was further increased by the deliberate nature of the violations and the lack of effective judicial review.
- 2) The circumstances, organisation and course of the process of appointment to the Supreme Court also raise justified doubts as to the independence and impartiality of the persons appointed. These doubts are of a permanent and irremediable nature.
- 3) There were no effective remedies before the national courts to establish the impact of flaws in the appointment process on the judges' empowerment and their independence and impartiality. Pre-existing remedies were either limited or excluded de jure or de facto. The Government has in fact structured the procedure for the selection of judges in such a way as to first ensure that nominations are given to persons who have its support and then to legitimise their selection by all means.
- 4) The willfulness, systemic nature and seriousness of the violations in the Supreme Court nomination procedure should have the effect of denying to these persons the guarantee of the irremovability of judges and limiting the application of the principle of legal certainty to their judgments. Fundamental flaws in the nomination procedure must be removed, while serious, intentional breaches of the law cannot be rewarded by accepting a situation unlawfully created (*ex iniuria ius non oritur*).

The case is pending.

Case before the ECtHR of *Reczkowicz and Others v. Poland* (nos. 43447/19, 49868/19 and 57511/19) - concerning the appointment of judges to two new chambers of the Supreme Court: Disciplinary Chamber of the Supreme Court and the Extraordinary Control and Public Affairs Chamber.

In the proceedings, the ECtHR will examine the three combined complaints. The facts of the first one are connected with the dismissal by the Disciplinary Chamber of the Supreme Court of the applicant's cassation appeal against a ruling of the disciplinary bodies of the Bar. The other two complaints concern judgments handed down by the Extraordinary Control and Public Affairs Chamber after it had examined the applicants' appeals against resolutions of the NCJ not to nominate them for appointment as judges.

Barrister Joanna Reczkowicz was suspended for three years after several incidents when she represented a client. She appealed the decision to the court. Her case was eventually dismissed in 2019 by the Supreme Court Disciplinary Chamber, one of two new chambers created as a result of judicial changes.

The other two applicants, Monika Dolińska-Ficek and Artur Ozimek, are district and circuit court judges who applied for positions elsewhere. The NCJ decided not to recommend their applications in 2018. The judges filed appeals with the Supreme Court. The Chamber of Extraordinary Control and Public Affairs rejected their complaints in 2019.

The case pending before the Court addresses the lawfulness of appointments to the Polish Supreme Court (SC) since 2018. The essential questions are, whether the newly shaped nomination process met the ECHR requirements; whether it was based on objective criteria and a fair procedure; whether it guaranteed independence and impartiality of those nominated, and in the end, whether they were lawfully established as judges. The applicants complain that the composition of the Supreme Court hearing their appeals did not meet the standards of an "independent and impartial court established by law" within the meaning of Article 6(1) of the ECHR. In addition, the complaints allege, concerning the procedure for judicial appointments, that the proceedings before the NCJ did not meet standards of impartiality and independence⁶. The case is pending.

Case before ECtHR of Sobczynska and Others v Poland (nos. 62765/14, 62769/14, 62772/14 and 11708/18) - concerning the admissibility of judicial review of the appointment of a judge by the President.⁷

In their complaints to the ECtHR, all non-appointed candidates raised allegations of violations of Article 6 (right to a court) and Article 13 ECHR (right to an effective remedy). The above-mentioned candidates not appointed by President also alleged a violation of Article 8 ECHR (right to protection of privacy) indicating that the arbitrary refusal to appoint them destroyed their careers⁸. The case is pending.

Case before the CJEU of Judge Waldemar Żurek (C-487/19) and the case of Judge Monika Frąckowiak, member of the Polish Judges' Association 'Iustitia' (C-508/19)

Judge Żurek was transferred from the division of the Regional Court in Kraków, where he sat, to another division. Dissatisfied, he appealed against this decision to the National Council of the Judiciary. The latter, however, discontinued the proceedings. The judge appealed against the NCJ resolution to the Supreme Court and requested that all judges from the Supreme

Court's Extraordinary Control and Public Affairs Chamber be excluded from ruling on his case.

The case concerns a question referred by the Polish Supreme Court to the Polish Civil Chamber in the case of Judge Waldemar Zurek. The case came before the CJEU due to fundamental doubts of the Supreme Court as to the proper implementation in the Polish judicial system of the principle of effective judicial protection, one of the fundamental principles under EU law. The obligation of all EU Member States to implement this principle follows from the second subparagraph of Article 19(1) of the Treaty on European Union. It is further specified in Article 47 of the Charter of Fundamental Rights of the EU, which provides *inter alia* that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'.⁹

In the case of Judge Zurek's appeal against a resolution of the new NCJ unfavourable to him, Aleksander Stępkowski, appointed to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court by President Andrzej Duda, ruled on a one-man basis. In connection with this "ruling", the Civil Chamber of the Supreme Court asked the CJEU a preliminary question (i.e. a preliminary legal question) as to whether such a one-man body appointed in flagrant violation of the law is a court within the meaning of EU standards.

In a similar case, also the judge Monika Frąckowiak seeks a declaration that a judge from the Disciplinary Chamber who was appointed to the Disciplinary Chamber in 2018 by the President of the Republic of Poland at the request of the National Council of the Judiciary was elected to this chamber illegally - not with compliance with Polish Constitution. In her case, the Disciplinary Chamber set up by the politicised National Council of the Judiciary is taking action in proceedings that are a form of repression for daring to challenge the political subordination of the judiciary.

This case is relevant to all cases brought before the Labour Chamber of the Supreme Court to determine whether also other new judges of the Supreme Court from the Disciplinary Chamber, the Extraordinary Control and Public Affairs Chamber and the Civil Chamber were effectively appointed as judges of the Supreme Court¹⁰.

In both cases the CJEU will assess the effectiveness of the appointment of judges to the Disciplinary Chamber and the Extraordinary Review Chamber in the Supreme Court in a procedure that involved the neo National Council of the Judiciary.¹¹

Presidential appointment of judges.

On 23 May 2020, as the term of office of the First President of the Supreme Court was expiring, the President of the Republic of Poland appointed a new President. The appointee was Małgorzata Manowska¹², who became a judge of the Civil Chamber of the Supreme Court upon the nomination of the new NCJ in 2018. Her previous status and the method of appointment of the new President to the office of judge is questionable. She was appointed to the Supreme Court in 2018 by the politically elected NJC, so it is unclear whether she has the status of a Supreme Court judge at all. In addition, the President's appointment to the position of First President of a person who won twice fewer votes than the winner of this

vote at the General Assembly of the Supreme Court is also questionable.¹³ The Polish Constitution (art. 183) requires that the First President of the Supreme Court be a person proposed by the General Assembly, i.e. the majority of judges. Prof. Manowska did not have such support. The constitutional power of the President of the Republic of Poland cannot be understood as full freedom in the designation of the First President of the SC. He has to choose one of such candidates who have received the support of the majority of members of the general Assembly of the SC who enjoy the confidence of that body. Only from such candidates is the President to make his choice.¹⁴

On 23 May 2020, in a vote of 95 members of the General Assembly of Judges of the Supreme Court, only 25 judges put their trust in Ms Manowska. Professor Włodzimierz Wróbel received 50 votes; the SCM did not adopt a resolution on the results of the election, which was prevented by the chairman of the session. The candidates were therefore not presented to the President by the General Assembly of the Supreme Court, as should be the case pursuant to Article 183 of the Constitution, but by the presiding judge, who was not mentioned in the Constitution.¹⁵

2. Irremovability of judges; including transfers, dismissal and retirement regime of judges, court presidents and prosecutors.

The reform in 2017 provided the Justice Minister the power to appoint and dismiss Presidents and Deputy Presidents of courts. Within the first six months of the law entering into force, the Minister had the power to replace the presidents or vice-presidents without any justification. Using this power, the Minister dismissed a number of presidents and vice-presidents, and subsequently appointed 66 new presidents and 63 new vice-presidents of common courts between August 2017 and early February 2018. There are 377 courts in Poland and the government itself has acknowledged that the Minister has replaced about 18% of presidents and vice-presidents of the courts¹⁶.

The Law on the Common Court System¹⁷ does not impose an obligation on the Minister of Justice to give reasons for his decision to dismiss a judge from his secondment to another court. There are also no grounds which should be followed by the Minister when removing a judge from his/her secondment. This mechanism - in cases of secondment of judges to higher courts - may be used as a form of punishment or pressure on the seconded judge. The law should also allow a judge to lodge an appeal with a court against the decision of the Minister.

The following cases are currently pending before the ECtHR

Case before ECtHR of Broda and Bojara v. Poland (Nos. 26691/18 and 27367/18) - concerning the dismissal by the Minister of Justice of deputy presidents of courts without justification of those decisions and without the possibility to appeal against that decision.

Judges Bojara and Broda have addressed the ECtHR for the fact that in January 2018 the Minister of Justice, using exceptional powers, dismissed them from their positions as vice-presidents of the District Court in Kielce without giving reasons. An amendment to the Law

on Common Courts, which came into force in 2017, equipped the Minister of Justice with the power to arbitrarily decide on the dismissal and appointment of court presidents across Poland. Minister Ziobro exercised this power and replaced 130 presidents and vice-presidents, including in the most important courts.¹⁸ The case is pending before the ECtHR for a possible violation of Article 6.

Amnesty International, together with the International Commission of Jurists, submitted to the ECtHR a third-party intervention in this case,¹⁹ which argues, inter alia, that safeguards ensuring due process in decisions affecting the careers and security of tenure of court presidents and vice-presidents are necessary to protect the independence of the judiciary. The principle of independence of the judiciary presupposes a significant degree of security of tenure for the presidents and vice-presidents of courts for the duration of their term of office. In order to ensure such security of tenure and to maintain the independence of the judiciary, the procedure for removal from the office of president or vice-president of a court during the term of office of a judge should provide guarantees of the independence and fairness of the procedure. It has also been pointed out that in assessing any justification put forward by the State for excluding access of judges to the court in relation to their career and security of tenure, the strong public interest in maintaining the role, independence and integrity of the judiciary must be taken into account. It can never be in the legitimate interest of the State to deprive judges who are acting as presidents or vice-presidents of courts of access to the court or of due procedural protection in disputes which may affect their institutional or individual independence. In assessing the adequacy of the procedural guarantees under Article 6.1, and in considering the justification for any limitation of aspects of the rights under Article 6.1 in cases involving the careers of judges, account should be taken of the particular importance of these proceedings for judicial independence and the rule of law, fundamental principles of the Convention system. This protection ultimately benefits all persons entitled under Article 6.1 to an "independent and impartial tribunal" of which the judge in question is a part. The application of Article 6.1 and related guarantees to cases concerning the tenure of presidents and vice-presidents of courts should depend on their legal and practical role in the national system in which they preside and the importance of the legal and practical guarantees of security of tenure of presidents and vice-presidents of courts for the independence of individual judges and the institutional independence of the judiciary. The case is pending.

Moreover, the reform which came into force in July 2018 and concerned a lower retirement age for the Supreme Court, meaning that 27 out of 73 judges had to step down unless they were given the president's approval to remain. The European Commission launched infringement proceedings against Poland over the Supreme Court law, and the ECJ agreed to its request that Poland be ordered to suspend the new retirement age until a final ruling on the case.²⁰ Consequently, the Polish parliament passed legislation reinstating the retired judges, which was signed into law by President in December 2018.

Transfers of prosecutors during the pandemic

On 18 January 2021, seven prosecutors learned that in 48 hours they were to report to their new workplaces several hundred kilometres away from their place of residence. They were sent on six-month secondments to district prosecutors' offices in small towns. Polish law allows prosecutors to be seconded to another prosecution service, but it is questionable whether these decisions were taken suddenly, without giving prosecutors the opportunity to prepare for these secondments. This requires a reorganisation of their professional and family life.²¹ The secondment of a prosecutor to another unit of the prosecutor's office is also questionable. Delegations were extended to prosecutors who criticise the prosecution service. The authorities explain their decision by the necessity to fill vacancies in smaller localities due to the pandemic, but according to the information received from superiors of these units, they did not report staff shortages. An additional problem for the seconded prosecutors is that in small towns, when hotels are not open, it is difficult to rent a flat overnight and the burden of finding a place to live falls on the seconded prosecutor. According to the prosecutors, this action is a form of intimidation of the prosecutors acting within the 'Lex Super Omnia' association. This association often criticises the leadership of the prosecution service and defends the independence of the prosecution profession.

The Association "Lex Super Omnia" demands an end to harassment in the form of initiation of disciplinary proceedings against its members by the management of the Prosecutor's Office, undermining confidence in the performance of their duties by prosecutors. They also demanded the introduction of a transparent promotion system, the abandonment of the use of special procedures in their allocation by the Prosecutor General and the complete elimination of awards and distribution of privileges to prosecutors. Moreover, they pointed to malfunctions in the activities of the public prosecutor's office, such as collecting, over a period of more than two years, accommodation allowances, previously due only to prosecutors on secondment, by public prosecutors appointed to the National Public Prosecutor's Office.²²

The transfer of Prosecutor Mariusz Krasoń

Prosecutor Mariusz Krasoń activist of the independent association "Lex Super Omnia" participated in the drafting of a resolution of the Assembly of Prosecutors in the Regional Prosecutor's Office in Kraków, in which prosecutors accused their superiors of limiting their independence.²³ Two months later in July 2019, by a decision without justification, he was delegated to a prosecution unit in another city.

"Long-term secondments of prosecutors, which do not take into account their personal situation and real staffing needs, are used as a method of extra-legal harassment and intimidation of other prosecutors" - indicated, in an open letter to the National Prosecutor regarding the transfer of prosecutor Krasoń, the Lex Super Omnia²⁴ Prosecutors' Association. The prosecutor challenged the secondment decision in court in November 2019. The Regional Court in Kraków decided that Krasoń 's secondment to Wrocław was to be "suspended for the duration of the proceedings in this case".²⁵ In January 2020, he was again seconded, this time to the district prosecutor's office in Kraków. In December 2019. In turn, the Kraków District Court reinstated Krasoń to work in Kraków, ordering the prosecutor's office to pay 1,000 PLN for each day of delay to the prosecutor's account. The prosecution did not comply with this. In suspending the secondment, the regional court took into

account arguments that the power to second is not discretionary. It must be justified, and the justification is subject to the court's review.

3. Promotion of judges and prosecutors

4. Allocation of cases in courts

The Random Case Allocation System of the common courts raises a number of doubts about the true impartiality of the system. The algorithm created for the lottery is not known. The lack of source code makes it impossible to determine how judges are selected for specific cases. The result of the lottery raises many concerns among people. It is worth to note that neither the Constitutional Tribunal nor the Supreme Court were included in the system of drawing lots for judges²⁶.

5. Independence (including composition and nomination of its members), and powers of the body tasked with safeguarding the independence of the judiciary (e.g. Council for the Judiciary)

The reform, which came into force in 2018, mandated that 15 of the 25 members of the National Council of the Judiciary (KRS), which is responsible for nominating judges, be appointed by the Parliament instead of elected by the judiciary.²⁷ Before this reform, only 32% of the members of the National Council of Judiciary were elected by Parliament, and the judiciary was more isolated from other authorities. Since the changes introduced by the ruling party Law and Justice, 92% of the members of this body have been chosen by politicians.²⁸

On 16 August 2018, in response to these changes, the Board of the European Network of Councils for the Judiciary (ENCJ) stated that the Polish NCJ does not comply with the statutory rule of the ENCJ that a member should be independent from the executive. The Board concluded that the NCJ no longer “guarantees the final responsibility for the support of the judiciary in the independent delivery of justice” and suspended its membership.²⁹

Case before the ECtHR of *Grzęda v Poland* (no. 43572/18) - concerning the shortening of the term of office of judges-members of the Nacional Council of Judicary (NCJ).

The complaint was filed by a judge of the Supreme Administrative Court who was a member of the previous National Council of the Judiciary functioning until 2018. Under the Polish Constitution, the term of office of elected members of the NCJ lasts four years - in the case of the complainant, it should therefore end in 2020. His four-year term of office on the Council was shortened as a result of the 2017 amendment to the NCJ Act. It entrusted the

selection of the 15 members of the Council-judges to the Sejm and not to the judicial community. The applicant argues that the expiration of his term of office in 2018 after the election of new members of the NCJ by the Sejm was incompatible with Article 6 (right to a court) and Article 13 (right to an effective remedy) of the ECHR, because Polish law did not provide him with the possibility to appeal this decision at the courts.³⁰ The case is pending.

The case of Żurek v Poland (no. 39650/18) - concerning the shortening of the term of office of judges-members of the NCJ.

Judge Żurek was a member and spokesman of the National Council of the Judiciary. For his critical assessments of the changes in the judiciary, he was subjected to repressions, including disciplinary proceedings brought against him by court disciplinary ombudsmen appointed under the Law and Justice regime. Judge Żurek challenged the legality of shortening the term of office of the "old NCJ" and extinguishing the mandates of its members. He also points to other infringements of the law: the impossibility of appealing against that decision, restrictions on the right to freedom of expression connected with his function as spokesman for the NCJ, and the right to a fair trial. He challenged the removal of the possibility for judges to elect members of the National Council of the Judiciary and the transfer of this competence to parliament³¹.

Amnesty International, together with the International Commission of Jurists, submitted to the ECtHR third-party intervention in this case (*amicus curiae*).³² It argued that the functioning of the NCJ - without pressure or influence from the executive and legislative branches or other external forces - is essential for the overall independence of the judiciary in Poland. The NCJ plays a fundamental role in defending and promoting judicial independence, which is the cornerstone of the rule of law and the protection of human rights in Poland. One of the safeguards of the independence of the NCJ is the constitutionally protected tenure of its members.

Furthermore, it was emphasised that the possible scope of restrictions on the right to freedom of expression must, when applied to judges, be interpreted in the light of the specific role of the judiciary as an independent branch of state power, in accordance with the principles of the rule of law. Any limitation on the right to freedom of expression must not infringe the duty of judges to interpret the law without fear or favour and to resist any infringement of their independence as judges. More so when judges speak from a position from which they are obliged to express certain concerns, such as when they are appointed as a representative or spokesperson of a judicial institution. Insofar as the dignity of the judicial office is preserved and the essence and appearance of judicial independence and impartiality are not undermined, the State must respect and protect the right of judges to freely express their opinions, particularly on matters concerning the administration of justice and respect for and protection of judicial independence and the rule of law.

The case is pending.

Disclosure of lists of support for the NCJ

Since the new National Council of the Judiciary (NCJ) was established in 2018, the Chancellery of the Sejm has been repeatedly requested to provide information on the names and places of jurisdiction of judges who have supported applications for nomination to the NCJ. The law on the new NCJ stipulated, however, that the lists of support for its members by law, as annexes, were not to be published.³³ However these lists were disclosed on 14.02.2020, after the verdict of the Voivodeship Administrative Court in Warsaw. The Voivodeship Administrative Court in Warsaw overturned the decisions of the President of the Office for Personal Data Protection to suspend the publication by the Chancellery of the Sejm of signatures under letters of support for candidates for the new National Council of the Judiciary.

The analysis³⁴ of the lists showed that out of 360 judges included in the lists, on the day the Sejm elected the members of the new NCJ, 49 were seconded to the Ministry of Justice (they were working there as clerks/civil servants), 32 were appointed by the Minister of Justice as court presidents and 24 were appointed as vice-presidents.³⁵ Furthermore, one of the members of the new NCJ, Maciej Nawacki (President of the Regional Court in Olsztyn) did not have the required number of signatures on his list of support. Several judges withdrew them at the last moment. This raises additional doubts as to whether the new NCJ is formed in accordance with the law.

Resolution by a panel of 3 joined Chambers of the Supreme Court

On 23 January 2020 the Supreme Court adopted a resolution by a panel of three joint chambers: the Civil, the Criminal and the Labour and Social Insurance Chambers on the judgments issued by judges appointed with the participation of the new NCJ.³⁶ The resolution reflected the Supreme Court's reaction to the response received by the court from the CJEU on 19.11.2019.³⁷

The resolution of the Supreme Court indicated that judges appointed to positions on the recommendation of the National Council of the Judiciary created under the Act of 8 December 2017 are not entitled to adjudication. The resolution does not refer to rulings made before 23 January 2020, and therefore has effect for the future - with the exception of the Supreme Court Disciplinary Chamber - its judgments have been null and void since its creation.. The right to a fair trial requires that an individual be tried by a duly staffed court, by a judge who meets criteria recognised throughout the EU. Judicial independence is a guarantee of an individual's effective right to a court.

The Constitutional Tribunal³⁸ declared this resolution unconstitutional, despite the fact that, in the opinion of Polish experts, it had no authority to make such an assessment.³⁹

6. Accountability of judges and prosecutors, including disciplinary regime and bodies and ethical rules, judicial immunity and criminal liability of judges.

The current mechanism of disciplinary responsibility violates the principle of judicial independence through the risk of exercising political control over the content of judicial decisions. The Law of 20 December 2019 introduced numerous changes regarding the

disciplinary responsibility of judges. In fact, the legislature intends to put full power in the hands of the disciplinary bodies, which will be able to determine, unchecked by law, independently and without statutory restrictions, what behaviour is or is not a disciplinary tort. The lack of adequate procedural guarantees for judges in relation to their right of defence is also questionable, particularly in relation to doubts about the legitimacy and compatibility of the current form of the Supreme Court Disciplinary Chamber with the principle of independence of the judiciary.

On 21 September 2018, the President of Poland appointed judges to the newly-established Disciplinary Chamber of the SC. The role of the Chamber is twofold: review of the disciplinary cases against Supreme Court judges; and serving as the second instance for disciplinary cases against other court judges and prosecutors. The Chamber thus retains the power to decide on the future of any judge facing disciplinary proceedings, including the power to remove a judge from the bench. Under the Chamber's rules, it is possible to conduct disciplinary proceedings in the justified absence of a judge or his/her counsel, which raises serious concerns over the right to fair hearing.⁴⁰

At the beginning of 2020 a new bill was introduced - called "muzzle law"⁴¹ - which unbailes judges to criticize the new organisation of the justice system, to question the legality of the newly elected judges of CT, NCJ and SC or even to apply UE law by submitting questions for a preliminary ruling to the CJUE. A special chamber within the Supreme Court - the Disciplinary Chamber continued to deal with independent judges and prosecutors.

The new law extended and aggravated the disciplinary responsibility of judges referred to in Article 107 of the Law on the Common Court System⁴². It introduced tools to interfere with judicial independence and judges' rights to freedom of expression and association by:

- Extending the disciplinary liability of judges to "actions questioning the existence of a judge's official relationship, the effectiveness of a judge's appointment or the legitimacy of a constitutional organ of the Republic of Poland" and "actions or omissions likely to prevent or significantly impede the functioning of a judicial organ". Both premises are questionable because of their very general nature.
- Requiring judges to disclose their membership in foundations or associations. This deeply interferes with the rights to freedom of association and privacy of judges and prosecutors.
- The Chamber for Extraordinary Control and Public Affairs became competent to consider applications for the exclusion of a judge involving allegations of lack of judicial independence or independence of the judge. It will deal with cases of judges who challenge the status of other judges or their right to adjudicate. It should be recalled that, according to the resolution of the 3 combined chambers of the Supreme Court, judges appointed to positions on the recommendation of the NCJ created under the law of 8 December 2017 who are part of this Chamber should not be entitled to adjudicate.
- Pursuant to the new Article 109 of the muzzle law, a judge's engaging in activities of a political nature, obstructing the functioning of the judiciary, as well as questioning the existence of a judge's official relationship or the effectiveness of his or her

appointment, will be threatened with two most severe sanctions: transfer to another official position and dismissal from office. The same solutions are envisaged for prosecutors.

Judges and prosecutors who spoke out in defence of an independent judiciary continued to face politicized disciplinary proceedings in retaliation. The following cases of judges and prosecutors, pending before the ECtHR and the domestic institutions illustrate these practises:

The case of judge Igor Tuleya before Polish Prosecution Service

In November 2020 the Disciplinary Chamber of the Supreme Court passed a resolution to waive the immunity of Judge Igor Tuleya of the District Court of Warsaw because the judge had allowed the media to be present during the examination of the prosecution's complaint. The public prosecutor's office is summoning the judge in a criminal case concerning the disclosure to the public of material from a pre-trial investigation. It concerned the judge's reversal of the prosecution's decision to discontinue the investigation into irregularities in the 2016 Sejm session. Tuleya is known for his criticism of the changes introduced in the Polish judiciary since 2015.⁴³ In January and February 2021, the judge was summoned twice to the National Prosecutor's Office as a suspect to face criminal charges. The judge does not recognise the decision to waive his immunity and does not appear for questioning.

The Case before the ECtHR of Tuleya v Poland (no. 21181/19) - concerning the system of disciplinary responsibility of judges.

Apart from being prosecuted by the public prosecutor's office at national level for his actions taken lawfully, which fell within the judicial sphere a number of disciplinary proceedings have been initiated against the judge. as a result, the judge has decided to refer the matter to the ECtHR.

The case has its origins in the new disciplinary system. This new system was introduced by the 2018 law by President. Thanks to the "reform", Ministry of Justice gained influence over disciplinary proceedings. It was the minister who appointed the three most important prosecutors of judges in the country and also staffed the disciplinary courts of first instance. The main court was the new Disciplinary Chamber created in the Supreme Court. The president, with the help of the politicised NCJ, staffed it with former Ministry of Justice prosecutors and lawyers affiliated with the Law and Justice party. After the law was amended, three disciplinary ombudsmen initiated a number of proceedings against judges in relation to the content of their rulings or their public activities. These proceedings mainly concern judges who openly criticised the changes to the judiciary introduced by the government between 2016 and 2018. Judge Tuleya has had investigations for, among other things, statements in the media about the politicised NCJ or for allegedly "exceeding the limits of free speech" at a music festival. Further proceedings were initiated by disciplinary ombudsmen when he asked the EU Court of Justice about the new disciplinary system. Any

judge can refer a legal question to the CJEU, but the ombudsmen ruled that the judge's decision may have been a "jurisprudential excess".

Tuleya had explanatory proceedings before disciplinary ombudsmen for attending meetings and conferences, including at the European Solidarity Centre in Gdansk, and allegedly disclosing information from the investigation. In 2017, the judge allowed the media to record the oral reasoning of the order on irregularities in the Sejm.

The judge believes that the proceedings were conducted in a manner disproportionate to the gravity of the individual incidents. Each time the judge was summoned to give explanations or was interrogated (in two months of 2018 he explained himself as many as six times). Proceedings should take 30 days, but in most cases the ombudsmen failed to meet the deadlines. And the proceedings were followed by materials discrediting the judge on state television and pro-government media. The judge also received insulting correspondence.

Tuleya accuses Poland of violating Article 8 of the Convention, which guarantees respect for private life. He alleges that "seven proceedings damaged his reputation as a judge, as well as the authority of the judiciary. The proceedings cast doubt on the judge's competence, as well as his objectivity and independence."

The judge claims that his right to freedom of expression was violated and he was deprived of the right to an effective remedy. The judge's hearings were conducted under the pain of criminal liability. When the judge requested that his attorney be allowed to attend the hearing, the ombudsman did not agree. In Tuleya's view, the judges participating in the investigations are deprived of guarantees protecting them from arbitrary decisions by the ombudsmen⁴⁴.

Amnesty International, together with the International Commission of Jurists, submitted to the ECtHR a third party intervention in this case.⁴⁵ The submission argues that disciplinary proceedings against a judge affect his professional reputation and that the nature of his role means that such proceedings affect the private life of an individual within the meaning of Article 8.1 of the Convention. In particular, such proceedings affect the professional relationships which such persons have developed over the course of their careers and may cast significant doubt on their professional reputation and standing, undermining their honour, integrity and personal and professional merit, both among their colleagues within the judiciary and in society at large. Furthermore, it has been stressed that if the only way to challenge the lawfulness, necessity or proportionality of a judge's dismissal or other significant disciplinary measure against him or her under Article 8 ECHR is by an authority that does not meet the relevant requirements of independence and impartiality in accordance with international standards of judicial independence, the basic requirements of Article 13 ECHR are not met. Following the judicial reforms carried out in Poland between 2015 and 2020, disciplinary proceedings against judges do not meet the requirements of impartiality and independence necessary to ensure an effective remedy under Article 13 ECHR. This is due to the fact that the body responsible for such proceedings does not have structural independence from the legislative and executive powers, as its appointing body, the NCJ, is not structurally independent under international standards of judicial

independence. It was stressed that the possible scope of restrictions on the right to freedom of expression must, when applied to judges, be interpreted in the light of the specific role of the judiciary as an independent branch of state power, in accordance with the principles of the rule of law. Any limitation on the right to freedom of expression must not infringe the right of judges to exercise their human rights? and to resist any infringement of their independence as judges. Insofar as the dignity of the judicial office is preserved and the essence and appearance of judicial independence and impartiality are not undermined, the executive must respect and protect the right of judges to speak out, particularly on matters relating to the administration of justice and to respect and protect judicial independence and the rule of law. The case is pending.

The case of judge Beata Morawiec

In October 2020 the Disciplinary Chamber issued a resolution waiving the immunity of Judge Beata Morawiec, former president of the Krakow Regional Court and president of the THEMIS Judges' Association, in connection with criminal proceedings concerning alleged corruption offences. The prosecutor's office conducted the criminal proceedings against Judge Morawiec while a parallel trial for infringement of personal rights was pending against the Minister of Justice in connection with a communication that the Ministry published after Judge Morawiec was dismissed from her position as president of the court. In January 2021, the Court of Appeal in Warsaw legally ordered the Minister of Justice to apologise to Judge Morawiec for the communication that defamed her.⁴⁶

Case of judge Paweł Juszczyzyn

On 4 April 2020, disciplinary proceedings were initiated against Judge Paweł Juszczyzyn after he, while hearing an appeal, requested from the Chancellery of the Sejm letters of support for members of the new National Judicial Council. This was because the judge whose appointment had been requested by the NCJ in its new composition had ruled on the case. In this way, Judge Juszczyzyn applied the CJEU judgment of 19.11.2019⁴⁷, according to which every court in Poland should examine the application of the legislation as to whether judges nominated by the NCJ can hear court cases. Judge Juszczyzyn was suspended from his duties and his salary was reduced by 40 per cent.⁴⁸

The cases of the 13 judges ruling on prosecutor Mariusz Krason

Since the beginning of 2020, criminal proceedings have been pending concerning the alleged abuse of powers by 13 judges from the Regional Court and the District Court of Kraków who, at various stages, dealt with the case of prosecutor Mariusz Krason (see section on transfer of prosecutors) They were summoned for questioning in connection with alleged crime under Article 231 of the Penal Code - exceeding the powers of public officials⁴⁹.

Summonses in the case were received by: Judge Marzena Henrych, Judge Sabina Czech-Śmiałkowska, Judge Katarzyna Rozwoda, Assessor Sławomir Folusz - from the District Court for Krakow-Śródmieście in Krakow, Judge Agata Pyjas-Luty, Judge Monika Kowalska and Judge Iwona Łuka-Kliszcz (retired) - from the Court of Appeal in Krakow, Judge Jarosław Łukasik, Judge Grażyna Baran, Judge Urszula Pałkowska-Różycka and Judge Dominika

Augustyn of the District Court in Kraków, and Judge Aneta Tomasik- Żukowska of the District Court for Kraków-Nowa Huta in Kraków (delegated to the District Court in Kraków). These actions of the National Public Prosecutor's Office may interfere with the exercise of judicial authority in a manner that is contrary to the principle of independence of judges.⁵⁰

7. Remuneration/bonuses for judges and prosecutors

The Disciplinary Chamber, alongside the Extraordinary Control and Public Affairs Chamber, was created by an amendment to the Supreme Court Act in December 2017. Its tasks include dealing with disciplinary offences not only of judges but also of barristers. It was the amendment to the Supreme Court Act of 8 December 2017 itself that gave the new Disciplinary Chamber far-reaching autonomy. Judges of the Disciplinary Chamber receive salaries 40 per cent higher than judges of the other chambers of the Supreme Court (Article 48 § 7). The President of the Disciplinary Chamber has a separate chancellery and a separate budget.

8. Independence/autonomy of the prosecution service

The Prosecutor's Office in Poland is divided into national, provincial, regional and district prosecutions. The head of the Prosecutor's Office is the Prosecutor General, who as of 2016 is also the Minister of Justice. The aim of the Public Prosecutor's Office is to conduct and oversee preparatory proceedings regarding criminal law, to act as the public accuser in criminal cases, to put forward complaints in criminal and civil cases, and to oversee decisions concerning pre-trial detention.⁵¹

The executive also extended their control to the prosecution service by transferring essential powers from the prosecution services to the Minister of Justice and the Prosecutor General.

For example, the Ministry of Justice may order prosecutors to carry out instructions from the Minister of Justice (acting as Prosecutor General) on specific procedural steps in individual proceedings. The Minister of Justice also has the power to change or overrule a prosecutor's decision or to take over cases conducted by prosecutors. Moreover, the Minister of Justice is allowed to make information from a particular case available to persons who are not public officials or to provide the media with information from an ongoing pre-trial investigation without requiring the consent of the prosecutor conducting the proceedings.⁵² The Prosecutor is obliged to carry out the orders, directives and instructions of the Superior Prosecutor who can change its decision, take over the case and carry out the prosecution activities in such case himself. Previously, the Prosecutor was also obliged to carry out the instructions of his superior if those do not relate to the content of the procedural act.

9. Independence of the Bar (chamber/association of lawyers) and of lawyers

10. Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

The role of the CT has been progressively marginalised. As a result, the Polish Ombudsman has stopped referring requests for the examination of laws in relation to the Constitution to the CT.⁵³

In October 2020, the CT delivered a judgment which deprived women of human rights. Under international human rights law, Poland is obliged to ensure women's legal access to abortion care at a minimum when their life or health is at risk, when the pregnancy involves a severe or fatal fetal impairment or results from sexual assault.⁵⁴ It has been repeatedly established that a failure to do so will give rise to multiple human rights violations under international human rights treaties that Poland has ratified, including the right to freedom from torture and other ill-treatment. By removing a long-established legal ground for access to abortion from Polish law, in October 2020, the Tribunal's decision is inconsistent with these international human rights obligations and may pave the way for further violations of women's human rights.⁵⁵

Further, because of the serious questions over the legitimacy of the current Constitutional Tribunal, questions remain as to whether its decision should be considered a decision of a "tribunal previously established by law" - in line with Article 47(2) of the Charter of Fundamental Rights of the European Union. Between July 2016 and December 2017, the European Commission adopted four Rule of Law Recommendations concerning Poland under its Rule of Law Framework and concluded that, in light of legislation impacting the functioning and independence of the Constitutional Tribunal, there was a clear risk of a breach of the rule of law as outlined in Article 2 TEU. The European Commission expressed serious concerns regarding the independence and legitimacy of the Constitutional Tribunal, noting that, "the constitutionality of Polish laws can no longer be effectively guaranteed. The judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review." The European Commission reiterated these unresolved concerns in its Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.⁵⁶

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- ³ <https://www.hfhr.pl/wp-content/uploads/2020/07/kierunek-strasburg-27-07-1.pdf>, p. 26
- ⁴ <https://www.rpo.gov.pl/pl/content/stanowisko-rpo-dla-etpc-ws-statusu-powolanych-do-sn>
- ⁵ <https://www.rpo.gov.pl/pl/content/stanowisko-rpo-dla-etpc-ws-statusu-powolanych-do-sn>
- ⁶ https://www.rpo.gov.pl/sites/default/files/Amicus_curiae_19.10.2020.pdf, <https://www.hfhr.pl/wp-content/uploads/2020/07/kierunek-strasburg-27-07-1.pdf>, p. 29
- ⁷ <https://www.rpo.gov.pl/pl/content/panel/sesja-6KPO-niezaleznosc-sadownictwa-przed-TSUE-i-ETPCZ>
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- ¹⁵ <https://monitorkonstytucyjny.eu/archiwa/14056>
- ¹⁶ <https://www.amnesty.org/en/documents/eur37/9051/2018/en/> and <https://www.amnesty.org/en/documents/eur37/8059/2018/en/>
- ¹⁷ Bill from 27.07.2001 (Dz. U. 2001, nr98, poz. 1070)-
<http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>
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- ²⁰ <https://www.amnesty.org/en/documents/eur37/9051/2018/en/>
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- ²⁹ <https://www.ency.eu/node/495>
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- ⁴³ <https://amnesty.org.pl/wp-content/uploads/2018/07/Poland-Moc-Ulicy-raport.pdf>, p. 35
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- ⁵¹ <https://ruleoflaw.pl/report-rule-of-law-in-poland-in-2020/>, p. 11
- ⁵² <https://www.rpo.gov.pl/pl/content/rzecznicz-skarzy-ustawa-o-prokuraturze-do-trybunalu-konstytucyjnego>
- ⁵³ Polish Ombudsman has this right according to art. 191.1.1 of the Polish Constitution
- ⁵⁴ See e.g. Human Rights Committee (HRC) (2019), General Comment No. 36, para. 8; *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016); *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017); *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (2005); Concluding Observations: Ireland, para. 9, CCPR/C/IRL/CO/4 (2014); Committee on the Elimination of Discrimination Against Women (CEDAW), *L.C. v. Peru*; CEDAW/C/50/D/22/2009 (2011); Committee on Economic, Social and Cultural Rights (CESCR) (2016), General Comment No. 22; Joint Statement of UN Special Procedures, International Safe Abortion Day, 28 September 2016.
- ⁵⁵ See e.g. CESCR: General Comment No. 22, para. 38; General Comment No. 3, para. 9; General Comment No. 14, paras. 32, 48, 50. See also “Maastricht guidelines on violations of economic, social and cultural rights”, 1997, Guideline 14(e); “Limburg principles on the implementation of the ICCPR”, 1987, Principle 72.
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