



# POLAND: FREE COURTS, FREE PEOPLE

JUDGES STANDING FOR THEIR INDEPENDENCE

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*Cover photo: Krakow, POLAND – 19 July, 2018: A woman dressed as a Supreme Court judge holds the Polish Constitution during a protest against the "reforms" of the judiciary. (c) Omar Marques/SOPA Images/LightRocket via Getty Images*

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# ACRONYMS

CBA	CENTRAL ANTI-CORRUPTION BUREAU ( <i>CENTRALNE BIURO ANTYKORUPCYJNE</i> )
CJEU	COURT OF JUSTICE OF THE EUROPEAN UNION
EC	EUROPEAN COMMISSION
ENCJ	EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY
NCJ	NATIONAL COUNCIL OF THE JUDICIARY ( <i>KRAJOWA RADA SĄDOWNICTWA</i> )
TEU	TREATY ON EUROPEAN UNION

# 1. EXECUTIVE SUMMARY

**“After my ruling everybody was telling me to be careful. [Then, the] disciplinary proceedings against me started. Now I know that they were simply waiting for me to make a mistake.”**

*Judge Dominik Czeszkiewicz, judge in the District Court in Suwałki*

Since late 2015, the government of Poland has adopted and implemented a set of legislative and policy measures with a clear goal in mind: to undermine the independence of the judiciary. They have achieved it by politicizing the system of judicial appointments, by giving the exclusive power to the Minister of Justice to dismiss and appoint Presidents and Vice-Presidents of Courts, by forcing the Supreme Court judges to retire, and by weaponizing of disciplinary proceedings. In today’s Poland, the government rewards, disciplines, punishes and silences judges and prosecutors as it wishes.

This report is based on research carried out continuously between March 2017 and May 2019. It presents detailed description and analysis of 10 cases of disciplinary proceedings against judges and prosecutors. The research was based on interviews with judges, prosecutors and activists; interviews with their lawyers; interviews with the Disciplinary Prosecutor for Common Courts; written communications of the Disciplinary Prosecutor; analysis of documentation from proceedings obtained by Amnesty International; and other data.

The cumulative effect of the “reforms” has been a near wholesale take-over of the judiciary at various levels, severely weakening the separation of powers in Poland. As the government continues to consolidate more and more power in the executive branch, judges and prosecutors have started to take a stand against the project to politicize the judiciary.

“We have never spoken out before. Now we do... Yes, we feel the pressure, but I don’t believe we will be silenced,” commented Judge Dorota Zabłudowska from the District Court in Gdańsk.

The government has responded to judges’ and prosecutors’ newly-acquired public voice with a smear campaign and threats, and by targeting them with disciplinary proceedings in a bald attempt to silence them and strip them of their autonomy. In today’s Poland, some judges and prosecutors find themselves in situations where their own human rights – in particular the rights to freedom of expression, belief, association and peaceful assembly – are breached. Moreover, through the new system of disciplinary proceedings, some judges have experienced targeted harassment for their professional decision-making, and the risk of being subjected to these proceedings hangs over others. Such harassment presents a real risk of undue influence on the judiciary, incompatible with Poland’s obligations under the European Convention on Human Rights and EU law.

Judges and prosecutors who are known as defenders of human rights are at increased risk of harassment and intimidation. This report details how the government has targeted judges by subjecting them to

disciplinary proceedings for rulings in which they upheld the human rights of persons who expressed dissent against the government. Such targeting raises serious concerns in a situation when the power over disciplinary proceedings has been concentrated in the hands of the Minister of Justice.

This report also documents the cooperative response of professional judges' associations as well as individual judges to these forms of pressure – mutual support, solidarity actions, and legal challenges to the so-called reforms.

The situation in Poland's judiciary sets alarm bells ringing in the European Commission (EC). In January 2016 it launched a dialogue with the government of Poland under the Rule of Law Framework. This was the first time the framework has been activated since its creation in 2014. In 2018 and 2019 the EC also brought three infringement proceedings against Poland for measures that do not comply with EU law; including the new disciplinary proceedings characterized by extensive powers of the Minister of Justice, and the special position of the Disciplinary Chamber of the Supreme Court. In April 2019, the European Commission concluded that the new system of disciplinary proceedings does not comply with the EU law. The EC stated that the Disciplinary Chamber of the Supreme Court is not an independent body.

In December 2017, after having gone through three stages of the dialogue with Poland under the Rule of Law Framework, the EC also "activated" Article 7(1) of the Treaty on European Union. This came after the adoption of amendments of laws on the Supreme Court and the National Council of the Judiciary. The EC concluded that the situation in Poland amounts to a "clear risk of a serious breach of the rule of law". Since then, the case of "rule of law in Poland" has been with the European Council. All of these proceedings were pending at the time of writing.

Reports of threats to, and security concerns for, publicly known judges and other members of the judiciary in Poland are not surprising when considered in the context of the ongoing negative media campaign, as well as campaigns spearheaded by pro-government groups. Such attacks create and sustain an environment of outright hostility toward the branch of government tasked with upholding the rule of law.

Defending the independence of the judiciary and the rights of those working within it are not simply ends in themselves. Independent courts are a guarantor of effective protection of people's human rights, for example to ensure due process for persons suspected of offences and effective remedy for human rights violations. If judges and prosecutors cannot operate independently, everyone's right to a fair trial is under threat. In other words, having a politically controlled judiciary and prosecution service makes everyone vulnerable to injustice.

## **DISCIPLINE AND SILENCE**

In response to the unprecedented mobilization of judges and prosecutors against these changes in the judiciary, the government began targeting the most vocal critics by making use of the same powers it accumulated through the "reforms". In September 2017 the Polish National Foundation, whose mission is to promote Poland, started a publicly-funded campaign called "Fair Courts". The campaign's goal was to promote the government's "reform of the judiciary". Its billboards fostered a predominantly negative image of judges by labelling them "a special cast", quoting from "unfair" judicial decisions and portraying judges as wrongdoers who enjoy impunity.

In the meantime, various anonymous Twitter accounts intensified online personal attacks against individual judges. One account named KastaWatch routinely published tweets amounting to online harassment and abuse of judges known for their criticism of the "reform" of judiciary. In particular it frequently attacked women judges who spoke out against the government's interference with the independence of the judiciary. They included Monika Frąckowiak and Dorota Zabłudowska, whose cases are detailed in this report.

There are indications that KastaWatch draws on classified or semi-classified information from government authorities. For example, on 3 April 2019, the day the European Commission announced that it had opened the third infringement procedure against Poland over the system of the disciplinary proceedings, KastaWatch published a snapshot of a confidential letter of notice sent from the EC to the Polish government.

During his talk at New York University in April 2019, Poland's Prime Minister Mateusz Morawiecki compared the situation regarding Poland's judiciary to that of post-Vichy France (Post-World War 2), suggesting it lacks legitimacy. The PM also declared that up to 85% of Poland's population supports the changes to the judicial system. According to a survey commissioned in February 2019 by *Iustitia*, the largest association of judges in Poland, 57% of participants feared that the independence of courts is at risk following the "reform" of the judiciary. Only 23% considered the situation "ok".

Although the majority of the judges interviewed for this report perceived politicians' statements and comments about them and their work as harassment, there were also those who considered them to be expressions of opinions and legitimate criticism.

## **COURTS AND HUMAN RIGHTS**

The independence of the judiciary is a crucial element of the right to a fair hearing. Under its international human rights obligations, Poland must ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. States have an obligation to take specific measures to guarantee the independence of the judiciary and protect judges from any form of political influence. Under international human rights law, judges shall decide matters presented before them not only impartially and in accordance with the law, but without threats or interference. Pursuant to the "reform" of the judiciary, this principle has been broken in Poland.

Elżbieta Podleśna is one of 14 women who organized a symbolic protest during the 2017 Independence March, during which they opened a banner proclaiming "Fascism Stop". She and the other women were verbally and physically abused and Elżbieta Podleśna suffered a neck injury. After the prosecutors dropped the women's complaint in September 2018, arguing that there was no public interest in pursuing it, the women appealed to the court. After the February 2019 hearing Elżbieta Podleśna said: "When we went to the hearing, I felt scared and I didn't know what the judge would say... That is why I appreciate that our case is internationally observed... I really feel I'm not protected as a citizen of this country... And this can happen to anyone living in Poland now... I don't believe in rule of law in Poland."

## **KEY RECOMMENDATIONS**

Amnesty International urges the authorities in Poland to:

- Immediately stop using disciplinary proceedings against judges and prosecutors merely for their exercise of the right to freedom of expression; for their rulings and other legitimate activities directly linked to their work.
- Review the new system of disciplinary proceedings to ensure they are independent from the government, in particular the Minister of Justice, and not used as retaliatory action or other forms of pressure and harassment against judges.
- Amend the Law on the National Council of the Judiciary to ensure that members who are judges are elected by their peers and not by the executive and/or the parliament.
- Take immediate and concrete steps to restore and guarantee the independence of the Supreme Court.

# 2. METHODOLOGY

This report is based on research carried out continuously from March 2017 until May 2019. It draws on seven research visits to Poland;<sup>1</sup> analysis of domestic legislation and international law and standards; analysis of EU law; reports of independent experts, intergovernmental organizations, and national professional bodies – including reports by the Council of Europe’s Venice Commission; and opinions issued by Poland’s Associations of Judges, *Iustitia* and *Themis*.

Individual cases presented in this report are based on interviews with judges, prosecutors, human rights defenders and activists; interviews with their lawyers; interviews with the Disciplinary Prosecutor for Common Courts; information taken from a written communication to Amnesty International from the Disciplinary Prosecutor;<sup>2</sup> analysis of documentation from legal proceedings obtained by Amnesty International; judges’ performance reviews, including data on the number of cases and rulings issued by specific jurists; and monitoring of media, including social media.

In total, Amnesty International conducted 14 interviews with judges and four interviews with prosecutors targeted by disciplinary proceedings during the research.

Amnesty International researchers analysed the various amendments to the Law of the Supreme Court;<sup>3</sup> the Law on Common Courts<sup>4</sup> and the Law on the National Council of the Judiciary.<sup>5</sup>

With regard to the EU response to the changes in the judiciary in Poland, this report draws on an analysis of written communication from the European Commission on the rule of law concerns since 2016; interviews with civil servants at the European Commission and other experts on EU law and policy; and the Polish government’s responses to the individual infringement proceedings in progress at time of writing. Publicly available documents in relation to the proceedings against Poland at the Court of Justice of the European Union (CJEU) have also informed this report.

Amnesty International communicated in writing<sup>6</sup> its concerns over the new disciplinary proceeding system to the Disciplinary Prosecutor for Common Court as well as in meetings.<sup>7</sup> The views of the Disciplinary Prosecutor and his deputies are reflected in this report. The main findings and recommendations of this report were shared with the authorities in Poland.

Judges, prosecutors and activists featured in this report are referred to by their full names with their informed consent. Amnesty International would like to thank all the individuals in Poland and beyond who cooperated with the organization in the course of the research for this report.

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<sup>1</sup> March-April 2017, July 2017, January 2018, February 2018, April 2018, October 2018, March 2019.

<sup>2</sup> <http://rzecznik.gov.pl/?s=amnesty>

<sup>3</sup> <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/U/D20180005Lj.pdf>;

<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180001045/O/D20181045.pdf>;

<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180002507/O/D20182507.pdf>;

<sup>4</sup> <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>;

<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180001443/O/D20181443.pdf>

<sup>5</sup> <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000003/O/D20180003.pdf>

<sup>6</sup> 20 December 2018

<sup>7</sup> 25 October 2018 and 7 March 2019, Warsaw



## HOW TO LOSE THE INDEPENDENCE OF THE JUDICIARY IN THREE YEARS

### November 2015 – August 2016

In November 2015, the new Parliament amended the **Law on the Constitutional Tribunal**. In December, the Parliament introduced further changes to the Tribunal's procedure – for example by requiring it to hear the majority of cases at full bench and decide by a two-thirds majority, as opposed to a simple majority. The amendment also gave Poland's President and the Minister of Justice the right to open disciplinary proceedings against Tribunal judges. In December 2016 the Parliament adopted a package of new laws on the Constitutional Tribunal, including a new procedure for the election of the President of the Tribunal authorizing the President of Poland to appoint an "Acting President", a term not recognized by the Polish Constitution. On 20 December 2016, the President of Poland appointed Julia Przyłębska as an "Acting President". Subsequently, Julia Przyłębska called the General Assembly of Judges, which elected her as one of the two candidates for the President of the Constitutional Tribunal. On 21 December 2016, the President of Poland chose to appoint Julia Przyłębska to post of the President of the Constitutional Tribunal.

### March 2016

Changes were brought to the **Law on the Public Prosecutor's Office** which strengthened the competencies of the Minister of Justice. Under the amended law, the function of the Minister of Justice was merged with the Prosecutor General. He can give written instructions to all the public prosecutors concerning the content of any individual case they are dealing with.

### August 2017

An amendment to the **Law on the System of Common Court** entered into force. The law empowered the Minister of Justice to dismiss and appoint presidents and vice-presidents of courts, without requiring that a justification be provided (this was applicable during the first six months since the law came to force). The law also created a new position of Disciplinary Prosecutor for Common Courts. The post holder and his two deputies are directly appointed by the Minister of Justice for a four-year term. The Disciplinary Prosecutor also chooses disciplinary prosecutors at the district and appeal courts. The Disciplinary Prosecutor investigates possible offences of judges pursuant to the request of the Minister of Justice, president of an appeal or district court, college of an appeal or district court, National Council of Judiciary or on his own initiative. The Disciplinary Prosecutor for Common Courts was appointed by the Minister of Justice in June 2018.

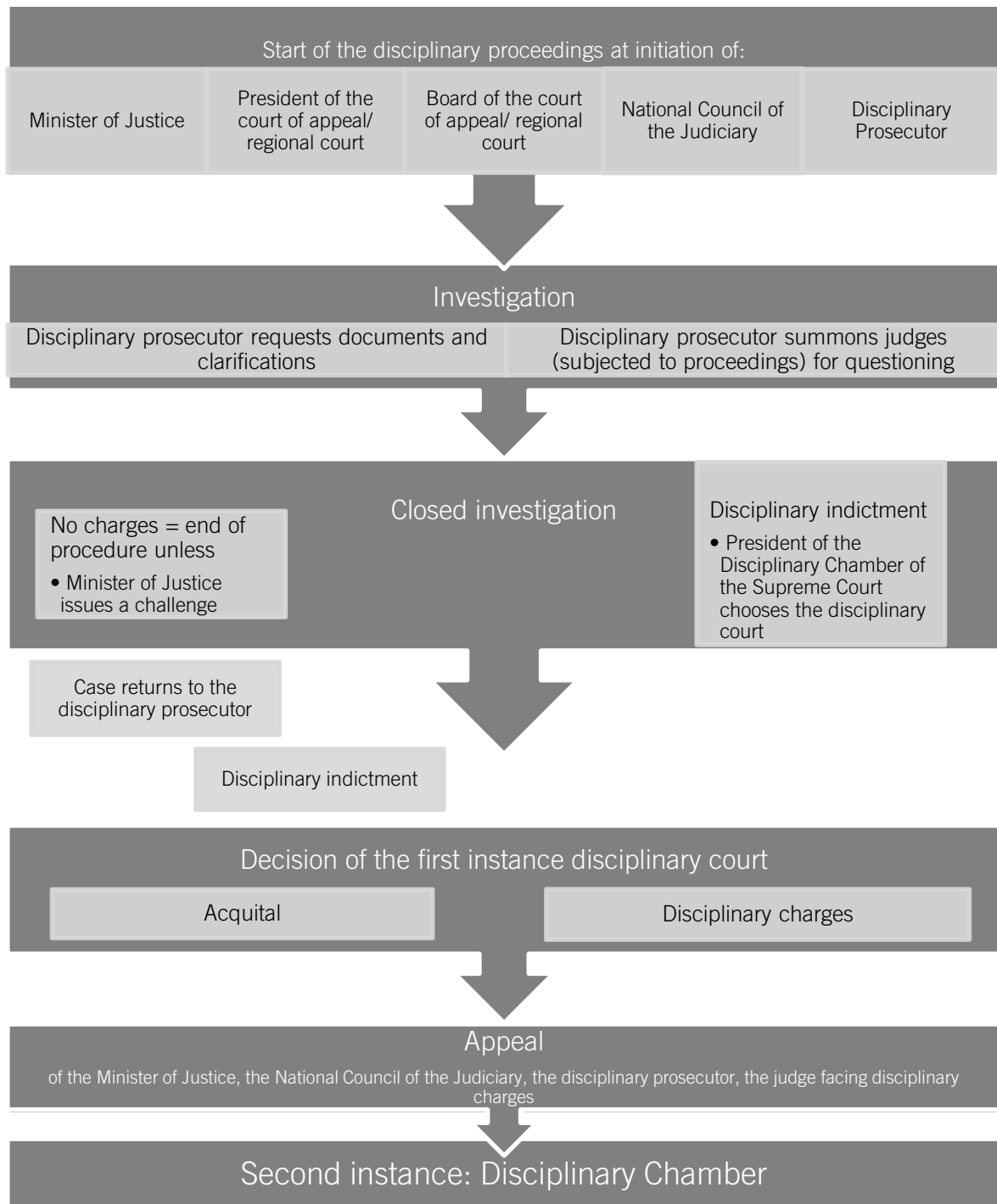
### December 2017

Amendment of the **Law on the Supreme Court** entered into force in April and July 2018, changing the retirement age of the Supreme Court judges. By lowering the retirement age for Supreme Court judges from 70 to 65 years, it resulted in – among other things – the forced retirement of 27 Supreme Court judges. The law also established two new chambers: the Disciplinary Chamber and the Extraordinary Chamber. The Disciplinary Chamber's members were to be elected by the National Council of the Judiciary and its "lay judges" by members of the Senate. In September 2018, the President of Poland appointed 10 new judges of the Disciplinary Chamber and in February 2019, the President of Poland appointed the heads of the two new chambers.

### January 2018

The amendment to the law on the **National Council of the Judiciary** entered into force. The law gave Parliament the power to appoint the 15 judges that comprise the NCJ. The Polish Constitution, however, expressly limits the number of the members of the NCJ appointed by Parliament to six. On 5 March 2018, Parliament appointed the new NCJ members, 8 of whom are the new presidents or vice-presidents of courts appointed by the Minister of Justice since August 2017. The amendment of the Law on NCJ prematurely terminated the tenure of the previous NCJ members.

**POLAND: NEW SYSTEM OF DISCIPLINARY PROCEEDINGS STEP BY STEP<sup>8</sup>**



<sup>8</sup> For detailed description of disciplinary proceedings, see section: 4.1 *The New Disciplinary Proceedings*

# 3. IMPACT ON JUDGES

**“If the judiciary loses its independence, the damage this will cause will last for generations.”**

Alina Czubieniak, Judge from Regional Court in Gorzów Wielkopolski

In the early stages of the “reform” of the judiciary, the authorities and pro-government media targeted a small number of individual judges who publicly spoke out against it. Waldemar Żurek, a judge of the Regional Court in Krakow who was an NCJ spokesperson until March 2018, had suffered several years of intimidation and harassment.

Serving as the spokesperson of the NCJ, Judge Żurek has voiced public criticism via the media since 2016 when the government first attempted to interfere with the independence of the judiciary by targeting the Constitutional Tribunal. In response, various authorities subjected Judge Żurek and his family members to investigations and disciplinary proceedings. Judge Żurek was also targeted by a negative campaign by pro-government media, including national television,<sup>9</sup> during which he received hate mail and abusive and threatening text messages.<sup>10</sup> For several months in 2016 and 2017, the Central Anticorruption Bureau (CBA) carried out an investigation of Judge Żurek’s finances. The Assembly of Judges of the Regional Court in Krakow raised concerns over procedural irregularities in the investigation as it “has been pursued without a formal decision and without a proper announcement for a period of [the first] 6 months.”<sup>11</sup> Judge Żurek reported intrusions by CBA officials into his home and office.<sup>12</sup> The CBA investigation eventually concluded in January 2018 that Judge Żurek was not involved in any major breaches of the law beyond inconsistent reporting on per diem received.

Judge Żurek also faced several disciplinary proceedings, including an investigation for his participation in July 2017 protests in defence of the independence of the judiciary. In 2017, the pro-government newspaper *Gazeta Polska* called for such proceedings after Judge Żurek spoke at a protest on 16 July 2017 in Warsaw. However, the disciplinary prosecutor at the Appeal Court in Krakow concluded in August 2017 that there were no grounds for such a move.<sup>13</sup>

The number of judges targeted by disciplinary proceedings increased after the authorities began implementing the Law on the Supreme Court and National Council of the Judiciary in 2018, and in the face of increased judicial criticism of the reforms.

Amnesty International has analysed the cases of eight judges against whom the Disciplinary Prosecutor’s office has triggered disciplinary proceedings either in a preparatory investigation of a possible offence, or disciplinary proceedings against a specific judge.<sup>14</sup> These cases present a non-exhaustive list of ongoing

<sup>9</sup> For example: <https://wiadomosci.tvp.pl/29588249/standardy-sedziego-zurka>

<sup>10</sup> Resolution of the Assembly of Representatives of Judges of the Regional Court in Kraków. <https://www.iustitia.pl/uchwaly/2124-stanowisko-sedziow-czlonkow-zgromadzenia-przedstawicieli-sedziow-okregu-krakowskiego-z-26-lutego-2018r>; Interview with Amnesty International on 8 June 2017 and 29 January 2018.

<sup>11</sup> Resolution of the Assembly of Representatives of Judges of the Regional Court in Kraków, pp. 1-2

<sup>12</sup> Interview with Amnesty International, 29 January 2018, Warsaw

<sup>13</sup> <https://www.tvp.info/33809312/nie-bedzie-postepowania-dyscyplinarnego-wobec-rzeczniaka-krs-waldemara-zurka>

<sup>14</sup> Ewa Maciejewska, Igor Tuleya, Dorota Zabłudowska, Barańska-Małuszek, Sławomir Jęksa, Alina Czubieniak, Monika Frąckowiak, Dominik Czeszkiewicz

disciplinary proceedings against judges and illustrate patterns in the way the Disciplinary Prosecutor has targeted judges who either:

- approached the Court of Justice of the EU with preliminary questions;
- spoke out publicly against the reform of the judiciary;
- issued rulings to uphold human rights.<sup>15</sup>

## 3.1 TARGETING JUDGES WHO TURNED TO THE CJEU WITH QUESTIONS

On 20 September 2018, the deputy Disciplinary Prosecutor for Common Courts questioned Ewa Maciejewska, a judge of the Regional Court in the town of Łódź, for over two hours.<sup>16</sup> She was the first judge to refer to the CJEU questions regarding the compatibility of the new disciplinary proceedings with EU law.<sup>17</sup> Specifically, Judge Maciejewska requested advice on whether the legislation that has removed the guarantees of independence of disciplinary proceedings against judges is compliant with Article 19 of the Treaty on European Union (TEU).

Ewa Maciejewska said that the conduct of the interrogation confirmed her concerns that political pressure was being exerted on judges. She said that the questioning verged on a breach of professional privilege – i.e. a judge’s obligation to respect confidentiality about matters related to the circumstances of particular cases<sup>18</sup> – and that it reassured her that she had been right when she referred the questions to the CJEU.<sup>19</sup>



Judge Tuleya addressing protestors at the Supreme Court in Warsaw, 4 July 2018. © Grzegorz Żukowski/ Amnesty International

Between August and September 2018, the deputy Disciplinary Prosecutor twice summoned Igor Tuleya, a Judge of the Regional Court in Warsaw, and required him to provide a written explanation regarding his public statements about the situation of the judiciary. In a separate, third summon issued on 14 August 2018, the deputy Disciplinary Prosecutor requested that Judge Tuleya provide a written explanation in relation to accusations that he leaked details of a case of opposition MPs who had filed a complaint over their de facto exclusion from a parliamentary session in December 2016.<sup>20</sup>

On 4 September 2018, Judge Tuleya submitted a request for a preliminary ruling from the CJEU in the context of a criminal case he was adjudicating. He asked the EU’s

highest court for an interpretation of Article 19 of the Treaty on European Union, requesting specifically whether the new legislation has “removed the guarantees of impartiality in disciplinary proceedings against judges and created the risk of using disciplinary proceedings to exert political control over court judgments”; and whether this contradicts member states’ obligations to ensure effective legal protection.<sup>21</sup> In a communication with Amnesty International, Disciplinary Prosecutor Piotr Schab stated that his office

<sup>15</sup> See 3.1. *Discipline and Silence* below.

<sup>16</sup> Under Article 114.1 of the Law on Common Courts, a disciplinary prosecutor carries out the initial stage of disciplinary proceedings. He acts either *ex officio* or pursuant to a request of the Ministry of Justice; National Council of the Judiciary; a president of an appeal or regional court; or college of an appeal or regional court.

<sup>17</sup> <http://www.lodz.so.gov.pl/index.php?p=new&id=858&idg=mg.121&keyword=pytanie%20prejudycjalne%20do%20tsue>

<sup>18</sup> Article 85.1 of the Law on Common Courts

<sup>19</sup> <http://prawo.gazetaprawna.pl/artykuly/1267433.sedzia-maciejewska-u-rzecznika-dyscyplinarnego.html>

<sup>20</sup> In December 2017 Judge Tuleya upheld the complaint of four opposition MPs against the decision of the Regional Prosecutor in Warsaw to discontinue an investigation regarding a particular Parliamentary session in December 2016. In January 2018, the vice-president of the Regional Court in Warsaw accused Judge Tuleya of revealing classified information in his ruling on the MPs’ complaint. The case of Judge Tuleya garnered a lot of media attention after some of the government party politicians commented that he was not suitable for the position of a judge pursuant to his decision in the MPs case. For details see: Amnesty International, *The Power of the Street*. 2018, p. 33

<sup>21</sup> <https://prawo.gazetaprawna.pl/artykuly/1246810.warszawski-sad-okregowy-wystapil-do-tsue-z-pytaniem-prejudycjalnym.html>

investigated whether “the request for a preliminary ruling, which [in the case of Judge Tuleya] did not meet the criteria set out in Article 267 TFEU... obstructed the course of the [criminal] proceedings”.<sup>22</sup>

Deputy Disciplinary Prosecutor Przemysław Radzik told Amnesty International that the text of the preliminary questions submitted by judges Maciejewska and Tuleya was identical, which “raised the suspicion” that “somebody influenced them... because they are in towns 150 kilometres apart... It was obvious that they consulted on it.”<sup>23</sup> Both judges denied the involvement of third parties in their decision to submit preliminary questions. The deputy Disciplinary Prosecutor claimed that was unlikely: “[W]hat [kind of] holy spirit is behind the two identical legal reasonings [of the preliminary questions]...? This raises concerns that one of the judges gave a false testimony.”<sup>24</sup>

At the time of meeting with Amnesty International, the deputy Disciplinary Prosecutor was considering referring the judges’ cases to the prosecutor on suspicion of the crime of providing a false testimony.<sup>25</sup> The initial investigation of the deputy Disciplinary Prosecutor concluded in December 2018 that neither of the judges had acted under undue influence.<sup>26</sup>

Amnesty International remains concerned that the disciplinary proceedings mechanism appears to be used against judges solely for the performance of their duties. Regular targeting of certain judges by investigations – even if they eventually conclude that they did not commit any offence – may amount to a form of harassment. National courts in EU member states have the right under Article 267 of the Treaty on European Union to submit questions to the CJEU regarding the interpretation of the Treaties.<sup>27</sup> Launching a disciplinary investigation against judges simply because they have exercised this right raises serious concerns about interference with the administration of EU law.

## 3.2 INVESTIGATED FOR EXERCISING FREEDOM OF EXPRESSION

The comments and statements of judges have also come under scrutiny by the Disciplinary Prosecutor for Common Courts. In cases documented by Amnesty International, initial investigations triggered by judges’ public criticism of the government’s reform eventually shifted to issues around their professional performance. Such shifts indicate the possibility that the Disciplinary Prosecutor is using alleged concerns about professional conduct as a proxy for targeting judges for the lawful exercise of their freedom of expression.

### JUDGE DOROTA ZABŁUDOWSKA, DISTRICT COURT IN GDAŃSK

**“I know that my president [of the court] and the head of my department were requested [by the Disciplinary Prosecutor] to write opinions on my performance so I can imagine the next step might be trying to find some reason for disciplinary charges in my work.”<sup>28</sup>**

Judge Dorota Zabłudowska

In January 2019, Judge Dorota Zabłudowska received two summonses from deputy Disciplinary Prosecutor Michał Lasota, informing her that she may have committed an offence against the dignity of a judge because she accepted a prize from the Mayor of Gdańsk, Paweł Adamowicz. Although the letter of the Disciplinary Prosecutor was dated 23 January, the Judge received it only on 5 March. Mayor Adamowicz had been fatally stabbed on 13 January 2019 during an annual charity event. He was known for his support of LGBTI rights and openness towards refugees and migrants.

<sup>22</sup> Letter from 4 January 2019 on files with Amnesty International.

<sup>23</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>24</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>25</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>26</sup> <http://rzecznik.gov.pl/wp-content/uploads/2018/12/Komunikat-Rzecznika-Dysc-z-1712.pdf>

<sup>27</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12016E267>

<sup>28</sup> Online communication with Amnesty International, 20 March 2019.

In a meeting with Amnesty International in March 2019, the Disciplinary Prosecutor stated that Mayor Adamowicz was a defendant in ongoing proceedings within the same court where Judge Zabłudowska works.<sup>29</sup> Judge Zabłudowska argued that the mayor was not involved in selecting the recipients of the prize she was awarded. The prize was awarded by the Council for Equal Treatment and she donated the financial reward to a charity.<sup>30</sup>

“Before I agreed with the nomination, I familiarized myself with the rules of the award to prevent exactly this kind of speculation of its links to politicians,” Judge Zabłudowska told Amnesty International.<sup>31</sup>

Judge Zabłudowska said she was not familiar with the case files relating to Mayor Adamowicz and only knew about the proceedings against him from the media. Despite this, the Disciplinary Prosecutor considered that Judge Zabłudowska’s acceptance of the prize, which included a financial reward of 3,300 Złoty (770 Euro), amounted to an interference with judges’ independence and the principle that it is not acceptable for a judge “to accept money from a defendant”.<sup>32</sup> The investigation was pending at the time of writing.

On 30 January 2019, the Disciplinary Prosecutor also requested that Judge Zabłudowska provide explanations for her tweet after the killing of mayor Adamowicz in which she said: “This is how hate speech ends.”<sup>33</sup> The proceedings were pending at the time of writing.

## JUDGE OLIMPIA BARAŃSKA-MAŁUSZEK, DISTRICT COURT IN GORZÓW WIELKOPOLSKI

**“In September 2018... I received information that the Disciplinary Prosecutor was seeking information about my performance. He was particularly interested to learn about any complaints or negative opinions about me... After a few months, I have learned [from the media] there are disciplinary proceedings against me for ‘exceeding the deadline for the delivery of written reasonings of judgments’ in a few cases. The delays were up to three days.”<sup>34</sup>**

Judge Olimpia Barańska-Małoszek

Judge Olimpia Barańska-Małoszek came to the attention of the deputy Disciplinary Prosecutor Przemysław Radzik after her participation at the Pol'and'Rock Festival in August 2018, where she had spoken about the importance of the independence of the judiciary for human rights.<sup>35</sup> Shortly after the festival, the deputy Disciplinary Prosecutor also requested information from the President of the District Court in Gorzów Wielkopolski about the performance of Judge Barańska-Małoszek in the period from January 2015 to August 2018.<sup>36</sup> The query requested information about any possible delays in relation to decision-making. There were 10 cases in which the judge was late in delivering written justification of her rulings; in seven of them the delay was between one and three days. On 4 April 2019, the deputy Disciplinary Prosecutor concluded that her responsibility for the delays was mitigated by her heavy workload as she had the highest number of cases in her department.<sup>37</sup>

Before the decision of the deputy Disciplinary Prosecutor to drop the case against her, Judge Barańska-Małoszek told Amnesty International that she found it difficult to work in the current climate and was worried about the future. She had no trust in the system of the disciplinary proceedings, because the second instance court would be the new Disciplinary Chamber of the Supreme Court. “Every single judge in the Disciplinary Chamber is connected to the Minister of Justice,” she said.<sup>38</sup>

<sup>29</sup> Interview with Amnesty International, 7 March 2019, Warsaw

<sup>30</sup> <http://orkiestra-vita-activa.pl/pl/idea/>

<sup>31</sup> Phone interview with Amnesty International, 25 March 2019

<sup>32</sup> Interview with Amnesty International, 7 March 2019, Warsaw

<sup>33</sup> <https://www.polsatnews.pl/wiadomosc/2019-03-06/sedzia-musi-sie-tlumaczyc-z-przyjecia-nagrody-od-adamowicza-bo-mogla-uchybic-godnosci-urzedu/>

<sup>34</sup> Interview with Amnesty International, 6 March 2019, Wrocław

<sup>35</sup> [http://gorzow.wyborcza.pl/gorzow/7\\_36844,23748948,sedziowie-na-pol-and-rock-mamy-nikle-pojecie-o-wartosciach.html](http://gorzow.wyborcza.pl/gorzow/7_36844,23748948,sedziowie-na-pol-and-rock-mamy-nikle-pojecie-o-wartosciach.html)

<sup>36</sup> Letter from 12 September 2018 on file with Amnesty International.

<sup>37</sup> Decision of the deputy Disciplinary Prosecutor on files with Amnesty International.

<sup>38</sup> Meeting with Amnesty International, 6 March 2019, Wrocław

## 3.3 INVESTIGATED FOR RULINGS

One of the most serious threats to the right to fair trial in Poland is the possibility that judges could be subjected to disciplinary proceedings for the content of their rulings. As of September 2018, Disciplinary Prosecutor Piotr Schab and his two deputies began targeting judges whose decisions in the courtroom were in their opinion “political”.

### JUDGE SŁAWOMIR JĘKSA, REGIONAL COURT IN POZNAŃ

**“If I will be disciplined for a ruling, no judge in Poland can feel safe anymore.”**

Judge Sławomir Jęksa

“I’m very f.... off about the situation in my country,” declared Joanna Jaśkowiak, the wife of the local mayor, before a crowd gathered in Poznań on International Women’s Day in 2017. She spoke about the crackdown on women’s rights in Poland: workplace discrimination in jobs, lack of access to contraceptives, gender-based violence – and also about the broader concern over the independence of the courts. “Women cannot remain silent,” she concluded. “Revolution is a woman!”<sup>39</sup>

A few months later somebody reported her speech to the police and she was charged with a misdemeanour for using “offensive words” in public.<sup>40</sup> The first instance court found her guilty and ordered a fine of 1,000 Zlotys (233 Euro), which she appealed. In September 2018, a judge of the Regional Court Poznań, Sławomir Jęksa ruled that she had not committed any offence.

In the view of Judge Jęksa, whilst using potentially “offensive” words, Joanna Jaśkowiak spoke during a rally, where the limit for freedom of speech is broader. He also acknowledged that her choice of words was prompted by concerns about the encroachment on human rights in Poland, including restrictions on freedom of assembly and interference with the functioning of the judiciary. He warned of the dangers when “politics enters the judiciary...” and interferes with its independence.<sup>41</sup> Judge Jęksa then proceeded to outline six points (below) illustrating infringements on the independence of the judiciary by various government authorities, including the President:

- refusal to publish the decisions of the Constitutional Tribunal;<sup>42</sup>
- issuance of a Presidential pardon in a case where judicial proceedings were still ongoing;
- refusal by the President to appoint three new judges of the Constitutional Tribunal, elected by the [previous] parliament, and appointment of another three judges [without a valid legal basis] in their place;
- removal of the members of the National Council of the Judiciary [by terminating their tenure prematurely], and of the Supreme Court judges [by forcing them into retirement];
- election of the new National Council of the Judiciary in an unconstitutional mode [by the parliament instead of assemblies of judges];
- failure by government to comply with decisions – pursuant to preliminary questions – of the Court of Justice of the European Union.

While the first instance court ignored this contextual reference made by the defendant during her speech, Judge Jęksa interrogated it and concluded that the defendant was right to express fear over the protection of human rights.

<sup>39</sup> See the video from the protest on 8 March 2017: <https://www.tvn24.pl/poznan,43/joanna-jaskowiak-dostala-wezwanie-na-policje-za-jestem-wk-wiona,802492.html>

<sup>40</sup> Under Article 141 of the Code of Petty Offences. <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19710120114>

<sup>41</sup> Ruling IV Ka 818/18 – Regional Court of Poznań, Ruling and Justification, 2018-09-24, section III.

<sup>42</sup> Reference from the ruling: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970780483>

## The consequences

Almost immediately after the decision, Judge Jęksa found himself at the receiving end of the political interference about which he had warned. The deputy Disciplinary Prosecutor for Common Courts started an investigation against him, arguing that he had committed “an offence against the dignity of the office of the judge”.<sup>43</sup> According to the Disciplinary Prosecutor for Common Courts, Piotr Schab, the ruling in the *Jaškowiak* case was an “expression of political opinions”.<sup>44</sup> He called it a “political manifest”, which represents a dangerous “precedent on the basis of which a judge could in the future acquit a thief arguing poverty resulting from systemic issues.”<sup>45</sup>

“The moment the ruling was published [on 25 September 2018], the [deputy] Disciplinary Prosecutor for Common Courts, Przemysław Radzik, took an interest in my person,” said Judge Jęksa. “First he sent a letter to the ‘local’ Disciplinary Prosecutor at the Appeal Court in Poznań.”<sup>46</sup> In the letter, he requested that Judge Mariola Głowacka, the local disciplinary prosecutor,<sup>47</sup> undertake an investigation into a possible disciplinary offence.<sup>48</sup> “On 3 October 2018, the [deputy] Disciplinary Prosecutor Radzik asked me to provide an explanation of my judgment.”

In his reply, Judge Jęksa challenged the allegations that he breached the obligation to be apolitical, noting that the deputy Disciplinary Prosecutor based them on media statements rather than the decision itself: “The oral delivery of the decision took over 30 minutes. The [deputy] Disciplinary Prosecutor seemed to have initiated the proceedings against me before he read the written ruling.”<sup>49</sup> Moreover, the judge argued, the deputy Disciplinary Prosecutor failed to clarify which specific parts of the ruling were considered to be politically motivated.<sup>50</sup>

When Amnesty International sought a clarification on the type of evidence available to the deputy Disciplinary Prosecutor at the beginning of the proceedings, he admitted that he had initiated the proceedings on the basis of media reports.<sup>51</sup>

On 5 November 2018, the local disciplinary prosecutor in Poznań, Judge Głowacka, dropped the case against Judge Jęksa, arguing the lack of legal grounds.<sup>52</sup> The Disciplinary Prosecutor for Common Courts was not satisfied and neither was the Minister of Justice who used his power to issue a challenge (*sprzeciw*) to the decision of the local prosecutor. On 7 February 2019, Judge Jęksa received a written notification that the Disciplinary Prosecutor started two proceedings against him: one for his decision into the *Jaškowiak* case being delivered orally; and one for a written justification of the decision. At the time of writing, Judge Jęksa was awaiting the first hearing at the disciplinary court.

According to the procedure, the President of the Disciplinary Chamber of the Supreme Court appointed the Appeal Court to hear the case, choosing the court in Katowice, 300 km from Poznań.

On 16 April, the Disciplinary Prosecutor for Common Courts also opened disciplinary proceedings against Judge Głowacka for alleged “procedural mistakes” when closing the proceedings against Judge Jęksa.

The case of Judge Jęksa and the subsequent chain of disciplinary proceedings illustrates the punitive attitude towards judicial decision-making that the authorities label as “political”. Although international law acknowledges that judges “should be held accountable for instances of professional misconduct”,<sup>53</sup> the UN Special Rapporteur on the independence of judges and lawyers has warned that “the independent exercise of their functions [requires] they should not be subject to disciplinary proceedings or sanctions relating to the content of their rulings, verdicts, or judicial opinions, judicial mistakes or criticism of the courts.”<sup>54</sup>

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<sup>43</sup> Article 107.1 of the Law on the System of Common Courts.

<sup>44</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>45</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>46</sup> Interview with Amnesty International, 5 March 2019, Poznań.

<sup>47</sup> Under Article 112.1, in cases of the judges of Regional Courts, the disciplinary prosecutor is either the Disciplinary Prosecutor for Common Courts, or (as in this case), the deputy disciplinary prosecutor at a Court of Appeal.

<sup>48</sup> The letter dated on 26 September 2018 is on files with Amnesty International.

<sup>49</sup> Interview with Amnesty International, 5 March 2019, Poznań.

<sup>50</sup> The reply dated on 19 October 2018 on files with Amnesty International.

<sup>51</sup> Meeting with Amnesty International, 7 March 2019, Warsaw.

<sup>52</sup> Decision on files with Amnesty International.

<sup>53</sup> Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para. 25.

<sup>54</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut. 2014. A/HRC/26/32, para. 87



## JUDGE ALINA CZUBIENIAK, REGIONAL COURT IN GORZÓW WIELKOPOLSKI

**“Once the judiciary loses its independence, the damage will last for generations. I have been a judge since 1984 and have experienced difficult times. I didn’t think I would go through it again. And the truth is, now it’s even worse.”**

Judge Alina Czubieniak

On 22 March 2019, the Disciplinary Chamber of the Supreme Court reprimanded Judge Alina Czubieniak from the Regional Court in Gorzow Wielkopolski for her “wrong interpretation of the law”. It concerned a 2016 case in which she had ordered a re-examination of a decision on the arrest of an illiterate defendant with mental health issues who had been accused of sexual assault of a minor.

“The man could not read, and the prosecutor presented to him, in the absence of his defence lawyer, documents with charges against him in writing... The man had no idea what was going on...” Judge Czubieniak explained.<sup>55</sup>

In 2017, at the peak of the government’s smear campaign against judges, the Minister of Justice took an interest in the decision of Judge Czubieniak and argued that she had endangered the course of criminal proceedings by releasing the suspect. After the first instance disciplinary court held that Judge Czubieniak had not erred in requesting a re-examination of the arrest due to the original absence of a defence lawyer, the Minister used his power – introduced within the reform of the judiciary – and appealed the decision to the Disciplinary Chamber of the Supreme Court.<sup>56</sup>

During the hearing on 22 March 2019, the Disciplinary Chamber decided that Judge Czubieniak committed a disciplinary offence by making a “procedural mistake”.<sup>57</sup> According to the Disciplinary Chamber the judge quoted Article 439 (revoking a decision on the grounds of procedural mistake) of the Code of Criminal Procedure, instead of Article 440 (revoking an obviously unjust decision).<sup>58</sup> In response to the verdict and its delivery, Judge Czubieniak called it a “tragicomedy”.<sup>59</sup> She also raised concerns that the wording of the decision strongly resembled that used in the challenge by the Minister of Justice against the decision of the first instance disciplinary court.<sup>60</sup> In response to her statements to the media published on 23 and 24 March 2019, the Disciplinary Prosecutor started new disciplinary proceedings against her for “offending the dignity of an office of a judge”.<sup>61</sup>

Judge Czubieniak sees her case as a warning to the other – especially younger – judges. “So far I’m pleasantly surprised, I get a lot of support from all around the country [after the decision of the Disciplinary Chamber]”.<sup>62</sup> The appeal case against the first decision of the Disciplinary Chamber, as well as the new disciplinary case against judge Czubieniak were pending at the time of writing.<sup>63</sup>

### CONCLUSION ON INVESTIGATIONS AGAINST JUDGES

In a meeting with Poland’s authorities, Amnesty International raised its concerns over the use of disciplinary proceedings against judges.<sup>64</sup> On the basis of documented cases, the organization considers that the current use of the proceedings risks resulting in an atmosphere where judges, out of fear of being subjected to disciplinary proceedings, risk having to base their decisions on political considerations rather exclusively on the law. It also raised concerns that targeting judges for their public outspokenness may be a breach of Poland’s international human rights obligations that guarantee for members of the judiciary the rights to

<sup>55</sup> Phone interview with Amnesty International, 27 March 2019.

<sup>56</sup> Article 121.1 of the Law on the System of Common Courts

<sup>57</sup> <http://rzecznik.gov.pl/2019/03/komunikat-rzecznika-dyscyplinarnego-sedziego-piotra-schaba-w-zwiazku-z-doniesieniami-medialnymi-w-sprawie-sedzi-aliny-czubieniak-prowadzacymi-do-dezinformacji-publicznej/>

<sup>58</sup> Phone interview with Amnesty International, 27 March 2019 <http://monitorkonstytucyjny.eu/archiwa/8438>

<sup>59</sup> <https://wiadomosci.onet.pl/tylko-w-onecie/alina-czubieniak-skazana-przez-izbe-dyscyplinarna-sn-na-kare-upomnienia/n1bf22e>

<sup>60</sup> <https://wiadomosci.onet.pl/tylko-w-onecie/alina-czubieniak-skazana-przez-izbe-dyscyplinarna-sn-na-kare-upomnienia/n1bf22e>

<sup>61</sup> <http://rzecznik.gov.pl/2019/03/komunikat-rzecznika-dyscyplinarnego-sedziego-piotra-schaba-w-sprawie-podjecia-czynnosci-wyjasniajacych-w-zwiazku-z-wypowiedziami-medialnymi-aliny-czubieniak-sedzi-sadu-okregowego-w-gorzowie/>

<sup>62</sup> Phone interview with Amnesty International 27 March 2019

<sup>63</sup> Phone interview with Amnesty International 27 March 2019

<sup>64</sup> Letter to the Disciplinary Prosecutor for Common Courts, 20 December 2018; Meeting with the Disciplinary Prosecutor for Common Courts and his deputies on 7 March 2019.

freedom of expression, belief, association and peaceful assembly, provided that in exercising such rights, they preserve the dignity of their office and the impartiality and independence of the judiciary.<sup>65</sup>

Cases of disciplinary proceedings against judges documented in this report were triggered by actions or statements that the Disciplinary Prosecutor considered to be “political” and therefore in breach of the dignity of the office of a judge.<sup>66</sup> In a meeting on 7 March 2019, Amnesty International representatives requested clarification of actions taken by judges which may amount to a political activity. “[Is] endorsement of political opinions political activity? Yes, it is. Negative endorsement of political opinions in public? [It] is a political activity.”<sup>67</sup> (for details see the case of Judge Jęksa above).

Amnesty International considers that the use of disciplinary proceedings against judges solely for the content of their rulings is in breach of international human rights law. It draws on the clarification by the UN Special Rapporteur in 2014 that “[judges] should not be subject to disciplinary proceedings or sanctions relating to the content of their rulings, verdicts, or judicial opinions, judicial mistakes or criticism of the courts.”<sup>68</sup>

## 3.4 MEDIA CAMPAIGN AGAINST JUDGES

Apart from disciplinary proceedings, judges as a group have been also targeted in a negative campaign in the pro-government media, which routinely portrays them as those who “damage the interests of Poland” and are “above the law”. The negative campaign is vibrant also on the social media. A twitter account named KastaWatch has routinely published tweets amounting to online harassment and abuse of judges known for their criticism of the “reform” of judiciary. The account also published screenshots of documents regarding disciplinary proceedings against specific judges, decisions of disciplinary courts and information about judges’ trips abroad,<sup>69</sup> as well as other information from their personal files. KastaWatch also targets judges whose rulings it disagrees with. It repeatedly expressed its disapproval with Judge Łukasz Biliński, known for upholding the rights of the anti-government protestors, and declared a commitment to “look closer at the activities of this judge”.<sup>70</sup> On 17 June 2019, the head of the District Court in Central Warsaw decided to move Judge Bilinski from the criminal to the family division of the court. “I consider it a retaliation for my decision-making,” said Judge Bilinski.<sup>71</sup>

KastaWatch also targeted Judge Dariusz Mazur, the spokesperson of the Association of Judges “Themis”, and an outspoken critic of the “reform” of the judiciary.<sup>72</sup> The account holders call themselves “stormy knights who will not be stopped” and whose aim is to “clean the justice system”. “For over 30 years no one had information that we possess [now]...”<sup>73</sup> There are indications that the account draws on classified or semi-classified information from government authorities.

## 3.5 FROM COURTROOMS TO THE “STREETS”

In response to the government’s measures against the independence of the judiciary, judges across Poland have also started to organize collectively. The assemblies of judges at courts have adopted resolutions critical of the laws and policy changes that have enhanced the powers of the Minister of Justice over courts. Judges participated in protests demanding “Free Courts” (*Wolne sądy*) in July 2017 and December 2018, and have started to publicly express concerns over the future of fair trials and rule of law in Poland. As the pressure against individual judges started mounting after the Minister of Justice appointed the Disciplinary Prosecutor for Common Courts, judges began to organize solidarity pickets holding signs declaring “We won’t be intimidated!”, “Independent courts: a right of every citizen” and “In solidarity with Judge Czubieniak” (see the case above).<sup>74</sup>

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<sup>65</sup> Basic Principles on the Independence of the Judiciary:  
<https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>

<sup>66</sup> Article 107.1 of the Law on the System of Common Courts.

<sup>67</sup> Interview with Amnesty International, 7 March 2019.

<sup>68</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut, A/HRC/26/32, 28 April 2014, para. 87  
<https://undocs.org/A/HRC/26/32>

<sup>69</sup> For example, it published details about lecturerships of Judge Dariusz Mazur, the spokesperson of the Association of Judges “Themis”.

<sup>70</sup> <https://twitter.com/WalskiJ/status/111177763516653570>

<sup>71</sup> <https://oko.press/sad-odsuwa-sedziego-bilinskiego-ktory-uniewinnial-za-udzial-w-protestach-antyrzadowych/>

<sup>72</sup> <https://twitter.com/KastaWatch/status/1129698038656708608>

<sup>73</sup> <https://twitter.com/KastaWatch/status/1121850457989754880>

<sup>74</sup> <https://oko.press/sedziowie-w-calej-polsce-demonstruja-nie-damy-sie-zastraszc/>

A number of judges told Amnesty International that they consider these public activities as their obligation to defend the independence of courts in Poland. “For the first time in our careers we have to stand our ground and show we are not just civil servants, but the authority that protects legal order,” observed Judge Dorota Zabłudowska.<sup>75</sup> “

Although these activities of the judges amount to an exercise of the right to freedom of expression, Amnesty International documented that in some cases, they triggered disciplinary action.

### **JUDGE MONIKA FRĄCKOWIAK, DISTRICT COURT IN POZNAŃ**

In the summer of 2018 some judges participated in a moot court (simulated proceedings for demonstration) and discussions at Pol'and' Rock Festival, with the aim of showing the festival-goers how courts operate and their role in society.<sup>76</sup> The fact that the judges were wearing their professional robes prompted the deputy Disciplinary Prosecutor for Common Courts to initiate an investigation. He alleged that two judges in particular – Arkadiusz Krupa and Monika Frąckowiak – “offended the dignity of a judge” when they participated during the festival at a “parody of a court hearing”.<sup>77</sup>

The initial investigation against Judges Frąckowiak and Krupa for their participation in the festival did not lead to any charges against them.<sup>78</sup> Despite this, the case against Judge Frąckowiak has continued. In the course of the initial proceedings, the Disciplinary Prosecutor also decided to scrutinize other aspects of Judge Frąckowiak's performance and requested information on her work between January 2015 and August 2018 from the President of the District Court in Poznań Nowe Miasto Wilda. When the Court President asked for the grounds for such a request, the Disciplinary Prosecutor quoted Article 15 of the Code of Criminal Procedure, which obliges authorities to cooperate with prosecutors carrying out an investigation. Failure to do so is punishable by a fine.

In January 2019, Judge Frąckowiak learned that the Disciplinary Prosecutor had begun proceedings against her for late delivery of written judgments in 172 cases.<sup>79</sup> In the period from 1 January 2015 to 31 August 2018, she had approximately 1,500 open cases, the highest number held by any individual in her department. Judge Frąckowiak told Amnesty International, “My workload has been perpetually up to 650 cases per year. It is simply impossible to provide written justification within 14 days. If you focus on these, you are late with other things... We regularly work overtime, which is not paid.”<sup>80</sup>

In the period from 1 January 2015 to 31 August 2018, Judge Frąckowiak concluded 987 cases, issuing 482 verdicts. To compare: the average number of concluded cases managed by a judge in the District Court's department for civil law cases for that period was 374 with 106 verdicts.<sup>81</sup>

In an April 2017 letter to the Disciplinary Prosecutor, the President of the District Court in Poznań Nowe Miasto Wilda admitted that it was physically impossible for Judge Frąckowiak to meet her deadlines under such high workload.<sup>82</sup> A supervising judge assessing the performance of Judge Frąckowiak raised the issue of her high workload in the same month. Despite that, he issued a positive opinion on her work acknowledging the consistency of her decision-making.<sup>83</sup> Similarly, in September 2018, the deputy disciplinary prosecutor at the Appeal Court in Poznań stated that the work of Judge Frąckowiak was satisfactory and that she “carries out the proceedings efficiently”.<sup>84</sup>

The issue of high workload, which generally affects the length of proceedings, is neither new nor exclusive to the workload of Judge Frąckowiak.<sup>85</sup> It remains unclear what prompted the deputy Disciplinary Prosecutor to investigate Judge Frąckowiak's files when there is no apparent link between them and her participation at the music festival. In an interview with Amnesty International, the Deputy Disciplinary Prosecutor Przemysław Radzik strongly rejected any allegations that the proceedings were motivated by her activism: “Absolutely not... I am not interested in the public activities of Judge Frąckowiak. She is supposed to be a judge [and] carry out her obligations... if her [written] justifications [of judgments were delivered late] because of her public activities, she should be able to explain that in the court... My task is to investigate

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<sup>75</sup> Phone interview with Amnesty International, 25 March 2019.

<sup>76</sup> <https://www.tvn24.pl/wiadomosci-z-kraju,3/sedziowie-krupa-i-frackowiak-wezwani-przez-rzeczniaka-dyscyplinarnego,879036.html>

<sup>77</sup> Summons by the disciplinary prosecutor, 11 November 2018.

<sup>78</sup> The Disciplinary Prosecutor concluded in January 2019 that they were “unaware” that wearing judges' robes at a festival was offensive.

<sup>79</sup> Communication of the Disciplinary Prosecutor from 17 January 2019 on files with Amnesty International.

<sup>80</sup> Interview with Amnesty International, 5 March in Poznań.

<sup>81</sup> Data on file with Amnesty International.

<sup>82</sup> Letter on file with Amnesty International.

<sup>83</sup> Document on file with Amnesty International.

<sup>84</sup> Document on file with Amnesty International.

<sup>85</sup> See for example: Kamil Joński. *Efektywność sądownictwa powszechnego*. Warsaw 2016. pp. 54-58

[https://iws.gov.pl/wp-content/uploads/2018/08/IWS\\_Joński-K.\\_Efektywność-sądownictwa-powszechnego1.pdf](https://iws.gov.pl/wp-content/uploads/2018/08/IWS_Joński-K._Efektywność-sądownictwa-powszechnego1.pdf)

her.”<sup>86</sup> When asked how the Disciplinary Prosecutor became interested in the performance of Judge Frąckowiak, he stated that there was “a report” from the parties in one of judge’s cases.<sup>87</sup>

On 5 April 2019, deputy Disciplinary Prosecutor Radzik filed a disciplinary indictment against Judge Frąckowiak to an Appeal Court in Lublin, 466 km from Poznań.

Judge Frąckowiak told Amnesty International that she does not believe she will get a fair trial: “It doesn’t matter what the decision will be in the first instance, the actual decision will be made by the Disciplinary Chamber of the Supreme Court.”<sup>88</sup> These fair trial concerns are bolstered by the European Commission decision of April 2019, which concluded that the second instance Disciplinary Chamber is not an independent judicial body because its members are elected by the NCJ, whose members in turn are appointed by politicians and not by their judicial peers (for details see section: 4.3 Supreme Court).<sup>89</sup>

### 3.5.1 SOLIDARITY WITH JUDGES

In response to the decision of the Disciplinary Chamber, which reprimanded Judge Alina Czubieniak (see above) after she ordered a re-examination of detention decision, judges in over 20 courts across Poland started taking solidarity action. They held banners proclaiming “We will not be intimidated”.<sup>90</sup> A pro-government twitter account KastaWatch stated that it is “analysing all images of judges involved in the action.”<sup>91</sup> During one of the judges’ solidarity pickets on 5 April 2019 in the town of Olsztyn, Maciej Nawacki, the President of the District Court and a member of the new National Council of the Judiciary appointed after the “reform”, summoned the police to where the judges and lawyers were assembled.<sup>92</sup> According to a report by Oko.Press,<sup>93</sup> when the judges attempted to take photos of the solidarity messages with Judge Czubieniak, police officers approached them to take their details, a common practice used against



11 May 2019, Judges of the Regional Court in Kraków express solidarity with Judge Czubieniak ©Iustitia. Association of Judges in Poland.

<sup>86</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>87</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>88</sup> Interview with Amnesty International, 5 March in Poznań.

<sup>89</sup> [http://europa.eu/rapid/press-release\\_IP-19-1957\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1957_en.htm)

<sup>90</sup> <https://oko.press/sedziowie-w-calej-polsce-demonstruja-nie-damy-sie-zastraszy/>

<sup>91</sup> <https://twitter.com/KastaWatch/status/1115376281942745094>

<sup>92</sup> <https://oko.press/maciej-nawacki-prezes-sadu-w-olsztynie-z-nominacji-ziobry-naslal-policje-na-swoich-sedziow/>

<sup>93</sup> An online media outlet specializing in investigative journalism.

protestors.<sup>94</sup> On his twitter account, Judge Nawacki stated that the assembly was “illegal” and therefore the “police [had] an obligation to respond”.<sup>95</sup>

The judges began holding similar pickets in smaller courts. In April 2019, a group of five judges held placards in front of the District Court in the town of Kętrzyn in solidarity with Judge Dorotą Lutostańską from the Regional Court in the town of Olsztyn who is facing disciplinary proceedings for “offending the dignity of the office of a judge”.<sup>96</sup> The deputy Disciplinary Prosecutor for Common Courts considers that she committed the offence by not opting out from a case of protestors who are known for using a sign “Konstytucja” (*Constitution*) on their placards.<sup>97</sup> The deputy Disciplinary Prosecutor commented that the judge was bound to exclude herself from the case as she wore a T-shirt with the same sign at a different occasion and “her objectivity was therefore of concern”.<sup>98</sup>

The judges used the following messages in their solidarity pickets in cities and towns across Poland:

- “We will not be intimidated”
- “Constitution”
- “Independent courts are a right of every citizen”
- “Unfree courts = unfree people.”<sup>99</sup>

Judges, like any other citizens, are entitled to freedom of expression, association and assembly. The only limitation stated in the 2002 UN Bangalore Principles of Judicial Conduct is that “a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary”.<sup>100</sup>

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<sup>94</sup> <https://oko.press/maciej-nawacki-prezes-sadu-w-olsztynie-z-nominacji-ziobry-naslal-policje-na-swoich-sedziow/>

<sup>95</sup> [https://twitter.com/Maciej\\_Nawacki/status/1114217041811128320](https://twitter.com/Maciej_Nawacki/status/1114217041811128320)

<sup>96</sup> [https://wiadomosci.dziennik.pl/wydarzenia/artykuly/595189.sedziowie-protest-dyscyplinarka-kod.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+Dziennik-Wiadomosci+%28RSS++Dziennik++Wiadomosci%29&utm\\_content=Google+Feedfetcher](https://wiadomosci.dziennik.pl/wydarzenia/artykuly/595189.sedziowie-protest-dyscyplinarka-kod.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Dziennik-Wiadomosci+%28RSS++Dziennik++Wiadomosci%29&utm_content=Google+Feedfetcher)

<sup>97</sup> Judge Lutostańską issued the ruling in November 2018. Held the protestors did not commit any offence. [https://www.olsztyn.so.gov.pl/index.php?option=com\\_content&view=article&id=1345:rzecznik-dyscyplinarny-wszczal-postepowanie-przeciwko-sedzi-sadu-okregowego-w-olsztynie&catid=44:komunikaty-rzecznikow-prasowych&Itemid=162](https://www.olsztyn.so.gov.pl/index.php?option=com_content&view=article&id=1345:rzecznik-dyscyplinarny-wszczal-postepowanie-przeciwko-sedzi-sadu-okregowego-w-olsztynie&catid=44:komunikaty-rzecznikow-prasowych&Itemid=162)

<sup>98</sup> <https://www.tvn24.pl/wiadomosci-z-kraju,3/sedzia-z-zarzutem-dyscyplinarnym-orzekala-w-sprawie-dzialaczek-kod,922512.html>

<sup>99</sup> <https://oko.press/sedziowie-w-calej-polsce-demonstruja-nie-damy-sie-zastraszc/>

<sup>100</sup> Principle 4.6

# 4. POLITICIZING THE JUDICIARY

**“A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.”**

*The Bangalore Principles of Judicial Conduct, Article 1.1.<sup>101</sup>*

Legislation adopted and implemented in Poland between 2015 and 2018 has had a devastating impact on judicial independence. Amendments to the laws governing all arms of the judiciary – the Constitutional Tribunal, National Council of the Judiciary, common courts and the Supreme Court – have rendered courts, judges and judicial institutions vulnerable to political influence.

The government has argued that the changes were necessary due to:<sup>102</sup>

- low trust in the judiciary;
- inefficiency of the court system;
- influence of those who “have lost the public trust” over the courts;
- lack of “real accountability” of the judges.

In July 2017, the President of Poland signed an amendment to the Law on the System of Common Courts. This entered into force in August 2017 and empowered the Minister of Justice to dismiss and appoint presidents and vice-presidents of courts. In the first six months of the law entering into force, the Minister had the power to replace the presidents or vice-presidents without providing any justification whatsoever.<sup>103</sup> The Minister therefore dismissed and subsequently appointed at least 130 presidents and vice-presidents of

<sup>101</sup> [https://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)

<sup>102</sup> Government's White Paper about the reform of the judiciary: [https://www.premier.gov.pl/files/files/white\\_paper\\_en\\_-\\_executive\\_summary.pdf](https://www.premier.gov.pl/files/files/white_paper_en_-_executive_summary.pdf)

<sup>103</sup> Pursuant to Article 17.1 of the July 2017 amendment of the Law on Common Courts, for the first six months after its entry into force, the Minister of Justice was capable of dismissing and appoint presidents and vice-presidents of courts without providing any explanation. <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20170001452/O/D20171452.pdf>

common courts between September 2017 and February 2018.<sup>104</sup> There are 377 courts in Poland<sup>105</sup> and the government has acknowledged that during the first six months after the law entered into force, the Minister had replaced about 18% of presidents and vice-presidents of the courts.<sup>106</sup>

The amendment to the Law on the Supreme Court adopted in December 2017 also includes provisions that allow the reopening of previously closed disciplinary proceedings against judges.<sup>107</sup> The law established the new Disciplinary Chamber<sup>108</sup> whose members were to be elected by the National Council of the Judiciary (NCJ) and whose “lay judges” were to be elected by members of the Senate.<sup>109</sup> As a consequence of the “reform” of the judiciary, the NCJ had lost its autonomy, and pursuant to the law adopted in December 2017, the majority of its members are now elected by parliamentarians, not by other judges, as was the practice in the past. The judges interviewed by Amnesty International in 2018 feared that once the new Disciplinary Chamber was elected, a series of disciplinary proceedings would commence against judges who have ruled against the wishes of the government in politically sensitive cases.<sup>110</sup> In February 2019, the President of Poland appointed the heads of the two new chambers of the Supreme Court: Disciplinary and Extraordinary.<sup>111</sup> By the time this report went to print, disciplinary proceedings against the most vocal judges critical of the “reform” of the judiciary were in full swing.

## 4.1 NEW DISCIPLINARY PROCEEDINGS

An important development in the government’s assault on the independence of the judiciary came in June 2018 when the Minister of Justice appointed the Disciplinary Prosecutor for Common Courts. In September 2018, the President of Poland appointed 10 new judges to the Disciplinary Chamber of the Supreme Court.

The position of Disciplinary Prosecutor for Common Courts was created within the “reform” of the judiciary. The post holder and his two deputies are directly appointed by the Minister of Justice for a four-year term.<sup>112</sup> The Disciplinary Prosecutor also chooses disciplinary prosecutors for the district and appeal courts.<sup>113</sup>

The law gives the Disciplinary Prosecutor and his deputies the power to investigate possible disciplinary offences pursuant to a request by the Minister of Justice, president of an appeal or district court, college of appeal or district court, National Council of Judiciary or from his own initiative.<sup>114</sup> The requirement for initiating an investigation is “establishing that there were circumstances which indicate that a disciplinary offence was committed”.<sup>115</sup>

Disciplinary Prosecutor Piotr Schab initiated the investigations against the judges, documented in this report, for one or more of the following actions with which he disagreed:

- approaching the Court of Justice of the European Union (CJEU) with preliminary questions regarding whether specific laws conform with EU law;
- publicly criticizing the government’s reform of the judiciary; or

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<sup>104</sup> The estimate (130-160 presidents and vice-presidents) by Helsinki Foundation of Human Rights, 2018, p. 16: <http://www.hfhr.pl/wp-content/uploads/2018/04/HFPC-Od-kadr-sie-zaczyna.pdf>. See also: <http://www.iustitia.pl/informacja-publiczna/2100-ostatecznie-130-prezesow-i-wiceprezesow-zostalo-odwolanych-przez-ministra-sprawiedliwosci>. The changes in the posts of presidents and vice-presidents of common courts continued even after February 2018. According to information published by the association of judges Iustitia, by May 2018, the total number of replaced presidents and vice-presidents was 204 (158 were removed by the Minister of Justice and 46 resigned). See the list: <http://monitorkonstytucyjny.eu/archiwa/3982>

<sup>105</sup> <http://sonar.wyborcza.pl/sonar/7,156422,22492032,sonarwsadach-pis-poprawia-ustawy-ziobro-powoluje-prezesow.html>

<sup>106</sup> Executive summary of the government’s White Paper on the Reform of the Polish Judiciary, March 2018, p. 6:

[https://www.premier.gov.pl/files/files/white\\_paper\\_en\\_-\\_executive\\_summary.pdf](https://www.premier.gov.pl/files/files/white_paper_en_-_executive_summary.pdf)

<sup>107</sup> Art. 124.1. The amendment of the Law on the Supreme Court entered into force in April 2018.

<sup>108</sup> The Chamber has two divisions: one serves as the first and the other as the second instance for disciplinary proceedings against judges, prosecutors, attorneys and notaries. Source: Art. 3 (Art. 27) of the Law on the Supreme Court <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/T/D20180005L.pdf>

<sup>109</sup> Under Art. 61§2 of the Law on the Supreme Court, the Senators will elect the lay members of the SC:

[http://orka.sejm.gov.pl/proc8.nsf/ustawy/2003\\_u.htm](http://orka.sejm.gov.pl/proc8.nsf/ustawy/2003_u.htm)

<sup>110</sup> Amnesty International. “Reform” of the judiciary in Poland poses risk to the right to fair trial: Briefing by Amnesty International ahead of the General Affairs Council Meeting. March 2018, p. 7.

<sup>111</sup> [https://www.rp.pl/Sedziowie-i-sady/302269952-Andrzej-Duda-powolal-prezesow-nowych-izb-Sadu-Najwyzszego.html?fbclid=IwAR1jCoP9NUtqscf2gilfdtLWWjPA\\_RO6yO9qoshPAa15Qz8cGFSo6p\\_VPBUNajwyzszego.html](https://www.rp.pl/Sedziowie-i-sady/302269952-Andrzej-Duda-powolal-prezesow-nowych-izb-Sadu-Najwyzszego.html?fbclid=IwAR1jCoP9NUtqscf2gilfdtLWWjPA_RO6yO9qoshPAa15Qz8cGFSo6p_VPBUNajwyzszego.html)

<sup>112</sup> Article 112.3 Law on Common Courts. <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>

<sup>113</sup> Article 112.6-13 Law on Common Courts

<sup>114</sup> Article 114.1 and 2 of the Law on Common Courts, emphasis added

<sup>115</sup> Article 114.1 of the Law on Common Courts

- simply participating in events where such criticism by others occurred.<sup>116</sup>

The Disciplinary Prosecutor stated that such activities are in his opinion irreconcilable with the position of a judge.

“Unfortunately, sometimes public speeches of judges are very close to political speeches... [and they do this] in connection with their work as judges, which is not acceptable.”<sup>117</sup>

The Disciplinary Prosecutor has opted for a broad definition of disciplinary offences that includes a wide range of actions, including tweets (see above: the case of Judge Zabłudowska) to formal judicial decision making (see above: the case of Judge Jęksa).

Once the Disciplinary Prosecutor has completed his investigation, he may either close it with the conclusion that there was no disciplinary offence, or he may issue an indictment identifying the alleged disciplinary offence. A disciplinary case against a judge is then heard in the first instance by a disciplinary court.<sup>118</sup> The decision as to which court an individual case will be heard in rests with the President of the Disciplinary Chamber of the Supreme Court.<sup>119</sup> In the second instance, the panel consists of two judges from the new Disciplinary Chamber and one lay judge of the Supreme Court.<sup>120</sup> Under the amended Law on the System of Common Courts, a judge may appeal the decision of the Disciplinary Chamber.<sup>121</sup> Such appeals are heard by a different panel of the same Disciplinary Chamber. The UN Human Rights Committee has clarified in its General Comment 12 on the right to fair trial that “where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is... incompatible with the Covenant.”<sup>122</sup> As the disciplinary proceedings may result in a dismissal from the office and they are also the prerequisite of a criminal liability of judges – a judge’s immunity can be removed only through disciplinary proceedings – a review of decisions should take place before a higher tribunal.<sup>123</sup>

The new system of disciplinary proceedings gives significant powers to the Minister of Justice, including:

- selection of the judges for the panels in the first instance disciplinary courts;<sup>124</sup>
- ability to file a challenge (*sprzeciw*) against a decision of a disciplinary prosecutor in a specific case;<sup>125</sup>
- right to appeal *any* first instance decision by disciplinary courts.<sup>126</sup>

The law also provides accused judges and the disciplinary prosecutor the right to appeal any first instance decision by disciplinary courts.

In October 2018, before the new disciplinary proceedings began, Judge Dariusz Mazur – spokesperson for the Association of Judges “Themis” – commented on the government’s “reforms” and the threat they present for the independence of judges in Poland: “Those who buy an axe and sharpen it usually don’t do that just to hang it on the wall.”<sup>127</sup> Judge Mazur argued that it is through the new system of disciplinary proceedings that the government of Poland seeks to further put the judiciary under political control.<sup>128</sup>

There is a lack of clarity about the criteria used by the Disciplinary Prosecutor for Common Courts to initiate disciplinary investigations. Instead of a clear definition of the activities constituting a disciplinary offence, the Law on Common Courts includes a general category of “professional offences”, namely offences against the “dignity of the office of judge.”<sup>129</sup> The judges subjected to the proceedings documented in this report

<sup>116</sup> There have also been a small number of proceedings in relation to other disciplinary offences that were not related to judges’ criticism or rulings. Source: Interview with the Disciplinary Prosecutor, 7 March 2019, Warsaw.

<sup>117</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>118</sup> In the cases against judges of Common Courts, the disciplinary courts of first instance are Appeal Courts (Article 110.1 of the Law on Common Courts).

<sup>119</sup> Article 110.3 of the Law on the System of Common Courts

<sup>120</sup> Art. 110.1.1-2., Law on Common Courts.

<sup>121</sup> Article 122.2 of the Law on the Supreme Court

<sup>122</sup> Human Rights Committee, CCPR/C/GC/32, 23 August 2007, para. 47

<sup>123</sup> The right to appeal in for example article 7(1)(a) of the African Charter does not, however, appear to be limited to criminal proceedings as such in that it allows for appeals “to competent national organs” against acts violating one’s “fundamental rights” in general.

<sup>124</sup> Art. 110a.1 Law on Common Courts

<sup>125</sup> Article 114.9 of the Law on the System of Common Courts

<sup>126</sup> Article 121.1 of the Law on the System of Common Courts

<sup>127</sup> Interview with Amnesty International, 26 October 2018, Krakow.

<sup>128</sup> [http://themis-sedziowie.eu/wp-content/uploads/2019/04/Judges\\_under\\_special\\_supervision\\_second-publication.pdf](http://themis-sedziowie.eu/wp-content/uploads/2019/04/Judges_under_special_supervision_second-publication.pdf), p. 7

<sup>129</sup> Article 107.1 of Law on the System Common Courts



received only general requests to provide “explanations” in relation to their public statements or a general allegation of “non-timely delivery of judgments”.<sup>130</sup>

Professional associations of judges in Poland have spoken out against the new system of disciplinary proceedings. The Association of Judges “Themis”, has labelled the new system of disciplinary proceedings as like an “inquisition”.<sup>131</sup> In a letter to the Vice-President of the European Commission Frans Timmermans in February 2019, the President of *Iustitia*, the Polish Judges Association, Krystian Markiewicz called the new disciplinary proceedings “repressive”. He has said that “[P]roceedings are usually initiated against judges who are active in the field of defending the rule of law, among others by educational actions, meetings with citizens and international activity. Such proceedings are also initiated against judges who asked [the CJEU] preliminary questions concerning the changes within the judicial system.”<sup>132</sup>

The disciplinary punishments for judges include admonition; reprimand; salary reduction of between 5% and 50% for a period of six months to two years; removal from a position; transfer to another location; and dismissal from the office of judge.<sup>133</sup>

## LACK OF PROCEDURAL RIGHTS FOR JUDGES UNDER DISCIPLINARY PROCEEDINGS

Under international human rights law, disciplinary proceedings against judges should follow fair trial requirements, including the principle of the presumption of innocence, the right to be tried without undue delay, and the right to defend oneself in person or with legal counsel of one’s own choosing.<sup>134</sup>

Although the Disciplinary Prosecutor for Common Courts has repeatedly stated that the disciplinary proceedings against judges generally follow ordinary criminal procedure, there are some notable exceptions, which have raised the following concerns over judges’ right to a fair hearing (see below: *International Standards and EU Law*).<sup>135</sup>

- The way the disciplinary prosecutors carry out the proceedings effectively strips judges of the right to defence lawyer in the preparatory stage of the proceedings. The Disciplinary Prosecutor for Common Courts has routinely barred some judges’ lawyers from the investigation hearings. For example, Jacek Dubois, the lawyer for Judge Igor Tuleya, was not allowed to participate in a hearing on 10 October 2018.<sup>136</sup> When Amnesty International inquired about the reasons for the denial of the presence of the judge’s legal counsel during the hearing, the Disciplinary Prosecutor Piotr Schab replied that it was in line with the law and that there was no need for a defence lawyer as the judge had been summoned only as a witness.<sup>137</sup> (For details see above: *Targeting Judges Who Turned to the CJEU with Questions*).
- Unlike in a criminal proceeding, the law permits a hearing of a disciplinary court to proceed even in the case of an excused absence of the accused judge or her/his lawyer.<sup>138</sup>
- Judges accused of disciplinary offences have only 14 days to submit written evidence in response to the charges against them. Any evidence submitted after this deadline may be considered only if the accused judge can prove it was not known to her or him earlier in the process.<sup>139</sup>

These provisions fall short of the requirements of international human rights standards and law. Under the Basic Principles on the Role of Lawyers “All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”<sup>140</sup> The European Court of Human Rights has clarified that the right to a fair trial requires that an accused person has a right to legal assistance during the initial stages of investigation.<sup>141</sup> The Court has specifically warned against the use of “incriminating statements made during police questioning by a suspect who did

<sup>130</sup> Requests to provide written explanations or summons to provide clarifications in persons delivered to judges Tuleya, Zabłudowska, Jęksa

<sup>131</sup> Association of Judges, Themis. *Judges under special supervision*. April 2019, p. 13. [http://themis-sedziowie.eu/wp-content/uploads/2019/04/Judges\\_under\\_special\\_supervision\\_second-publication.pdf](http://themis-sedziowie.eu/wp-content/uploads/2019/04/Judges_under_special_supervision_second-publication.pdf)

<sup>132</sup> <https://www.rechtersvoorrechters.nl/letter-from-the-polish-judges-association-to-frans-timmermans/>

<sup>133</sup> Article 109.1 of the Law on the System Common Courts

<sup>134</sup> Article 14 of the International Covenant on Civil and Political Rights and articles 10 and 11 of the Universal Declaration of Human Rights. See: Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. 2014. <https://undocs.org/A/HRC/26/32>

<sup>135</sup> Interview with Amnesty International, 25 October 2018 and 7 March 2019 Warsaw.

<sup>136</sup> <https://dorzeczy.pl/kraj/79983/Tuleya-po-raz-czwarty-przed-rzeczniakiem-dyscyplinarnym-Jego-pelnomocnik-zostal-wyproszony.html>

<sup>137</sup> Interview with Amnesty International, 25 October 2018, Warsaw.

<sup>138</sup> Article 113b of the Law on the System of Common Courts.

<sup>139</sup> Article 114.4 of the Law on the System of Common Courts.

<sup>140</sup> Principle 1

<sup>141</sup> *Dayanan v Turkey* (7377/03), (2009) paras. 30-32; See *Salduz v Turkey* (36391/02), Grand Chamber (2008) para54.

not have access to a lawyer”.<sup>142</sup> In this regard, the practice of the disciplinary prosecutors to summon judges as “witnesses” in the preparatory stages of the proceedings, which may or may not result in disciplinary cases against them, raises concerns over self-incrimination. In the cases documented by Amnesty International, the disciplinary prosecutors denied judges summoned as “witnesses” the right to a lawyer during the hearings.

### **LACK OF GUARANTEES AGAINST ‘POLITICAL CONTROL’ OF PROCEEDINGS**

In a July 2018 decision regarding a person facing extradition from Ireland to Poland, the CJEU stated that the “disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.”<sup>143</sup>

## **4.2 REMOVING THE INDEPENDENCE OF THE NATIONAL COUNCIL OF JUDICIARY**

The amendment to the Law on the National Council of the Judiciary (NCJ) came into force in January 2018, giving Parliament the power to appoint the 15 judges that comprise the NCJ. The Polish Constitution, however, expressly limits the number of members of the NCJ appointed by Parliament to six. On 5 March 2018, Parliament appointed the new NCJ members, 8 of whom also happen to be the new presidents or vice-presidents of courts appointed by the Minister of Justice since August 2017.<sup>144</sup>

The amendment to the Law on the NCJ also prematurely terminated the tenure of the previous NCJ members. According to the new procedure introduced by the amendment to the Law, the mandate of the “old” members expires when new members are appointed.<sup>145</sup>

On 17 September 2018, the General Assembly of the European Network of Councils for the Judiciary (ENCJ)<sup>146</sup> suspended the membership of Poland’s National Council of the Judiciary.<sup>147</sup> The ENCJ concluded that due to the 2017 “reforms”, the NCJ could no longer be considered independent of the executive and legislature. As a consequence of the suspension, the NCJ has been stripped of its voting rights and excluded from participation in ENCJ activities. The main reason for ENCJ’s decision was the process for the election of NCJ members by the Parliament. The ENCJ also noted that the amendment of the law on the NCJ “is part of an overall reform to strengthen the position of the executive, seriously infringing the independence of the judiciary”.<sup>148</sup> In November 2018, the President of ENCJ Kees Sterk stated that “the actions of the [NCJ] since its suspension... give little reason to believe that a change for the better is looming. The ENCJ learned that the [NCJ] actually started disciplinary proceedings against members of the former [NCJ], against judges who protest against the reforms, and against judges who exercise their right as European judges to send preliminary questions to the European Court in Luxembourg.”<sup>149</sup>

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<sup>142</sup> *Salduz v Turkey* (36391/02), Grand Chamber (2008) para. 55, *Nechiporuk and Yonkalo v Ukraine* (42310/04), (2011) paras. 262-263, *John Murray v United Kingdom* (18731/91), Grand Chamber (1996) para66

<sup>143</sup>

<http://curia.europa.eu/juris/document/document.jsf?text&docid=204384&pageIndex=0&doclang=EN&mode=req&dir&occ=first&part=1&cid=743687>, para 67

<sup>144</sup> <http://wyborcza.pl/7,75398,23108831,krakowa-rada-ziobrownictwa-zobacz-kim-sa-nowi-sedziowie.html>

<sup>145</sup> Article 6 of the Law on the National Council of Judiciary adopted on 8 December 2017.

<sup>146</sup> The ENCJ is the body which unites all Councils for the Judiciary of the EU member states and represents them in the EU.

<https://www.encj.eu/index.php/>

<sup>147</sup> <https://www.encj.eu/node/495>

<sup>148</sup> See note 7, p. 4.

<sup>149</sup> <https://www.encj.eu/node/510>



*Demonstration against the laws infringing the independence of the judiciary outside the ruling party "Law and Justice" headquarters in Warsaw, 26 July 2017. The placards read: "Constitution". ©Grzegorz Żukowski/Amnesty International*

## 4.3 THE SUPREME COURT

The amendment to the Law on the Supreme Court entered into force in April 2018 and resulted in – among other things – the forced retirement of the 27 out of the 74 Supreme Court judges. This was due to the lowering of the retirement age for Supreme Court judges from 70 to 65 years by the amendment.<sup>150</sup>

Among judges forced to retire was the First President of the Supreme Court Małgorzata Gersdorf, aged 65, whose 6-year term of office was due to finish in 2020. Her forced retirement was deemed unconstitutional by many experts and observers, including Amnesty International.<sup>151</sup>

The terms of the 27 forcibly retired Supreme Court judges expired on 3 July 2018.<sup>152</sup> Three of them applied for extensions of their tenure, which the NCJ rejected. The chairman of the NCJ, Leszek Mazur, stated that he would not process their appeals.<sup>153</sup> In August 2018, the three judges appealed the NCJ decision at the Supreme Court arguing that their tenure had not terminated on 3 July 2018.<sup>154</sup> On 30 August, the Supreme Court referred preliminary questions to the CJEU with respect to the three judges.<sup>155</sup> The Supreme Court sought clarification on whether:

<sup>150</sup> Article 37.1 of the Law on the Supreme Court.

<sup>151</sup> Art.183 para 3 of the Constitution of Poland sets the tenure of the President of the Supreme Court for six years. For more details, see also Themis, Association of Judges, 'Alarming revolution within the Polish Supreme Court': <http://themis-sedziowie.eu/wp-content/uploads/2018/07/Revolution-within-the-Polish-Supreme-Court-final.pdf>; Amnesty International has also criticised the law as an attempt to oust the current Supreme Court President, calling on the Senate to reject it, see <https://www.amnesty.org/en/latest/news/2018/07/poland-attempts-to-oust-the-current-supreme-court-president-must-be-rejected/>

<sup>152</sup> Art.111 para.1 and Art. 37 of the Law on the Supreme Court:

<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/T/D201800005L.pdf>

<sup>153</sup> <http://prawo.gazetaprawna.pl/artykuly/1193143,mitera-przewodniczacy-krs-nie-przesle-do-sn-odwolan-3-sedziow.html>

<sup>154</sup> [http://www.sn.pl/aktualnosci/SitePages/Komunikaty\\_o\\_sprawach.aspx?ItemSID=234-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty\\_o\\_sprawach](http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=234-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach)

<sup>155</sup> Text of the preliminary questions in Polish: <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20po%207-18.pdf>

- under EU law that protects judges against age-based discrimination the Supreme Court is authorized to strike down the provision of the law that forced a number of judges to retire; and<sup>156</sup>
- the new Disciplinary Chamber, composed of judges elected under the new rules, constituted an independent tribunal within the meaning of EU law.<sup>157</sup>

The relevance of this case goes beyond the individual cases of the Supreme Court judges, all of whom requested to remain in their posts after reaching the new (lowered) retirement age. The CJEU review is the last resort to assess whether the new legislation – under which the members of the NCJ are elected by members of parliament – is in line with EU law. Under the new legislation, the Disciplinary Chamber of the Supreme Court is “composed exclusively of judges selected by [the NCJ]”.<sup>158</sup> The Supreme Court essentially sought a clarification from the CJEU whether the Disciplinary Chamber, appointed by a body with questionable independence, can be considered “an independent court or tribunal within the meaning of EU law”.<sup>159</sup>

On 24 September 2018, the EC referred Poland to the CJEU over the Law on the Supreme Court.<sup>160</sup> (see below: *Response of the EU*) In November 2018, the CJEU granted the request of the EC for interim measures to prevent the implementation of the law forcing the Supreme Court judges to retire. In December 2018, Poland responded with an amendment to the law reinstating the Supreme Court judges who had been forced to retire prematurely.

In early hours of 26 April 2019, MPs adopted another amendment to the Law on the Supreme Court. This amendment provides for the discontinuation of the appeal of the three Supreme Court judges who were forced to retire under the previous amendment to the Law on the Supreme Court.<sup>161</sup>



Protest in front of the Supreme Court on 16 July 2017 in Warsaw. © Grzegorz Żukowski/ Amnesty International

<sup>156</sup>

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=210388&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3978813>

<sup>157</sup> Case C-585/18, See:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=210384&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3980131>

<sup>158</sup> Case C-585/18, Question no. 1

<sup>159</sup> Case C-585/18, Question no. 1

<sup>160</sup>

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=207961&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1490238>

<sup>161</sup> Article 8 of the amendment. At the time of writing the case was heard by the CJEU to which the Supreme Court turned with preliminary questions.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=207961&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1490238>

## FURTHER AMENDMENTS TO THE LAW ON THE SUPREME COURT

On 20 July 2018, the Parliament adopted another law that amends, among other things, the Law on the Supreme Court and the Law on the National Council of the Judiciary. The President signed the amendment on 26 July and the law entered into force on 10 August.<sup>162</sup> A crucial change in this law involves the procedure for the election of the new President of the Supreme Court. The Law lowers the required quorum: under the amendment, two thirds (i.e. 80 out of 120) of the Supreme Court judges need to be present at the election, as opposed to the previous requirement of 110.<sup>163</sup>

The NCJ has elected many new Supreme Court judges who were reported to be associated with the current ruling party. Among the 12 candidates applying for positions in the Disciplinary Chamber, there are six prosecutors alleged to have close links to the Prosecutor General, who is also the Minister of Justice.<sup>164</sup> One example is prosecutor Małgorzata Bednarek who, until her appointment in September 2019 to the Disciplinary Chamber, was a prosecutor promoted by the Minister of Justice to the Office of the National Prosecutor.<sup>165</sup>

Although the implementation of the 2017 amendment of the Law on the Supreme Court has been partially halted by the intervention of the European Commission, the Law on the Supreme Court appears to have two main objectives: a) to terminate the term of the existing Supreme Court judges and to form the “new” Supreme Court consisting of judges elected by the politicized National Council of the Judiciary; and b) to ensure that the second instance court in the disciplinary proceedings is the new Disciplinary Chamber of the Supreme Court, consisting of judges vetted by the politicians.

## 4.4 INTERNATIONAL STANDARDS AND EU LAW

While disciplinary proceedings are a legitimate mechanism to ensure that judges and prosecutors are accountable, state actors must refrain from using this mechanism as a weapon to silence those who have criticized or are perceived to have criticized the government. The UN Special Rapporteur on the independence of judges and lawyers noted in a 2007 report that “[g]overnments often regard judges’ and lawyers’ efforts to defend human rights and fundamental freedoms as political interference.”<sup>166</sup>



To ensure the independence of the judicial system, judges, lawyers and prosecutors must be free of any interference, pressure or threat that might affect the impartiality of their judgments and decisions.<sup>167</sup>

A key element of the requirement of judicial independence is *non-interference*. Under principles 2 and 4 of the Basic Principles on the Independence of the Judiciary, this means that “no authority, private group or individual may interfere in judicial decisions; they must respect and abide by the decisions of the judiciary. Judges shall decide matters presented before them not only impartially and in accordance with the law, but without *threats or interference*.”<sup>168</sup>

Cases documented in this report involve disciplinary proceedings initiated against judges for publicly expressing their concerns and criticism of the government’s reform of the judiciary. Under international human rights standards, members of the judiciary are “*entitled to freedom of expression*, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”<sup>169</sup>

When it comes to disciplinary proceedings against judges, the Basic Principles clarify that a “charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously

<sup>162</sup> <https://www.tvn24.pl/wiadomosci-z-kraju.3/prezydent-podpisał-ustawe-o-sadzie-najwyzszym.856682.html>;

<https://www.newsweek.com/judge-who-wont-retire-quietly-opinion-1066526>

<sup>163</sup> <https://prawo.gazetaprawna.pl/artykuly/1172616.wybor-i-prezesa-sn-zmiany-w-procedurze-projekt-pis.html>

<sup>164</sup> <http://wyborcza.pl/7,75398,23815901,krs-wybiera-sedziow-sn-mariusz-muszynski-zrezygnowal.html>

<sup>165</sup> <http://katowice.wyborcza.pl/katowice/7,35063,23530282,inkwizytorka-od-ziobry-trafi-do-sadu-najwyzszego-sedziowie.html>

<sup>166</sup> A/HRC/4/25, para 16. <https://undocs.org/A/HRC/4/25>

<sup>167</sup> Report of the Special Rapporteur on the independence of judges and lawyers, June 2017, A/HRC/35/31, para 70

<sup>168</sup> Report of the Special Rapporteur on the independence of judges and lawyers, June 2017, para 71

<sup>169</sup> Principle 8 of the Basic Principles on the Independence of the Judiciary

and fairly under an appropriate procedure. The judge shall have the **right to a fair hearing**.<sup>170</sup> Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review.<sup>171</sup> In her 2014 report, the UN Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, emphasized the importance of independence of a body holding judges and prosecutors accountable: “That body should foster transparency in all disciplinary proceedings and provide defendants with procedural safeguards, including the right to present a defence and to appeal to a competent higher court.”<sup>172</sup>

## EU LAW

Article 19(1) of the Treaty on European Union, read in connection with Article 47 of the Charter of Fundamental Rights of the European Union, requires that member states, including Poland, guarantee the right to an effective remedy before an independent and impartial court. The new disciplinary proceedings characterized by extensive powers of the Minister of Justice, and the special position of the Disciplinary Chamber of the Supreme Court,<sup>173</sup> led the European Commission to a conclusion in April 2019 that Poland does not comply with the EU law. Specifically, the EC considered that the Disciplinary Chamber of the Supreme Court is not an independent body.<sup>174</sup>



Assembly in front of the European Commission Representation Office in Poland on 25 June 2018, calling on Europe to continue to urge Poland to uphold the rule of law.  
© Barbora Černušáková/ Amnesty International

<sup>170</sup> Principle 17 of the Basic Principles on the Independence of the Judiciary

<sup>171</sup> Principle 20 of the Basic Principles on the Independence of the Judiciary; Principle 15.6 of Bangalore Principles

<sup>172</sup> <https://undocs.org/A/HRC/26/32>, para 90

<sup>173</sup> Disciplinary Chamber has its own President and budget (Article 7.4 of the Law on the Supreme Court). Unlike the heads of other Supreme Court chambers, the President of the Supreme Court cannot second judges from the Disciplinary Chamber to any other chamber of the Supreme Court without the permission of the President of the Disciplinary Chamber (Article 35.3 of the Law on the Supreme Court)

<sup>174</sup> [http://europa.eu/rapid/press-release\\_IP-19-1957\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1957_en.htm)

# 5. THE SITUATION OF PROSECUTORS

**“Without an independent prosecution, you cannot have justice.”**

Krzysztof Parchimowicz, Chairman of Association of Prosecutors *Lex Super Omnia*<sup>175</sup>

The precursor to the reforms on the judiciary were changes to the Law on the Public Prosecutor’s Office in 2016, which strengthened the office of the Minister of Justice. The law merged the function of the Minister of Justice with the Prosecutor General of Poland, and equipped him with new competencies, including the power to give written instructions to all the public prosecutors concerning the content of any individual case.<sup>176</sup> The amendment also gave the superior public prosecutors the right to change or revoke a decision of a subordinate public prosecutor,<sup>177</sup> and the Minister of Justice, as the Prosecutor General, is able to change or revoke decisions taken by any public prosecutor.<sup>178</sup> The Minister of Justice also acquired new powers in the administration of the prosecution system; for example, concerning the proposal of the National Prosecutor,<sup>179</sup> the Prosecutor General/ Minister of Justice appoints and dismisses the heads of district, county and regional prosecution offices.<sup>180</sup>

Prosecutors play a critical role in ensuring that victims and survivors of human rights violations enjoy effective remedy. They oversee investigations and are also of critical importance in ensuring suspects’ human rights in criminal proceedings. The European Court of Human Rights has recognized the key role that prosecutors play and has observed that “both the courts and the investigation authorities must remain free from political pressure”.<sup>181</sup> Prosecutors should be autonomous in their decision-making and, while cooperating with other institutions, should perform their respective duties free from external pressures or interference from the executive power or the parliament, having regard to the principles of separation of powers and accountability.<sup>182</sup>

Commenting on the situation in Poland in June 2016, the Council of Europe Commissioner for Human Rights warned that the Minister of Justice’s enhanced powers had not been balanced by “clear and solid safeguards against abuse... [He] now has the power to intervene at each stage of legal proceedings led by

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<sup>175</sup> Interview with Amnesty International, 7 March 2019, Warsaw

<sup>176</sup> Article 13.2 of the Law on the Public Prosecutor Office. For details in English, see: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e), paras. 45-60

<sup>177</sup> Article 8 of the Law on the Public Prosecutor Office

<sup>178</sup> Article 13.2

<sup>179</sup> The National Public Prosecutor is the deputy of the Public Prosecutor General. The

<sup>180</sup> Article 15.1 of the Law on Prosecution. In Polish: rejonowa, okręgowa, regionalna. <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000177/U/D20160177Li.pdf>

<sup>181</sup> *Guja v. Moldova* (Grand Chamber), no. 14277/04, para. 86.

<sup>182</sup> *Kolevi v. Bulgaria*, no. 1108/02, 05/02/2010, paras.148-149; *Pantea v. Romania*, no. 33343/96, 03/09/2003, para 238; *Moulin v. France*, no. 37104/06, 23/02/2011, para. 57.

any prosecutor by issuing instructions, guidelines and orders on specific measures relating to individual cases.”<sup>183</sup>

In 2016, the Prosecutor General used his powers to replace the chiefs of all 11 regional prosecutors' offices; 44 out of 45 chiefs of county prosecution offices and their deputies; and 307 out of 342 chiefs of district prosecution offices.<sup>184</sup> In addition to these changes, by the end of 2016, as many as 500 out of a total of 6,000 prosecutors in Poland had been either demoted to a lower position, transferred to another location or forced to retire.<sup>185</sup>

In February 2017, a group of prosecutors formed an association called Lex Super Omnia.<sup>186</sup> It soon became known for statements critical of the government's "reform" of the judiciary. Its chairman, Krzysztof Parchimowicz, noted "[m]y problems started with interviews: all of a sudden, someone was criticizing prosecutors. [At the same time], the prosecution became controlled by friends of politicians. They broke all the rules on professional progression; everything was happening in a nepotistic way."<sup>187</sup>

Prosecutor Parchimowicz observed that these new practices demoralized prosecutors: "Without an independent prosecution, you cannot have justice."<sup>188</sup>

Krzysztof Parchimowicz has faced three disciplinary proceedings in relation to media statements in which he criticized the Prosecutor General and the National Prosecutor. In relation to all three proceedings, in March 2018 the disciplinary court held that although a prosecutor does not have the right to express her or his opinions publicly without informing their superiors, public damage caused by Krzysztof Parchimowicz's statements was minimal.<sup>189</sup> Despite this, the deputy National Prosecutor continues to press new disciplinary charges against him.<sup>190</sup> (See below: *Solidarity with Prosecutors*)

"The law permits us to establish professional associations, and as members we have the right to freedom of expression. However, the disciplinary prosecutor seems to think the Law on Prosecution is above international human rights law," Prosecutor Parchimowicz told Amnesty International.

On 6 May 2019, a disciplinary panel at the office of the Prosecutor General held a hearing with prosecutor Piotr Wójtowicz from the district prosecutor's office in the town of Legnica.<sup>191</sup> In July 2017, he took part in protests demanding the independence of the judiciary. Before that, he was one of the prosecutors demoted after the changes in the prosecution service in 2016; first from a position of an appeal prosecutor to regional, and then from regional to district prosecutor.<sup>192</sup> During the protests in 2017 held in front of the Regional Court in Legnica, Prosecutor Wójtowicz said: "I have nothing to lose. What could they do to me? Move me to Elk? [a town in north-eastern Poland, about 600 km from Legnica.]"<sup>193</sup>

That statement triggered disciplinary proceedings. The deputy Disciplinary Prosecutor's investigation concluded in September 2018 that prosecutor Wójtowicz had not breached the obligation to remain apolitical. However, the deputy to the Prosecutor General did not share that view and appealed the decision.<sup>194</sup>

"This case is not merely about whether prosecutors enjoy the right to freedom of expression and assembly, it is about the future of prosecution in Poland," commented Joanna Jakubowska-Siwko, the lawyer of prosecutor Wójtowicz.<sup>195</sup>

On 11 June 2019, the disciplinary court dropped the charges against prosecutor Wójtowicz of offending the dignity of public office.<sup>196</sup>

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<sup>183</sup> Report by Nils Muiznieks Commissioner for Human Rights of the Council of Europe, para 95: <https://rm.coe.int/16806db712>

<sup>184</sup> In Polish: *Raport: Prokuratura pod specjalnym nadzorem*. November 2018, p. 7, <https://for.org.pl/a/6413,raport-prokuratura-pod-specjalnym-nadzorem-kadry-i-postepowanie-dobrej-zmiany>

<sup>185</sup> Amnesty International, *Rule of Law and Human Rights Concerns in Poland*, Update. May 2017. p. 7

<https://www.amnesty.org/download/Documents/EUR3762272017ENGLISH.pdf>

<sup>186</sup> <http://lexso.org.pl/o-nas/>

<sup>187</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>188</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

<sup>189</sup> Interview with Amnesty International, 7 March 2019, Warsaw. Online communication 21 January 2019.

<sup>190</sup> See: <https://oko.press/sad-nad-niezaleznym-prokuratorem-krzysztofem-parchimowiczem/>

<sup>191</sup> <https://oko.press/scigani-prokuratorzy-juz-nie-beda-sami-wspieraja-ich-prawnicy-sedziowie-i-zwykli-obywatele/>

<sup>192</sup> Upon the merger of the position of the Prosecutor General and the Minister of Justice, which took effect in March 2016, as many as 500 out of the total 6,000 prosecutors in Poland were either degraded to a lower position, transferred to another location or forced to retire. Amnesty International interviewed two of the demoted prosecutors on 23 March 2017 in Warsaw,

<https://oko.press/sad-nad-prokuratorem-wojtowiczem-za-obrone-wolnych-sadow/>

<https://oko.press/sad-nad-prokuratorem-wojtowiczem-za-obrone-wolnych-sadow/>

<sup>195</sup> <http://wyborcza.pl/7,75398,24757958,dyscyplinarka-za-obrone-sadow-sprawa-prokuratora-wojtowicza.html>

<sup>196</sup> Information obtained by Amnesty International from the legal team of the Prosecutor Wójtowicz on 11 June 2019.



At the time of writing disciplinary proceedings were ongoing in a preparatory stage involving six prosecutors, as well as five proceedings in which the prosecutors had already received indictments for their public statements or participation in protests and public events.<sup>197</sup>

Prosecutors play a crucial role in the administration of justice and thus also the protection of human rights, including the right to remedy for victims of crime. Under the UN Guidelines on the Role of Prosecutors, they should “carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination”.<sup>198</sup> There are concerns that pursuant the 2016 reform compromised the ability of the prosecution service to carry out its duties in line with these principles. The 2016 changes subordinated the prosecution office to a politician – the Minister of Justice – who became the chief prosecutorial body.<sup>199</sup>

## SOLIDARITY WITH PROSECUTORS

As the disciplinary proceedings against prosecutors escalated in the first half of 2019, their peers and other activists responded with solidarity actions. In April 2019, the court of first instance was forced to postpone the disciplinary hearing for Krzysztof Parchimowicz due to the large number of supporters who turned up.<sup>200</sup> The disciplinary panel was expected to hold a hearing into disciplinary charges against Krzysztof Parchimowicz for a statement of Lex Super Omnia from February 2017.<sup>201</sup> In the statement, the association expressed concerns about weaponizing the prosecution in a case against a Krakow judge who issued a not-guilty judgment in a case involving medical doctors. The Minister of Justice was one of the plaintiffs.<sup>202</sup> Lex Super Omnia stated that the proceedings against the Kraków judge were an attempt to influence the decision-making of courts and called them unlawful.<sup>203</sup> In response, the disciplinary prosecutor charged three members of the association, including Krzysztof Parchimowicz, with the “offence against the dignity of the office of a public prosecutor”.

On 11 April 2019, dozens of supporters of Prosecutor Parchimowicz, comprising judges and lawyers as well as activists involved in various protests in Poland, came to the disciplinary hearing. Krzysztof Parchimowicz’s lawyer requested a change of room to enable full public participation in the hearing; the disciplinary panel granted the request and adjourned the hearing.

“We go to each other’s hearings and inform others, including judges and lawyers about them,” explained Prosecutor Parchimowicz.<sup>204</sup>

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<sup>197</sup> Disciplinary proceedings in the stage “in personam” against: Wojciech Sadrakuła, Ewa Wrzosek, Krzysztof Parchimowicz, Katarzyna Gembalczyk, Dariusz Korneluk. There were also proceedings against Jacek Kaucz who died in March 2019.

<sup>198</sup> Guidelines, Article 13

<sup>199</sup> Venice Commission, Opinion on the Act of the Public Prosecutors Office, December 2017, p. 10

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e)

<sup>200</sup> <https://oko.press/sad-nad-niezaleznym-prokuratorem-krzysztofem-parchimowiczem/>

<sup>201</sup> <http://lexso.org.pl/2017/02/14/stanowisko-stowarzyszenia-w-sprawie-instrumentalnego-podejmowania-sledztw/>

<sup>202</sup> <https://www.tvn24.pl/wiadomosci-z-kraju,3/sledztwo-ws-sedzi-prowadzila-proces-ws-smierci-ojca-ziobry,713165.html>; and:

<https://www.tvn24.pl/wiadomosci-z-kraju,3/proces-ws-smierci-jezego-ziobry-sad-odrzucil-wnioski-oskarzycieli,708244.html>

<sup>203</sup> <http://lexso.org.pl/2017/02/14/stanowisko-stowarzyszenia-w-sprawie-instrumentalnego-podejmowania-sledztw/>

<sup>204</sup> Interview with Amnesty International, 7 March 2019, Warsaw.

On 6 May 2019, a large group of supporters gathered at the disciplinary court hearing with Piotr Wójtowicz. Holding placards #WolnaProkuratura (Free Prosecution), the supporters filled the hall of the office of the National Prosecutor.



Picket at the National Public Prosecutor's Office, 28 February 2019. ©Inicjatywa obywatelska Wolna Prokuratura (Free Prosecution)

# 6. IMPACT ON PEOPLE

“Law is there to protect you, use it as a tool, don’t be afraid of it.” Elżbieta Podleśna, a human rights activist, learned these words in the 1980s from her father, a former judge and member of Solidarity. “I would go to a Christmas panto at the court, so I associate courts with that and a cartoon “*Well, just you wait, rabbit!*”<sup>205</sup> and the smell of oranges, paper and robes,” she reflected.<sup>206</sup>

Elżbieta Podleśna has had her fair share of experience of police stations, courtrooms and lawyers’ offices. She is one of 14 women who on 11 November 2017 attempted to join the Independence Day march in Warsaw with a banner reading “Fascism Stop”. Some of the marchers attacked the 14 women verbally and physically, injuring several of them, including Elżbieta Podleśna.



Artwork depicting Elżbieta Podleśna. “Activism is saint, sweet.” © Marta Frej

In early May 2019, Elżbieta Podleśna travelled to Belgium and the Netherlands to talk to Amnesty International and the public about the situation of activists in Poland. On 6 May, the morning of her return to Warsaw, police raided her house at 6am. They arrested and detained her for several hours on suspicion of “offending religious beliefs.”<sup>207</sup> The police claimed to have found in Elżbieta Podleśna’s home copies of posters depicting the Virgin Mary with a halo around her head and shoulders in the colours of the LGBTQ flag.<sup>208</sup> If convicted, Elżbieta Podleśna could be sentenced to two years in prison. Amnesty International stated that such posters do not represent a criminal

<sup>205</sup> A famous Soviet cartoon in the 1980s featuring Rabbit who routinely outsmarts Wolf. [https://en.wikipedia.org/wiki/Well,\\_Just\\_You\\_Wait!](https://en.wikipedia.org/wiki/Well,_Just_You_Wait!)

<sup>206</sup> Interview with Amnesty International, 3 May 2019.

<sup>207</sup> Article 196 of the Criminal Code. <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970880553>

<sup>208</sup> Article 196 of the Criminal Code

offence and are protected under the right to freedom of expression.<sup>209</sup>

Elżbieta Podleśna has been participating in public protests since April 2016, when she joined an assembly challenging a nationalist march in Warsaw. Her peaceful activism has resulted in 14 proceedings against her under both the Code of Minor Offences and the Criminal Code. It is not the proceedings itself that she fears but the potential lack of justice. "If I break the law, I want the judge to say that. But I also want an acknowledgement of *why* I broke the law in an action of civil disobedience."<sup>210</sup>

A prominent TV journalist told Amnesty International during the protests for independent judiciary in July 2017 that "[p]oliticians don't like journalists and it is supposed to be so. Journalists scrutinize the government, write about their affairs, write about injustice. Cases of civil complaints against journalists are common all around the world. I myself faced complaints by politicians over the years. But I felt safe because we had free courts."

Andrzej Majdan, an activist whose status has been changed by the prosecutor from victim to suspect in criminal proceedings concerning violence during an assembly (see the case below), commented: "From the perspective of an innocent person facing criminal charges in politicized proceedings, independent courts are the only chance for objective and fair assessment of my case."<sup>211</sup>

Amnesty International has documented extensively the difficulties which protestors such as Elżbieta Podleśna have experienced with the justice system.<sup>212</sup> Since the change of the Law on Assemblies in 2017,<sup>213</sup> the simple act of peacefully assembling to express collective dissent has landed hundreds of protestors in police custody and in lengthy court proceedings in their attempts to defend themselves against prosecution.<sup>214</sup> For the protestors but also for all those who may want to lawfully express their opinions about public affairs without fear of repercussions, the courts are of critical importance to safeguard people's rights to freedom of expression and assembly against those in power.

While the investigation against Judge Jęksa solely for his ruling into a case of a protestor (see above: *Prosecuted for Rulings*) has been the most explicit example of the use of the new system of disciplinary proceedings aiming to discipline and silence a judge, Amnesty International has documented other examples of pressure on judges or prosecutors for their roles in upholding the human rights of protestors.

## 6.1 CASE OF JUDGE DOMINIK CZESZKIEWICZ

Judge Dominik Czeszkiewicz from the District Court in Suwałki in north-eastern Poland issued a decision in January 2017 in the case of a group of activists who had protested against a candidate of the Law and Justice Party during the opening of an exhibition in March 2016. Referring to the European Convention on Human Rights and other standards, Judge Czeszkiewicz found the activists not guilty of disturbing public order by "shouting, making noise or causing alarm".<sup>215</sup> The police appealed the decision. The media subsequently reported that on 25 March 2017, the deputy Minister of Justice met with Regional Court Judge Jacek Sowul, who was responsible for the appeal.<sup>216</sup> On 6 April, Judge Sowul overturned the not guilty verdicts and ordered a re-examination of the case.<sup>217</sup> It took another year to reach the final decision. In May 2018, the District Court in Suwałki held that the activists had disrupted public order but did not impose any penalty against them.<sup>218</sup>

The case attracted the attention of high-ranking politicians from the ruling Law and Justice Party who fiercely criticized Judge Czeszkiewicz's original decision exonerating the activists. In January 2018, the deputy

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<sup>209</sup> <https://www.amnestyusa.org/press-releases/activist-arrested-in-poland-and-house-raided-after-amnesty-international-meeting/>

<sup>210</sup> Meeting with Amnesty International, 3 May 2019, Den Haag.

<sup>211</sup> Communication with Amnesty International, 20 May 2019.

<sup>212</sup> Amnesty International. *Poland: On the Streets to Defend Human Rights*. October 2017 (Index: EUR 37/7147/2017); Amnesty International. *The Power of the Street*. June 2016 (Index: EUR 37/8525/2018);

<sup>213</sup> In December 2016, the Parliament adopted an amendment to the Law on Assemblies, which provided that "cyclical demonstrations" had priority over any other assemblies at that location and at those times. The law entered into force in April 2017 and served as the basis for bans on any counter-assemblies in central Warsaw occurring in the vicinity of the pro-governmental "cyclical" rallies. For details see: Amnesty International, *The Power of the Street*.

<sup>214</sup> Amnesty International, *The Power of the Street: Protecting the Right to Peaceful Protest in Poland*. June 2017, p. 6

<https://www.amnesty.org/en/documents/eur37/8525/2018/en/>

<sup>215</sup> Article 51.1 of the Code of Petty Offences

<sup>216</sup> <https://www.tvn24.pl/wiadomosci-z-kraju.3/suwalki-sedzia-jacek-sowul-i-kulisy-wyroku-przeciwko-dzialaczom-kod.784627.html>

<sup>217</sup> <https://oko.press/sad-suwalkach-odpuszcz-dzialaczom-kod-beda-sadzeni-trzeci/> or <https://www.tvn24.pl/wiadomosci-z-kraju.3/suwalki-sedzia-jacek-sowul-i-kulisy-wyroku-przeciwko-dzialaczom-kod.784627.html>

<sup>218</sup> <http://wiadomosci.gazeta.pl/wiadomosci/7,114883,23444733,krzyczeli-na-wiecu-senator-anders-sa-winni-ale-sedzia-nie.html>

Minister of Interior, Jarosław Zieliński, who was among the politicians who took part in the exhibition opening, stated in a radio interview that Judge Czeszkiewicz “encouraged the breaches of the law”<sup>219</sup>

On 26 January 2018, the College of Judges of the Regional Court in Suwałki decided to open disciplinary proceedings against Judge Czeszkiewicz. He told Amnesty International: “After the [first *not guilty*] decision everybody was telling me to be careful. A few months ago, someone told me disciplinary proceedings against me have started. Now I know that they were simply waiting for me to make a mistake.”<sup>220</sup>

On 17 January 2018, Judge Czeszkiewicz was assigned a criminal case involving a minor. He scheduled the child’s interview for 26 January. The president of the Regional Court intervened and claimed that the case was urgent and the minor should have been interviewed faster. The case became the basis of disciplinary proceedings against Judge Czeszkiewicz.<sup>221</sup>

The proceedings were conducted between January and May 2018. In April 2018, the deputy disciplinary prosecutor at the Regional Court in Suwałki issued a disciplinary indictment against Judge Czeszkiewicz, alleging procedural mistakes by not scheduling the interview with the minor promptly enough.<sup>222</sup> On 28 May 2018, the deputy disciplinary prosecutor changed his April decision and discontinued the proceedings. He held that there were no grounds to open the case against Judge Czeszkiewicz and stated that the “disciplinary effect” had been already achieved by the proceedings undertaken thus far.<sup>223</sup>

That case took place before the full implementation of the new system of disciplinary proceedings. Neither the Disciplinary Prosecutor for the Common Courts nor the members of the new Disciplinary Chamber of the Supreme Court had been nominated. With the advent of the new system of disciplinary proceedings, the project to silence judges and subordinate them to the executive has been streamlined and made much more efficient. Concern continues among judges, prosecutors and those pursuing their rights through the courts that the new mechanism for disciplinary proceedings will make it easier to target judges and further undermine the independence of the judiciary.

## 6.2 CASES OF PROTESTORS

### 14 WOMEN

On 11 November 2017, during the annual Independence Day march in Warsaw, 14 women stood near the Poniatowski bridge and opened a 7 metre-long banner saying “Fascism Stop”. Some of the participants responded by verbally and physically attacking the women. Videos obtained by Amnesty International depict marchers kicking, hitting, spitting on and verbally abusing the 14 women. Some people grabbed Elżbieta Podleśna (see above) by the neck and dragged her on to the pavement. Others violently pushed one of the women protestors to the ground; she lost consciousness and had to be attended by medical personnel.

Some of the volunteers from the march’s security tried to protect the women, but no police were on the scene to protect them or ensure public order until after around 30 minutes.<sup>224</sup> Upon arrival, following the call of the women, the police ID-checked the women and questioned their presence at the march, implying that they were provocateurs and had got themselves into trouble deliberately. The police did not approach or question any of the marchers.

<sup>219</sup> Radio 5 interview with Zieliński (in Polish) <https://radio5.com.pl/pierwszy-gosc-w-2018/>

<sup>220</sup> Interview with Amnesty International, 25 February 2018, Białymstok

<sup>221</sup> On 26 January 2018, the College of Judges of the Regional Court in Suwałki decided to open disciplinary proceedings against Judge Czeszkiewicz: [https://siecobywatelska.pl/wp-content/uploads/2018/02/A\\_2018\\_02\\_15\\_09\\_09\\_57\\_286.pdf](https://siecobywatelska.pl/wp-content/uploads/2018/02/A_2018_02_15_09_09_57_286.pdf)

<sup>222</sup> Phone conversation with Judge Czeszkiewicz on 20 April 2018.

<sup>223</sup> Decision on file with Amnesty International.

<sup>224</sup> Phone interview with Amnesty International, 14 November 2017



14 women attacked during Independence march protest on 11 November 2017 ©Tomasz Stępień/OKO.press

On 5 December 2017, the police authorities informed Amnesty International in a letter that the police operations on 11 November addressed the situation adequately and within the limits of the law.<sup>225</sup>

To their astonishment, the women learned in February 2018 that the police had opened an investigation against 13 of them for “interference with a lawful assembly”. Since the 2017 amendment of the Law on Assemblies, the Independence March qualifies as a “cyclical assembly” and any counter-assembly must be at a mandatory distance of at least 100 metres. The police charged nine of the women under Article 52.2 of the Code of Minor Offences. On 27 September 2018, the District Court in Warsaw Śródmieście found them guilty and ordered them to pay a fine of 200 zloty (around 50 Euros) and the costs of the legal proceedings. Their appeal was pending at the time of writing.<sup>226</sup>

The women filed a complaint on 21 November 2017 with the Regional Prosecutor in Warsaw alleging grievous bodily harm.<sup>227</sup> Among the evidence submitted were photos and videos from the march, and medical records of the injuries sustained.

In September 2018, the Prosecutor decided to discontinue the investigation into the women’s complaint, concluding that they had not suffered “grievous bodily harm” and that although the Prosecutor found that the attack and the violence against them met the threshold for three other criminal offences, there was no “public interest” to justify public prosecution into the case.<sup>228</sup>

The Prosecutor’s decision further stated that “...the attackers did not intend to administer a joint beating of the victims but rather show their discontent with the fact that the victims were situated on the route of their march. The location of the injuries suffered by the victims (mainly legs, buttocks, wrists), their nature (bruising, skin abrasions, grazing) indicate that the violence... was directed at less crucial parts of the body...”<sup>229</sup>

The women lodged an appeal against the Prosecutor’s decision to discontinue the proceedings and the case remains pending. On 13 February 2019, a judge ordered that the investigation be re-opened. The case was assigned to another prosecutor within the Regional Prosecution in Warsaw who decided on 19 March 2019 that there was in fact a public interest in continuing with a public prosecution.<sup>230</sup>

<sup>225</sup> The letter is on file with Amnesty International.

<sup>226</sup> The appeal hearing was scheduled for 14 June 2019.

<sup>227</sup> Article 157.1 of the Criminal Code

<sup>228</sup> Decision of the prosecutor from 31 August 2018 on file with Amnesty International.

<sup>229</sup> The decision of the prosecutor from 19 March 2019.

<sup>230</sup> The decision of the prosecutor from 19 March 2019.

## ANDRZEJ MAJDAN

Andrzej Majdan is a 61-year-old citizen journalist,<sup>231</sup> recording public protests and events for an online channel for activists.<sup>232</sup> In June 2017, he was a volunteer-guard during an assembly organized by the Committee for the Defence of Democracy (Komitet Obrony Demokracji, KOD) to mark the anniversary of a large protest of workers and students in 1976, during which two people died and almost 200 were injured.<sup>233</sup> Andrzej Majdan told Amnesty International: "I was recording the protest wearing a high-vis vest with the logo of KOD. At some point, a group of counter-protestors appeared who started disrupting the demonstration. There were only about 4 local police officers and no state police present... The group [of counter-protestors] started to shout: 'Death to the enemies of the fatherland!' and other chants. At first, the marshals removed them but they continued... they moved on the side of the assembly and opened a banner."<sup>234</sup>

As Andrzej Majdan continued to film the incident, one of the counter-protestors approached him and grabbed his backpack.

"More men emerged and one of them kicked me and punched me in my face... Then someone attacked me from the back and then some more people emerged and started kicking me... Eventually the KOD marshals came and [my attackers run away]. I tried to hold one of them by his leg," he said.<sup>235</sup>

The police eventually came 20 minutes later and initially tried to tell Andrzej Majdan that nothing had happened. The next day a group of KOD activists reported the case at a police station in Warsaw.

In a reaction to the attack, the speaker of the parliamentary club of the governing Law and Justice Party, Beata Mazurek, stated that "Every action provokes a reaction... the situation should not have happened, but I also understand them."<sup>236</sup> In similar vein, the then Minister of Interior blamed the opposition, specifically the Civic Platform party: "They incite, cheer and strive for aggression on the streets of Polish towns."<sup>237</sup>

During the investigation, the prosecutor responsible for the case changed three times. Initially, Andrzej Majdan was treated as a victim in the case, but in July 2018 the prosecutor issued an indictment in which she pressed charges against five men who attacked him, along with an indictment against Andrzej Majdan himself.<sup>238</sup> The case against him was pending at a District Court in Radom at the time of writing. He has been charged with "participation in a physical assault" which can carry up to three years' imprisonment.<sup>239</sup>

What these cases illustrate is the importance of the individual elements of the justice system – from law enforcement, through prosecution to courts – for human rights. The response of the prosecution service to human rights violations experienced by the 14 women in Warsaw and by Andrzej Majdan during the protest in Radom raise concerns over the compliance within the requirement of an independent, impartial and objective manner.<sup>240</sup> The failure to investigate the attacks against the 14 women raises serious questions about the ability of prosecutors to act in public interest and take proper account of the position of the suspect and the victim as required under international standards.<sup>241</sup>

<sup>231</sup> Age given for the time of the incident in June 2017. He was 63 at the time of writing in 2019.

<sup>232</sup> <https://m.facebook.com/VidKOD/>

<sup>233</sup> [https://pl.wikipedia.org/wiki/Wydarzenia\\_radomskie](https://pl.wikipedia.org/wiki/Wydarzenia_radomskie)

In English: [https://en.wikipedia.org/wiki/June\\_1976\\_protests#Events\\_in\\_Radom](https://en.wikipedia.org/wiki/June_1976_protests#Events_in_Radom)

<sup>234</sup> Interview with Amnesty International, 7 March 2019.

<sup>235</sup> Interview with Amnesty International, 7 March 2019.

<sup>236</sup> <https://www.rp.pl/Prawo-i-Sprawiedliwosc/170629198-Beata-Mazurek-Atak-w-Radomiu-Rozumiem-ich-Slowa-rzecznik-PIS-obięgly-swiatowe-media.html>

<sup>237</sup> <https://tygodnik.dorzeczy.pl/33485/Blaszczak-o-incydenie-w-Radomiu-Politycy-PO-daza-do-tego-zeby-doszlo-do-awantur-na-ulicach-polskich-miast.html>

<sup>238</sup> The indictment dated on 30 July 2018 is on files with Amnesty International.

<sup>239</sup> Article 158.1 of the Criminal Code

<sup>240</sup> Guidelines on the Role of Prosecutors, Article 13a. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>

<sup>241</sup> Guidelines, Article 13



*Attack on Andrzej Majdan (falling) on 24 June 2017 in the town of Radom. © Filip Błazejowski*



# 7. RESPONSE OF THE EU

Various EU institutions have been monitoring and responding to the situation in Poland with concern since 2016. When the Polish Parliament adopted amendments to the laws on the Supreme Court and the National Council of the Judiciary in December 2017, the European Commission concluded that the situation in Poland amounted to a “clear risk of a serious breach of the rule of law” and triggered proceedings under Article 7(1) of the Treaty on European Union (TEU).

## 7.1 RULE OF LAW FRAMEWORK AND ARTICLE 7 TEU

In January 2016 the European Commission (EC) launched a dialogue on the situation in Poland under the Rule of Law Framework.<sup>242</sup> This was the first time the framework was used since its creation in March 2014. In July 2016, the EC stated that there was a “systemic threat to the rule of law in Poland” as the Constitutional Tribunal was not capable of ensuring an effective constitutional review.<sup>243</sup> It issued four recommendations aimed at restoring the independence of the Constitutional Tribunal. By December 2016, the concerns of the EC had persisted and broadened.<sup>244</sup> The situation further deteriorated during the first half of 2017 and in July 2017 the EC warned Poland that if it continued to undermine the rule of law, the EC would trigger an Article 7(1) TEU procedure, an accountability mechanism aimed at ensuring that all EU Member States respect the founding principles of the EU as laid down in Article 2 TEU.<sup>245</sup> The EC gave Poland one month to address the Commission’s concerns with the “reform” of the judiciary.

As the government of Poland continued with the adoption and implementation of laws that breached the independence of the judiciary, the EC indeed triggered Article 7(1) TUE by adopting a “Reasoned proposal on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law” in December 2017.<sup>246</sup> Since then, the “rule of law in Poland” has been on the Council’s agenda under this ‘preventive’ clause of Article 7 TEU. Although sanctions against Poland could only be adopted after a unanimous vote of all member states who would have to agree that Poland’s actions had resulted in a “serious and persistent breach” of EU values,<sup>247</sup> the dialogue itself under Article 7 is an important accountability tool.

In March 2018, the European Parliament formally welcomed the triggering of Article 7(1) TEU by the European Commission<sup>248</sup> after also having expressed serious concern about the situation in Poland numerous times before, particularly in three resolutions in 2016 and 2017.<sup>249</sup>

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<sup>242</sup> [http://europa.eu/rapid/press-release\\_MEMO-16-62\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm)

<sup>243</sup> [http://europa.eu/rapid/press-release\\_IP-16-2643\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2643_en.htm)

<sup>244</sup> [http://europa.eu/rapid/press-release\\_MEMO-16-4479\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-4479_en.htm)

<sup>245</sup> [http://europa.eu/rapid/press-release\\_IP-17-2161\\_en.htm](http://europa.eu/rapid/press-release_IP-17-2161_en.htm)

<sup>246</sup> European Commission, Brussels, COM(2017) 835, 20.12.2017

<sup>247</sup> Article 7(2) of the TEU.

<sup>248</sup> [http://www.europarl.europa.eu/doceo/document/TA-8-2018-0055\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2018-0055_EN.html)

<sup>249</sup> EP resolutions on Poland from April 2016 ([http://www.europarl.europa.eu/doceo/document/TA-8-2016-0123\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2016-0123_EN.html)); September 2016 ([http://www.europarl.europa.eu/doceo/document/TA-8-2016-0123\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2016-0123_EN.html)); and November 2017 ([http://www.europarl.europa.eu/doceo/document/TA-8-2017-0442\\_EN.html#def\\_1\\_1](http://www.europarl.europa.eu/doceo/document/TA-8-2017-0442_EN.html#def_1_1))

## 7.2 INFRINGEMENTS AGAINST POLAND

In three separate proceedings under Article 258 TFEU, the EC concluded that Poland's reform of the judiciary breached EU law.

In 2018, the CJEU adopted a decision in the case of *Associação Sindical dos Juizes Portugueses (ASJP)*.<sup>250</sup> Under Article 19(1) TEU member states must provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. In the ASJP decision, the Court of Justice reiterated that national courts within the EU must ensure "effective judicial protection" in the fields covered by the EU law.<sup>251</sup> By issuing the decision into the case, the Court of Justice clarified that it is within its scope to carry out an assessment of judicial independence in individual member states.<sup>252</sup>

The EC referred Poland's Law on Common Courts to the CJEU in March 2018.<sup>253</sup> The EC argued that the law that lowered the retirement age of judges and gave the Minister of Justice the power to extend the tenure of a judge breached EU law. On 8 April, the CJEU held a hearing into the case (C-192/18).<sup>254</sup> During this hearing, the EC stated that the law grants wide discretion to the Minister of Justice to extend a judge's tenure without providing the criteria or justification for such an extension. Such broad powers, the EC argued, can be used as a means to put pressure on the judiciary in breach of EU law.<sup>255</sup> The representative of the government of Poland stated that the infringement proceedings in this case amounted to an unjustified interference in the national judicial system by the EC.<sup>256</sup> The case was pending at the CJEU at the time of writing.

In September 2018, the EC referred to the CJEU another piece of legislation, the Law of the Supreme Court.<sup>257</sup> The EC argued that the law changing the retirement age of the judges and thus cutting their tenure short breached the principles that should guide the removal of judges from their posts. The law also gave the power to extend the tenure of a judge to the President of Poland, which the EC considered to be a breach of the principle of judicial independence from the executive power. The CJEU formally granted the EC's request for interim measures in November 2018.<sup>258</sup> The measures halted attempts to force the retirement of Supreme Court judges. In his Opinion adopted on 11 April 2019, the Court's Advocate General confirmed that the legislation breached EU law.<sup>259</sup> On 24 June 2019, the CJEU ruled that the contested Law on the Supreme Court was in breach of EU law.<sup>260</sup>

The EC sent a Letter of Formal Notice to Poland on 3 April 2019 regarding the new disciplinary regime for judges.<sup>261</sup> The EC expressed concern that the disciplinary regime undermined the independence of Polish judges because they lacked necessary safeguards to protect them from political control, as required by EU law. Poland was given two months to reply. If the EC is not satisfied with the reply, it may eventually refer the case to the CJEU after giving Poland another opportunity to respond to a "reasoned opinion".

The government's response to the proceedings at EU level has ranged from threats that Poland will ignore the CJEU ruling<sup>262</sup> to statements that the CJEU has no competence to assess the internal organization of the system of courts in a member state.<sup>263</sup> In response to the announcement about the infringement proceedings over the system of disciplinary proceedings, the Minister of Justice called the judges a "special caste". He further said: "I would gladly ask Mr Timmermans [the vice-President of the European Commission], if the

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<sup>250</sup> <http://curia.europa.eu/juris/document/document.jsf?text=&docid=199682&doclang=EN>

<sup>251</sup> Judgment of the Court in case C-64/16, 27 February 2018, para 34, 40

<sup>252</sup> Para 43 of the judgment

<sup>253</sup> The mechanism has not been used in the history of the EU yet. Within Article 7(1) the EC can identify a "Clear Risk of Serious Breach" of EU values, which may later trigger sanctions. [https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C\\_.2018.182.01.0014.01.ENG](https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2018.182.01.0014.01.ENG)

<sup>254</sup>

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=202264&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2044028>

<sup>255</sup> Article 19 TEU. For details on the hearing (7 April 2019) see: <http://eulawanalysis.blogspot.com/2019/04/does-poland-infringe-principle-of.html>

<sup>256</sup> <https://oko.press/trybunal-sprawiedliwosci-ocenia-przepisy-ustawy-o-sadach-powszechnych/>

<sup>257</sup> [http://europa.eu/rapid/press-release\\_IP-18-5830\\_en.htm](http://europa.eu/rapid/press-release_IP-18-5830_en.htm)

<sup>258</sup> After provisionally granting it in October 2018.

<sup>259</sup>

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=212921&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1947306>

<sup>260</sup> <https://www.amnesty.eu/news/eu-top-court-condemns-polands-law-forcing-supreme-court-judges-to-retire/>

<sup>261</sup> See the press release of the European Commission: [http://europa.eu/rapid/press-release\\_IP-19-1957\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1957_en.htm)

<sup>262</sup> Deputy Prime Minister Jarosław Gowin in August 2018: <http://wyborcza.pl/7,75398,23828743,gowin-rzad-zapewne-zignoruje-orzeczenie-trybunalu-sprawiedliwosci.html>

<sup>263</sup> Minister of Justice in September 2018: <https://prawo.gazetaprawna.pl/artykuly/1277302,ziobro-o-tsue.html>

standards he's after, standards he wants to defend and protect, are those that protect thieving judges and criminals?<sup>264</sup>

The anonymous twitter profile KastaWatch called the Advocate General of the CJEU “a circus clown grilling Poland”;<sup>265</sup> and implied that the President of the CJEU, Koen Lenaerts, is biased because he attended a congress organized by the Association of Judges Iustitia.<sup>266</sup> The same argument was used on 19 March 2019 by the plenipotentiary of Poland’s Prosecutor General during the CJEU hearing on Poland,<sup>267</sup> when he requested that Judge Lenaerts be removed from the proceedings due to his alleged bias.<sup>268</sup>

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<sup>264</sup> <https://www.tvn24.pl/tvn24-news-in-english,157,m/polish-justice-minister-ziobro-comment-on-eu-infringement-procedure,924251.html>

<sup>265</sup> <https://twitter.com/KastaWatch/status/1116276269090578432>

<sup>266</sup> <https://twitter.com/KastaWatch/status/1115535686034186240>

<sup>267</sup> The request for preliminary ruling of the Supreme Court, see: 4.3 The Supreme Court.

<sup>268</sup> <https://www.tvn24.pl/wiadomosci-z-kraju,3/wniosek-o-wylaczenie-z-postepowania-prezesa-tsue-koena-lenaerts,919808.html>

# 8. RECOMMENDATIONS

## To the government of Poland

### On judiciary:

- Immediately stop using disciplinary proceedings against judges and prosecutors merely for their exercise of the right to freedom of expression; for their rulings and other legitimate activities directly linked to their work.
- Take immediate and concrete steps to restore and guarantee the independence of the Supreme Court, which has been undermined by the amendment of the Law on the Supreme Court that entered into force in April 2018.
- Review the Law on the Supreme Court in order to ensure compliance with the principle of separation of powers in the operation of the two new Supreme Court chambers: Extraordinary and Disciplinary.
- Review the new system of disciplinary proceedings to ensure they are independent from the government, in particular the Minister of Justice. The system of disciplinary proceedings must ensure that judges can exercise their judicial functions free from retaliatory action or other forms of pressure, including politically motivated disciplinary proceedings, harassment and intimidation.
- Amend the Law on the National Council of the Judiciary to ensure that members who are judges are elected by their peers and not by the executive and/or the parliament.

### On prosecution of protestors:

- Ensure that no person is detained or prosecuted for activities protected by the right to freedom of peaceful assembly.
- Ensure that effective and impartial investigations are carried out into all cases of alleged ill-treatment by state officials and bring those responsible to justice.

### On the criminal case against Elżbieta Podleśna:

- Ensure that the investigation against Elżbieta Podleśna for “offending religious beliefs” is halted immediately, that the police return all of Elżbieta Podleśna’s belonging and that she can carry out her peaceful actions free from harassment and reprisals.

### On human rights defenders:

- Publicly acknowledge the important role played by human rights defenders, in particular women human rights defenders and people of all genders promoting women’s rights and gender-related issues, and ensure they are able to work in an environment free from violence, harassment and discrimination.
- Refrain from bringing criminal charges or any other proceedings or administrative measures against human rights defenders and other civil society actors that stem solely from the peaceful exercise of their rights. Investigate any complaints of misuse of procedures to target protestors and human rights defenders.

## To the European Commission

- Continue holding the government of Poland accountable for breaches of EU law, in particular:

- the values of respect for human dignity, freedom, equality, the rule of law and respect for human rights enshrined in Article 2 TEU;
- the obligation to ensure effective legal protection in the fields covered by Union law as required by Article 19 TEU in conjunction with Article 47 of the Charter of Fundamental Rights.
- In the absence of an effective review of the new system of disciplinary proceedings to ensure they are independent from the government, refer the Law on the System of Common Courts; the Law on the Supreme Court; and the Law on the National Council of the Judiciary, all of which regulate the system of the disciplinary proceedings, to the Court of Justice of the European Union.

#### **To the member states of the EU**

- Use the dialogue with Poland within the proceedings under Article 7.1 TEU effectively; urge the government of Poland to address all of the recommendations of the European Commission and halt the harassment of judges. Demand that Poland amends the legislation on the judiciary to bring it in line with the EU's founding principles under Article 2 TEU.

#### **To the European Parliament**

- Continue to closely monitor the situation of rule of law and fundamental rights in Poland.
- Continue calling on the government of Poland to end breaches of EU law and the founding principles of the EU.
- Continue holding the EC and the Council accountable on their actions taken with regard to the serious violations of the founding principles in Poland.

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# POLAND: FREE COURTS, FREE PEOPLE

## JUDGES STANDING FOR THEIR INDEPENDENCE

The judiciary in Poland is under assault. Since late 2015, the government of Poland has adopted and implemented a set of legislative and policy measures with a clear goal in mind: to undermine the independence of the judiciary. The authorities have achieved this by exerting political influence over judicial appointments, giving exclusive power to the Minister of Justice to dismiss and appoint Presidents and Vice-Presidents of Courts, forcing Supreme Court judges to retire, and weaponizing disciplinary proceedings to unjustly target some judges. In today's Poland, the government rewards, disciplines, punishes and silences judges and prosecutors as it wishes.

This report details cases where the government has targeted judges with disciplinary proceedings for rulings in which the judges have upheld people's human rights; for judges publicly expressing concerns over the government's effort to undermine the independence of the judiciary; and for judges who have sought opinions from the Court of Justice of the European Union.

Judges and prosecutors have fought back against the pressure on them and in defence of their independence. This report tells the story of how judges have worked individually and collectively to challenge the pressure and harassment they have faced through mutual support, solidarity actions, and legal challenges.

"We have never spoken out before. Now we do... Yes, we feel the pressure, but I don't believe we will be silenced," commented Judge Dorota Zabłudowska from the District Court in Gdańsk.