

# THEMIS

## ASSOCIATION OF JUDGES

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### **Disciplinary case of judge Czeszkiewicz.**

#### **1. Political context of the case<sup>1</sup>.**

In January 2017, Judge Dominik Czeszkiewicz from the District Court in Suwałki in north-eastern Poland issued a decision that held that activists of Committee of Defence of Democracy (KOD), who were protesting against promoting a candidate of the Law and Justice Party during a ceremony of a historical museum exhibition opening were *not guilty* of disturbing public order by “shouting, making noise or causing alarm”.<sup>2</sup> During the ceremony Minister of Interior Mariusz Błaszczak, accompanied by his deputy Jarosław Zieliński expressed his hope that local Law and Justice candidate Anna Maria Anders would become a member of parliament in forthcoming by-election, which was a clear element of parliamentary campaign. Referring to, among other things, the European Convention on Human Rights, Judge Czeszkiewicz held that the protesters did not disrupt public order but merely exercised their right to freedom of expression at a public event. The police appealed the decision. According to the media, on 25 March 2017, the deputy Minister of Justice Łukasz Piebiak met with Regional Court Judge Jacek Sowul, who was responsible for examination of the appeal. On 6 April, Judge Sowul overturned the *not guilty* verdicts and ordered a re-examination of the case.<sup>3</sup> The case was re-examined on 29 June 2017. Judge Piotr Taraszkiewicz of the District Court in Suwałki ruled again that the protesters were not guilty. The police appealed again. In October 2017, Judge Sowul was promoted to the position of the president of the Regional Court in Suwałki.<sup>4</sup> On 26 October 2017, the Regional Court once again partially overturned the *not guilty* verdicts in respect of three protesters and ordered a re-examination. In the case of two protesters who did not speak during the ceremony and were merely present, the Regional Court upheld their not guilty verdicts. The hearing in the District Court with the three remaining protesters was

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<sup>1</sup> This subchapter is based mainly on Amnesty International briefing:  
<https://www.amnesty.org/download/Documents/EUR3780592018ENGLISH.PDF>

<sup>2</sup> Article 51.1 of the Code of Petty Offences.

<sup>3</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>4</sup> <https://bialystok.onet.pl/suwalki-nowy-prezes-sadu-okregowego-to-nominacja-polityczna/40b9cmh>

scheduled for 19 February 2018 but was adjourned due to an anonymous complaint alleging possible unlawful activities on the parts of some judges of the Regional Court.<sup>5</sup>

The case and the decisions of the District Court in Suwałki were criticized by high-ranking politicians from the Law and Justice Party. In January 2018, the deputy Minister of Interior, Jarosław Zieliński, who was among the politicians who took part in the museum exhibition opening, stated in a radio interview that in his decision, Judge Czeszkiewicz “encouraged the breaches of the law”.<sup>6</sup>

## **2. Just a pretext.**

On 17 January 2018, Judge Czeszkiewicz was assigned a criminal case involving interrogation of a minor in the procedure of securing evidence. He set the date of the hearing for 26 January. According to art. 2 of the Internal Rules on the Functioning of the Ordinary Courts such interrogation shall be conducted “without undue delay”, which means it shall be done within reasonable time. The regulation does not provide for a concrete time limit, which depends on the circumstances of the case. Therefore, why did a judge schedule interrogation after 9 days? The crucial factor was the fact that Prosecutor’s request for the court hearing was based on art. 185 “a” of the Code of Penal Proceedings, which provides for rules of interrogation at the pre-trial stage of the minor who is a victim of an offence committed with the use of violence<sup>7</sup>. The idea of that regulation is to interrogate the minor by the judge just once for entire proceedings, in a way which enables to avoid re-victimization during subsequent repeated questionings. That is why the expert-psychologist shall take part in the examination which is audio and video-recorded in order to be played back during trial. All in all, the interrogation shall be prepared well in order to be comprehensive. Judge Czeszkiewicz, after examination of the files, decided that the identity parade with participation of the suspect in front of the victim is required. When he contacted the public prosecutor in charge to appoint the term of the interrogation including identity parade, he found out that the suspect was released from the custody and that it is difficult to arrange participation of the expert-psychologist in the questioning within the next few days. All in all it became clear that the case lost its fast-track procedure status. After this consultation the judge scheduled interrogation of the victim for 26 January. The president of the Regional Court, Jacek Sowul, intervened claiming that the case was urgent and the minor should have been interrogated faster. Subsequently, judge Czeszkiewicz fixed the date of

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<sup>5</sup> <https://kodu24.pl/suwalscy-sedziowie-wykluczeni-z-procesu-dzialaczy-kod/>

<sup>6</sup> Radio 5 interview with Zieliński (in Polish) <https://radio5.com.pl/pierwszy-gosc-w-2018/>

<sup>7</sup> Article 185a. of the Code of Penal Proceedings:

*§ 1. In cases concerning offences committed with the use of violence or with the threat of its use, or arising out of offences specified in Chapter XXIII, XXV and XXVI of the Penal Code, the injured party who, at the time of the act, was younger than 15 years, should be examined in the capacity of witness only if his/her testimony can be important for resolving of the case and should be examined only once, unless new essential circumstances are disclosed whose elucidation requires repeated examination or when it is demanded by the accused who had no defence counsel at the first examination of the injured person.*

*§ 2. The examination shall be conducted by the court in a session with the participation of an expert psychologist. The prosecutor, defence counsel and attorney of the injured person shall have the right to participate in the examination. The person specified in Article 51 § 2 shall also have the right to participate, provided that it does not preclude the possibility of free expressions of the examined person.*

*§ 3. The vision and sound recording of the examination of the witness shall be played back and the protocol of the interrogation shall be read at the main trial.*

examination on the next day, 18 January, and on that day the examination took place. This forced interrogation, lacking the real identity parade, which was replaced by mere showing a black-and-white photo of the suspect among photos of other persons, was not successful to say the least. The victim did not recognize the perpetrator and the hearing had to be repeated by another judge afterwards.

### **3. Give me the man and I'll find a paragraph against him<sup>8</sup>.**

On 26 January 2018, the College of Judges of the Regional Court in Suwałki decided to open disciplinary proceedings against judge Dominik Czeszkiewicz. The College<sup>9</sup> decided to support the initiative of President of the Court to instigate disciplinary proceedings, partially due to the tricky action of President Sowul. During the sitting of the College, Sowul, who was a chairman, described the case concerning interrogation of the minor as a very serious one, namely as a case of a child abduction with the use of firearms, which is a felony with maximum statutory penalty of 15 years of imprisonment<sup>10</sup>. Actually, the case was much less severe and concerned compelling another person to a specific conduct, which is endangered by maximum penalty of 3 years of imprisonment<sup>11</sup>. If we take under the consideration that judge Sowul is a criminal judge with a long professional experience, it is hard to believe that it was just a mistake. One may think it was rather done on purpose to increase the gravity of the offence in order to influence the decision of the College. During a College sitting, the President also informed its members that the case has media and political dimension, due to the fact that both Ministry of Justice and Appellate Court in Białystok are interested. Then, one of the judges-members of the College objected against instigating disciplinary proceedings in respect of judge Czeszkiewicz since, as they pointed out, such decision would be perceived as politically motivated. Afterwards this judge tendered his resignation from the College and left the sitting. Subsequently the College unanimously decided in favour of the President's motion. As a result of the decision of the College, disciplinary proceedings were instigated against Judge Czeszkiewicz solely because of the fact that he initially was planning to question (interrogate) the victim on 26 January. However, when making the decision about instigation of the proceedings, the College did not take into account that the victim have already been interrogated on 18 January. Therefore, this decision of the College was based merely on the intention of Judge Czeszkiewicz, not on his actions.<sup>12</sup> This is not only contrary to the complex circumstances of the case, which required performing of proper identity parade, but also against the old Latin rule *Cogitationis poenam nemo paritur*<sup>13</sup>. Judge Czeszkiewicz told Amnesty

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<sup>8</sup> Famous sentence attributed to Andriej Wyszynski, Russian public prosecutor in the times of Stalin's regime.

<sup>9</sup> Collective advisory organ of the President of the court chosen from among the judges by General Assembly of the court.

<sup>10</sup> Art. 252 para 1 combined with art. 263 para 2 of Polish Penal Code.

<sup>11</sup> Art. 191 para 1 of Polish Penal Code.

<sup>12</sup> [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>13</sup> No one shall be punished for the mere intention.

International<sup>14</sup>: “After the [first *not guilty*] decision everybody was telling me to be careful. A few months ago, someone told me that disciplinary proceedings against me had started. Now I know that they were simply waiting for me to make a mistake”.<sup>15</sup>

Unfortunately, his predictions have quickly come true. Jacek Sowul, the President of the Regional Court in Suwałki, ordered an examination of eight of his collective judgments which were overturned by the Regional Court and send back to district court for re-examination between 2014 and 2017. It is important to note that a great reform of Polish penal law, both substantive and procedural, entered into force in the middle of 2015. It introduced a wide range of diverging interpretations and legal uncertainty within the institution of the collective sentence. In such a situation there is no real ground to instigate disciplinary proceedings in respect of judge, especially if we take under the consideration the fact that Czeszkiewicz based his decisions on relevant case law. What is more, he issued about 80 collective sentences within the required time period and the overall stability of his jurisprudence was at a high level. Last but not least, one of the requested judgements was overturned by the President Sowul, whose decision was simply incorrect. Judge Czeszkiewicz correctly discontinued proceedings in respect of a collective sentence when he assessed that, according to the current regulation, the newly introduced mixed penalty (incarceration combined with restriction of liberty) should not be connected with simple deprivation of liberty. In spite of the fact that such decision was in accordance with the doctrine of penal law President Sowul overturned it.

On the basis of the facts described above, on 13 April 2018, the disciplinary prosecutor charged judge Czeszkiewicz with two professional misconducts:

- 1) for his initial decision to schedule the interrogation of the minor in the procedure of securing evidence for 26 January, even in spite of the fact that the victim was actually examined on 18 January (however, what is significant, the date of factual questioning is omitted in the description of the case provided by disciplinary prosecutor),
- 2) for not raising his professional qualifications between 2014 and 2017 which caused overturning of 8 collective sentences in the mentioned period.

Both disciplinary charges are based on art. 107 para. 1 of the Act on the System of Ordinary Courts which enables to instigate disciplinary proceedings in respect of a judge who committed professional misconduct, among others based on obvious and flagrant violation of laws, which is absolutely not the case with judge Czeszkiewicz. The background of his disciplinary case (namely the element of political campaign of the governing party) in conjunction with lack of sufficient factual grounds for instigation of disciplinary proceedings clearly shows that the entire proceedings are politically motivated. The same assessment is expressed in point of 3 of the resolution of the the Assembly of Representatives of Judges of the Regional Court in Krakow of 26 February 2018, which stipulates: “... *in a case pending before the Regional Court in Suwałki, a disciplinary case was groundlessly commenced against judge Dominik*

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<sup>14</sup> See Amnesty International briefing: “Reform of the judiciary in Poland poses risk to the right to fair trial”.  
<https://www.amnesty.org/download/Documents/EUR3780592018ENGLISH.PDF>

<sup>15</sup> Interview with Amnesty International, 25 February 2018, Białystok.

*Czeszkiewicz. From the context of the case it can be concluded that actions of the President of the Court Jacek Sowul, newly appointed by the Minister of Justice, have an implied political meaning and constitute a form of retaliation for an earlier judgement rendered by judge Dominik Czeszkiewicz in another case, which was adversely evaluated by the executive power”<sup>16</sup>.*

Additionally, on the same day 13 April 2018, one of the judges of Regional Court, privately a close friend of President Sowul, gave judge Czeszkiewicz a formal warning<sup>17</sup> based on the fact that he had made a mistake in one of the protocols of the trial and in one of the verdicts. However, the situation is problematic, since any of above-mentioned mistakes had not caused overturning of the judgement. Both mistakes could have been rectified in a mode of standard proceedings just as obvious mistakes, and were not serious enough to become a real basis for formulating of a formal warning which requires an obvious breach of law. Addressing a judge with a formal warning due to such a trivial reason is obviously groundless and not in accordance with well-established practice.

Judge Czeszkiewicz feels that the impartiality of the court’s work has been severely undermined: *“I object to the impartiality of the proceedings as the Advocate is a close friend to the President of the court [who filed the complaint] ... It feels that the decisions are made at the Regional Court and the Appeal Court. We joke that before making any decision we should consult them.”*<sup>18</sup> However, since the disciplinary proceedings may result in sanctions, including his removal from the post, Judge Czeszkiewicz says he is worried about his job and future.

#### **4. New mode of disciplinary proceedings in the context of judicial independence.**

Had his disciplinary proceedings, based on such poor charges, been completed one or two years ago, judge Czeszkiewicz would not have to be afraid of his professional future. He would have faced the disciplinary proceedings before an independent and impartial disciplinary court. Unfortunately, the regulation on the new mode of disciplinary proceedings against judges, which entered into force in April 2018<sup>19</sup>, is in breach of the due process of law in many aspects. For example, currently members of first instance disciplinary courts are elected by the Minister

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<sup>16</sup> <http://konstytucyjny.pl/resolution-of-the-assembly-of-representatives-of-judges-of-the-regional-court-in-krakow-of-26-february-2018/>.

Quite recently Assembly of Judges of the Appellate Court in Kraków shared the same opinion in its resolution No 4 of 16 April 2018, which hasn’t been translated into English yet.

<sup>17</sup> A measure by means of which the superior court judge can draw attention of a lower level judge to something, e.g. an administrative matter (in Polish: “wytyk”) applicable in case of establishing of an obvious and serious breach of law. This institution is provided by art. 40 of the Law on the functioning of ordinary courts. The formal warning is an aggravating circumstance in the course of disciplinary proceedings and, what is more, three formal warnings applied within 5 years stop the progression of judge’s salary (seniority bonus) for three years.

<sup>18</sup> Interview with Amnesty International, 25 February 2018, Białystok.

<sup>19</sup> Introduced in the Law on the Supreme Court . <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/T/D20180005L.pdf>

and the law on Law on the System of Ordinary Courts.

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

of Justice who is at the same time the General Prosecutor Public (furnished with broad investigative powers) and the member of the political party forming parliamentary majority. What is more it is permissible under the current law to carry out a hearing in disciplinary proceedings in justified absence of a judge or her/his counsel, which undermines the right to defence<sup>20</sup>. The new law explicitly allows to apply in respect of judges evidence obtained without judicial control and in violation of laws, including telephone tapping<sup>21</sup>. This law also grants very extensive powers in matters of disciplinary proceedings to representatives of the executive power, i.e. the Minister of Justice and the President<sup>22</sup>. This means that there is no real guarantee of the right to fair process. This situation raises serious concerns over the guarantees of independence of the judiciary, especially taken together with the fact that judges-members of the Disciplinary Chamber of the Supreme Court are elected by the politicised National Council of the Judiciary, and lay judges of the above-mentioned Chamber are elected directly by politicians [Senators]. In fact, the Disciplinary Chamber would be an entirely new body, completely independent from the rest of the Supreme Court, with separate President, budget and office. What is peculiar is the fact that judges-members of the Disciplinary Chamber of the Supreme Court are granted an unwarranted by the workload, very high 40 percent bonus to their salary<sup>23</sup>, which is obviously aimed at corrupting them to be ready pursue politically-motivated proceedings against their colleagues<sup>24</sup>. The solutions described above result in an inquisitorial model of disciplinary proceedings against judges, which are going to politicize these proceedings and restrict procedural rights of the defendants in such a manner that their position is significantly worse than the position of defendants in criminal proceedings. A result will be a ‘chilling effect’ on the work of the judges, especially in cases that will be of a political or media character. Judge Czeszkiewicz can easily become one of the first victims of the new, deeply politicised and reduced in terms of fair procedure guarantees, mode of the disciplinary proceedings in respect of judges.

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<sup>20</sup> Art. 115.a para 3 of the Law on the System of Ordinary Courts.  
<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>

<sup>21</sup> Art. 115.c of the Law on the System of Ordinary Courts.

<sup>22</sup> Including the possibility of filing by the Minister of Justice of a binding objection to a decision of a Disciplinary Proceedings Representative on a refusal to initiate disciplinary proceedings - art. 114 para 9 of the Law on the System of Ordinary Courts.

<sup>23</sup> Art. 48 para 7 of the Law on the Supreme Court.

<sup>24</sup> In judicial environment this bonus has already gained a nick-name of ‘Judas’ silver’.