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Judges under special supervision, namely ‘The Great Reform’ of the Polish justice system.[1]

(updated for 5 April 2019)

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[1] The original Polish version of this report will be published by Wolters Kluwer this year in a monograph entitled: “Constitution. Rule of law. The Judiciary. Current problems of the judiciary in Poland”, edited by Ł. Bojarski, K. Grajewski, J. Kremer, G. Ott and W. Żurek.

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Foreword.

Dear Readers,

The changes currently being made to the Polish justice system, which cannot be referred to as a reform, but which are destroying the foundations and principles of a state governed by the rule of law, are giving rise to a great deal of concern on the part of the entire legal environment. All Judges of the Republic of Poland, who are responsible in their mission for ensuring that citizens have a just and fair trial, are required to make the whole of the community aware of the threats that are appearing of a breach of their fundamental civic rights.

We are presenting to you an in-depth and accurate analysis of the state of these threats prepared by Judge Dariusz Mazur, Spokesman of the Association of Judges, THEMIS. The problems mentioned in it, which are known to the legal environment, should also become public knowledge, enabling every citizen to assess for themselves the acts of the ruling party that are destroying the independence of the courts and the impartiality of judges.

By recommending to the reader that he should read the issues presented in this document carefully, I would like to point out that, when being appointed to their positions, all Polish judges say the following words to the Polish President:

> *"As a judge of the ordinary court, I solemnly swear to faithfully serve the Republic of Poland, uphold the law, fulfil the duties of a judge conscientiously, administer justice in accordance with the law, impartially according to my conscience, keep legally protected secrets confidential and follow the principles of dignity and integrity in my conduct."*

Therefore, when taking up the honourable service of administering justice for the citizens of their country, all judges should protect the rule of law. This means the observance of both the norms arising from domestic law, especially the Constitution, as well as the norms arising from the international agreements that are binding on Poland.

We, the citizens of the European Union, the legal system of which essentially operates on the principle of communicating vessels, need to be aware that the introduction of authoritarian rule in any of the member states, which treats the rule of law with contempt, constitutes a deadly threat to the integrity of the whole of the European project.

President of the Association of Judges 'Themis'
Regional Court Judge Beata Morawiec

"*Illegality can also be codified*"
(Stanisław Jerzy Lec)[2]

I. The actual objective of the so-called "great reform" of the justice system.

For the past three years, we have been witnessing the so-called 'great reform' of the justice system in Poland, which includes hundreds, if not thousands, of amendments to a dozen or so acts of law, including basic laws, such as the Act on the Organization of Ordinary Courts, the Act on the National Council of the Judiciary as well as an entirely new Act on the Supreme Court. In this landmark for the justice system, it is worth asking whether the objective of implementing the 'great reform of the justice system'[3] is – as per the reassurances of representatives of the executive authority – to contribute to an increase in the independence of the courts, expedite court proceedings, ensure the effectiveness of disciplinary proceedings against judges, de-communize the courts and eradicate corruption, which is allegedly rife among the Polish judiciary. Unfortunately, the answer to these questions is unequivocally negative.

The wording of the said statutes does not even contain one provision that could contribute to expediting the proceedings, although the creation of the extraordinary complaint in the Act on the Supreme Court can effectively contribute to the prolongation of a number of proceedings,[4] not to mention a significant deterioration in the level of safeguards in legal proceedings. After all, it should be noted that, although much remains to be improved with regard to the effectiveness of court proceedings in Poland, the average effectiveness of these court proceedings is at the European average level.[5]

The effectiveness of disciplinary proceedings against judges has always been at an incomparably higher level than the effectiveness of actions to waive parliamentary immunity, not to mention proceedings against politicians before the State Tribunal.[6]

Given that the judges of the Supreme Court had background checks conducted many years ago and, 30 years after the transformation of the state system, the average age of a Polish judge is approximately 42 there cannot, therefore, be any actual talk of a real need to de-communize the judiciary. The assertions of general corruption in the Polish justice

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2 Polish poet, satirist and aphorist born in Lviv (1909–1966).

3 It primarily encompasses the amendments to the Act on the Organization of Ordinary Courts with the Act of 12 July 2017 (Journal of Laws 2017, item 1452), the amendment to the Act on the National Council of the Judiciary of 8 December 2018 (Journal of Laws of 2018, item 3) and the Act on the Supreme Court of 8 December 2018 (Journal of Laws of 2018, item 5).

4 This institution makes it possible to overrule final judgments passed over the last 20 years by any court in Poland on the basis of unclear and general criteria, while decisions on repeat appeal proceedings will be made by judges of the Extraordinary Complaint and Public Affairs Chamber of the Supreme Court that has been newly-appointed by a politicized National Council of the Judiciary.

5 https://www.ec.europa.eu%2Ftransparency%2Fregdoc%2Frep%2F1%2F2017%2FPL%2FCOM-2017-167-F1-PL-MAIN-PART-1.PDF&usg=AOvVaw194POTsMBlZKeEjAK1Hcva, accessed on 13/01/2019.

6 The occasionally cited argument that disciplinary proceedings are proved to be ineffective by the fact that "only" 11 judges were removed from office in over 300 disciplinary proceedings between 2011 and 2015 is a false argument. Account should be taken of the fact that such a penalty, sometimes called 'a professional death penalty', is the equivalent of a life sentence in criminal proceedings, while many of the proceedings against judges do not apply to them committing crimes, but acts of far lower gravity, e.g. failing to observe the deadlines for preparing statements of reasons of judgments.

administration are simply unfounded.[7] Finally, I would give half my kingdom to anyone who can find even one solution in the above legislation which increases the independence of the Polish judiciary.

What, therefore, is the real objective of the so-called 'great reform of the justice system'? The answer is simple and clear. In the short term, it is about a purge of the personnel in the justice system and, in the long term, it is about its subordination to the political factor, including in particular the Minister of Justice.

Over the 6 months since the amendment of the Act on the Organization of Ordinary Courts entered into force, the Minister of Justice arbitrarily and often by using untrue or fabricated statistical data on the effectiveness of the courts, dismissed around 150 presidents and vice presidents of the Ordinary Courts of various instances before their terms of office expired.[8] Worse still, it seems that the main criteria for appointing their successors were not their merits but the degree of their loyalty to the Ministry of Justice, which is indicated by the fact that the positions of the dismissed presidents, were filled with people lacking experience in court management and even people who have been punished for disciplinary reasons. Furthermore, many of those people were delegated 'in advance' (with respect to their competence) to adjudicate in courts of a higher instance, as an additional bonus.

A complete 'purge' was conducted in the National Council of the Judiciary, which had previously played a fundamental role in safeguarding the independence of the judiciary. Meanwhile, contrary to Article 187 of the Constitution, as well as the recommendations of the authorities of the Council of Europe,[9] the principle of appointing 15 judges – Council members – by the judges was waived, transferring this prerogative to the Polish parliament, simultaneously terminating the terms of office of members of the Council to date. Furthermore, as disclosed by the media, a number of personal and private connections between judges – members of the new Council – and the Ministry of Justice are so significant that this can be easily regarded as an additional authority of the executive.[10]

The new Act on the Supreme Court was originally drawn up to enable a purge in the personnel of Poland's highest judicial authority. While the reduction in the retirement age for judges alone was intended to replace around 40% of the judges and, simultaneously, lead to

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[7] According to the written information obtained by the Association of Judges 'Themis' from the Supreme Court over the 10 years from 1 January 2008 to 31 December 2017, there was only one disciplinary action against a judge, based on a charge of corruption (http://themis-sedziowie.eu/wp-content/uploads/2018/02/IMG_2899-e1519303114485.jpg, accessed on 13/01/2019).

[8] This constitutes around 20% of all presidents and vice presidents, which does not illustrate the actual extent of the purging; suffice it to say that out of 11 presidents of the Ordinary Courts of the highest instance (namely the Appeal Courts), as many as 10 were replaced. Furthermore, the scale of the changes would almost certainly have been greater if not for the appeals of the Associations of Judges not to take up the office of the prematurely dismissed presidents and the solidarity of many judges rejecting the appointments.

[9] It arises from opinion no. 10 of the Consultative Council of European Judges (CCJE) of 2007 stating that, when there is a mixed membership of the Council for the Judiciary, a substantial majority of the members should be judges elected by their peers (points 18 and 25). In turn, point 19 emphasized that the membership of the Council must have no interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration. Similar recommendations were issued by the General Assembly of the European Network of Councils for the Judiciary (resolution of 23 May 2008) and the Council of Europe (Recommendation 94/12), as well as being included in the European Charter on the Statute for Judges of 1998.

[10] Judges-members of the new National Council of the Judiciary are mainly judges recently employed by the Ministry of Justice or judges who were promoted by the Minister of Justice to the offices of presidents of courts replacing the presidents dismissed before the expiry of their term of office several months before being appointed to the NCJ.

the termination of the constitutionally guaranteed term of office of the First President of the Supreme Court, the increase in the number of judges as a result of the establishment of two new Chambers, means that the majority of the members of the Supreme Court will soon be newly-appointed people. The ruling party's plans to replace the personnel in the Supreme Court were not fully implemented because of the Order of the European Court of the European Union, of 19 October 2018, in case C-619/18 R[11] at the request of the European Commission applying an interim measure by which Poland was required to immediately suspend the application of the national provisions reducing the retirement age for Supreme Court judges. Consequently, on 17 December 2018, the President signed an Act[12] reinstating over 20 Supreme Court judges who had been forced to retire prematurely. This partial failure of the pseudo-reform of the justice system does not change the fact that the National Council of the Judiciary has become politicized, after which it appointed judges to the Extraordinary Complaint and Public Affairs Chamber, as well as to the Disciplinary Chamber, which guarantees politicians influence on the control of the validity of parliamentary elections, as well as control over disciplinary proceedings against judges and representatives of other legal professionals.

The conclusion drawn from the above arguments is indeed depressing. The only objective of the so-called 'great reform of the justice system' is to replace staff in functional positions in the justice system and subordinate the justice system to political factors, in particular the Minister of Justice in order to create a system of mono-power, by which the State authority will be built on spreading fear among citizens who are deprived of effective legal protection.

The argument frequently raised by the Ministry of Justice that individual measures implemented by the 'reform' operate in some other European States is erroneous and demagogical. Firstly, certain measures arise from the judicial tradition and culture of individual states as a result of which they may operate completely differently than in Poland.[13] Secondly, measures adopted by some states, combined with other factors, form a coherent system in which individual weaknesses can be compensated for by emphasizing some elements more than others. The creation of a new system in Poland consisting of the weakest parts of foreign solutions that are generally criticized in other states resembles the process of Doctor Frankenstein creating his monster in Mary Shelley's famous novel. Therefore, it can be predicted that the introduction of so many changes undermining the independence of the judiciary will lead to the emergence of a dangerous caricature of an independent justice

[11] https://www.curia.europa.eu%2Fjcms%2Fupload%2Fdocs%2Fapplication%2Fpdf%2F2018-10%2Fcp180159en.pdf&usg=AOvVaw2rkq5FV8-R_7qXw39P3fYO, accessed on 13/01/2019.

[12] Act of 21 November 2018, Journal of Laws of 2019, item 2507, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180002507/O/D20182507.pdf., accessed on 03/03/2019.

[13] There are countries in Europe where the Prosecutor General is subordinated to the Minister of Justice to a substantial extent (e.g. Germany and Belgium), although, due to the highly- and well-grounded legal culture of these states and the political class, this does not raise doubts about the independence of the prosecution service. In Poland, the political class certainly does not observe the norms of independence of the judiciary, which is indicated by the statements of the current Prosecutor General – Minister of Justice, Zbigniew Ziobro, who while commenting on the conclusions of the Assembly of Lawyers in Katowice held on 3 March 2017, suggested that judges who directly apply the Constitution or acts of international law can expect disciplinary action. The announcement by Deputy Minister of Justice, Łukasz Piebiak, of the impending expulsion of 'black sheep' from the profession, namely judges who do not 'support the state' in proceedings they are handling which was expressed in a television interview in January 2018, should be treated similarly. It is a highly disturbing phenomenon when members of the Ministry of Justice contest the right of judges to rely on sources of higher order law and recommend that judges should be biased to the favour of the state; it is an unacceptable practice to suggest that judges will face disciplinary liability if the 'guidelines' are not followed.

system in which the highest authorities, such as the Constitutional Tribunal, the National Council of the Judiciary and the Supreme Court will not so much be of a marginal status as constituting tools of the executive for exercising influence over the judiciary. In this way, the system of the Polish state is being transformed from one that is based on the 'rule of law', in which one of the main objectives of the law is to restrict the executive authority forcing the rights and freedoms of the people to be respected, to a system of 'rule by law' in which the law becomes the executive's primary tool for achieving its political objectives at the expense of a significant reduction in the level of protection of civil rights and freedoms.

Professor Jerzy Zajadło described this aptly and succinctly: '*Their objective is to transform judges and courts into compliant executors of will of the aforementioned central power – to an extent that is equal to that already achieved for the legislative and the executive authorities. Courts understood in this way cease to be courts and it would be difficult to find an appropriate term to describe their essence'.* Further, the professor said that: '*This is not only about eliminating cases known from the more recent or more distant past of the so-called judges being on call. This is about a model ensuring that judges are such that they do not even need to be reminded over the phone what the executive expects from them (strictly speaking – so-called political decision-making headquarters); they are expected to understand this, feel it and even anticipate the sovereign's desires themselves.'*[14]

This report gives a systematic presentation of a brief summary of measures taken and legislative initiatives which have taken place over the past 3 years within the framework of the so-called 'great reform' of the justice system and which seeks to subordinate the judiciary to the political factor. The author of this report emphasizes the potentially most effective way of achieving this goal in the form of a new model of disciplinary proceedings against judges and other legal professionals.

II. Black PR campaign against judges.

Political subordination of the judiciary requiring significant legislative changes would have been substantially more challenging, if not impossible, had the judiciary been perceived by the public as being a high authority. Therefore, in order for the political factor to successfully conduct a hostile takeover, it needed to 'arm itself' through an intensive and negative propaganda campaign conducted in the media by politicians from the ruling party paid for with public funds and using the state media. A large part of this negative campaign was also conducted abroad, which, to use military terminology, was a way of 'securing the flank' against an attack from outside in the form of possible interventions from supranational bodies safeguarding the rule of law. Fortunately, this was not entirely successful.

[14] https://www.oko.press%2Fzajadlo-pis-buduje-niedemokratyczne-panstwo-bezprawia%2F%3Ffb_comment_id%3D2045719322140616_2045772772135271&usg=AOvVaw14vofxQdpqY-qw2KIVkL1S, accessed on 13/01/2019.

The most spectacular manifestation of defaming judges in the media was conducted in September 2017 in the so-called 'billboard campaign'[15] involving television, the press and the Internet. The cost of the campaign was estimated at 9 million zlotys (over 2 million euros), which is comparable to the costs of the presidential election campaign in Poland. The campaign was handled by the Polish National Foundation, an institution established during the current term of office of the Polish Parliament under the auspices of the Law and Justice party and is financed by the 17 largest state-owned enterprises controlled by the ruling party's nominees. Although the Foundation's statutory objective is to promote Poland's best interests abroad, the main objective of the media campaign was to undermine the authority of the judiciary in Poland.

The government claimed that the campaign was intended to promote the great reform of the justice system, but it was, in fact, a black PR campaign presenting a distorted picture of the Polish judiciary, generally describing long-ended disciplinary proceedings with regard to some judges (including one deceased judge) in a very biased way, as well as their alleged or actual judicial errors. Although some of those situations were true, others were presented in a distorted or even completely false manner. One of the 'true' examples used by the campaign referred to a judge who stole a sausage from a shop. This situation indeed took place, but the website presenting the story failed to mention that the judge had been in retirement for many years at the time of the incident and furthermore, he had been suffering from a serious mental disorder. Judges were described as 'an exceptional caste' for the purposes of the campaign. As for the choice of colours, the campaign used black and white on the billboards and in the Internet. Judges were displayed on the black side and were depicted as classical examples of corruption, a lack of competence and indolence. The campaign generally tried to belittle the whole of the professional group and relied on more or less accurately presented negative examples and therefore on the basis of the principle of collective responsibility.

One of the judges aptly commented on the 'billboard campaign' as follows: '*The situation, in which one branch of branches of state authority pays to organize a negative campaign against another branch of state authority of the same state, is so peculiar that even George Orwell or Monty Python could not have come up with that*'.

It is quite surprising that, soon after the campaign started, some Law and Justice politicians claimed that it was not being run by either the government or by their political party. Such an assertion appears unbelievable, given that the Prime Minister of that time, Beata Szydło, attended the official inauguration of the campaign. Moreover, the people responsible for the campaign were former employees of Prime Minister Szydło's office, while the campaign was entirely financed by state-owned enterprises. Moreover, the campaign was nothing more than a continuation of the government's policy of defaming judges which had already been initiated much earlier in the public media controlled by the government.

Although the opposition parties notified the prosecution service that the campaign may have breached the prohibition to finance political parties with public funds other than those from

[15] https://www.oko.press%2Fulica-zagranica-czyli-dlaczego-billboardy-wisza-polsce-wyjasnienia-pis-kiepskiego-kabaretu%2F&usg=AOvVaw1PnMlSsm7laVum-2xYeJ-N, accessed on 03/03/2019.

the official subsidies provided for in the Act on Political Parties,[16] it seems rather doubtful that the prosecution service supervised by the Minister of Justice – Prosecutor General would have been able to impartially and fairly assess whether a campaign supporting the reform being forced through by the very same Minister of Justice – Prosecutor General constituted an offence.

It should be noted that it could not have been a coincidence that on the one hand the 'billboard campaign' was run at the end of 2017, which was shortly after numerous street protests persuaded President Andrzej Duda to veto the first and the most radical version[17] of the legislation introducing 'the great reform' of the justice system and, on the other hand, just before politicians of the ruling party successfully forced through the new versions of the most important legislation on the judiciary.

Shortly after the billboard campaign, which lasted around 2 months, ended, the newly-appointed Prime Minister, Mateusz Morawiecki, joined the front lines of the propaganda against the judiciary, this time mainly advocated abroad.

Firstly, on 13 December 2017, Mateusz Morawiecki's article of 'Why my government is reforming Poland's judiciary' appeared on the pages of the *Washington Examiner*.[18] This publication defamed Polish judges. Its content implied that the Polish judiciary is the personal remains of the Communist system and that the 'old' National Council of the Judiciary has formed a coterie, which no judge of the first instance court can influence and is therefore promoting 'nepotism and corruption'. According to Mateusz Morawiecki, the previous system of allocating cases to specific judges promoted their 'corruption'. The Prime Minister also stated that '*Bribes are demanded in some of the most lucrative-looking cases*', while the courts work to the benefit of wealthy and influential defendants.

Next, on 16 December 2017, in an interview for the TVP news programme, 'Wiadomości',[19] the Prime Minister reported that, at the meeting with the President of the Republic of France, he compared Polish judges and Polish courts to courts of Vichy France collaborating with the Nazis, simultaneously claiming that the removal of this strain from the French judiciary took place quicker than the de-communization of the Polish judiciary is taking.

Finally, on 10 January 2018, at a meeting with European journalists in Brussels,[20] Mateusz Morawiecki handed out leaflets in English describing the so-called 'reform of the justice system' and gave an oral statement in which, once again, he emphasized the failure to de-communize the Polish judiciary and accused the Polish judges of being politicized, using an isolated, dubious example of the former President of the Regional Court in Gdańsk. He also

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16 https://www.polskatimes.pl%2Fpo-zawiadamia-prokurature-ws-kampanii-billboardowej%2Far%2F12505118&usg=AOvVaw1aoBn8J1-4CaPByT1hanPn, accessed on 03/03/2019.

17 The original version of the Act on the Supreme Court, under pressure of public opinion (large street protests in more than 200 cities) vetoed by the President Andrzej Duda, stated that the offices of all Supreme Court judges were to be terminated at the time that the Act enters into force, while the Minister of Justice could appoint the temporary membership of the Supreme Court at his own discretion, namely until the judges of the Supreme Court were appointed by the new politicized National Council of the Judiciary.

18 https://www.washingtonexaminer.com%2Fprime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary&usg=AOvVaw35Iim7GpHtKddczltC6ix5, accessed on 03/03/2019.

19 https://oko.press%2Fporownujac-rezim-vichy-prl-morawiecki-obrazil-jednoczesnie-polakow-francuzow-porownanie-zreszta-niezbyt-trafne%2F&usg=AOvVaw0M8VZI8FNAsVtiIfVGG1k_, accessed on 13/03/2019.

20 https://www.tvn24.pl%2Fwiadomosci-z-kraju%2C3%2Fmorawiecki-tlumaczy-zagranicznym-dziennikarzom-zmiany-w-sadownictwie%2C808395.html&usg=AOvVaw0KHD7CTBMP9_6DiCmc-iZl, accessed on 03/03/2019.

suggested that one of the judges of the Supreme Court was a paedophile on the basis of a part of a telephone conversation with one of the judges quoted out of context, which was unlawfully recorded by the secret service.

The Prime Minister did not specify the sources of his revelations or any statistical data confirming them. However, the allegation that the Polish judiciary is of a post-Communist nature 30 years after the transformation of the system, with the average age of Polish judges being 42, is *prima facie* absurd. In the context of the alleged intention to de-communize the judiciary, it is amazing that the leader of the changes devastating the Polish justice system is a current member of parliament, Stanisław Piotrowicz, who holds the post of Chairperson of the Justice and Human Rights Parliamentary Committee. He is a former Communist prosecutor, a member of the Polish United Workers Party, who prosecuted members of the opposition and who received a Bronze Cross of Merit for his loyalty to the Communist party.[21]

A non-governmental organization used the Prime Minister's comments to report him to the public prosecutor for contempt of national constitutional authorities, raising false accusations on the judges and breaching diplomatic secrecy.[22] However, it could not have been expected that, the prosecution service controlled by the ruling party, would have effectively conducted such proceedings.

Defamatory public statements about judges can even be heard to this day by the ruling party's politicians. It was disclosed in January 2019 that, during the visit of the members of the LIBE Commission of the European Parliament to Poland in October 2018, Marek Suski, a 'Law and Justice' Member of Parliament, stated that '*some Polish judges are thieves, others are violent and still other have passed controversial and questionable judgments*'. Mr. Suski also claimed that some judges have been bribed with cars in return for positive judgments, while some judges – members of the (former) National Council of the Judiciary – are so rich that they have gold bars buried in their gardens. Obviously, Marek Suski did not reveal the source of such information, while the revelations described could not be confirmed either by any materials in the media or statements of the prosecution service, which likes to boast about its successes in combating criminal activities among judges. The MP himself, later confronted by journalists about this comment, said that, when he referred to the person burying gold in his garden he did not mean a judge but a member of the NCJ who was a member of Parliament.[23]

In addition to the black PR addressed to the whole of the judicial profession, the pro-government media, not minding their words and relying on groundless allegations, often attack those individual judges who guard the independence of the judiciary. The media especially enjoy attacking the former spokesperson of the National Council of the Judiciary, judge Waldemar Żurek.

Although these examples of the black PR targeted at judges do not seem sophisticated, nonetheless – in accordance with the rule that a lie repeated 100 times becomes the truth – the

[21] https://www.natemat.pl%2F84341%2Coskarzanie-opozycjonisty-to-nie-jedyna-plama-na-zyciorysie-posla-piotrowicza-jako-prokuratur-uniewinnil-ksiedza-pedofila-z-tylaw&usg=AOvVaw3jcBliIAekdOhQf-9fT-Y9, accessed on 03/03/2019.

[22] https://www.wiadomosci.wp.pl%2Fmorawiecki-popelnil-przestepstwo-kod-zawiadamia-prokurature-6224528194050177a&usg=AOvVaw0HSIRMYCMe1e2PkkVPu4PP, accessed on 03/03/2019.

[23] https://www.wiadomosci.onet.pl%2Ftylko-w-onecie%2Fmarek-suski-i-zloto-zakopane-w-ogrodku-cimoszewicz-cwiakalski-budka-komentuja%2F0x1n6vr&usg=AOvVaw1y8V12pl7SneJ9UkpAty9G, accessed on 03/03/2019.

intensive negative campaign paid off and resulted in public trust in the judiciary deteriorating from over 40% to just over 20%. Furthermore, a wave of public protests against the pseudo-reform of the justice system was far more modest in 2018 than the massive protests that took place in July 2017, during the first attempt to enforcing 'the great reform' (before the 'billboard campaign').

III. The collapse of the National Council of the Judiciary as an authority safeguarding the independence of courts and the impartiality of judges.

The key to the ruling party seizing control over the judiciary lay in legislative changes leading to the political subordination of the National Council of the Judiciary, which decides on such issues such as who becomes a judge and who will be promoted to a higher judicial office, as well as setting out the rules of judicial ethics, thereby directly affecting the initiation of disciplinary proceedings against judges.

Its political subordination was achieved by transferring the right to appoint 15 judges – members of the NCJ – from the self-governing judicial bodies to the Polish Parliament, where the ruling party has a majority. New judges – members of the Council – were appointed in March 2018, whereby their appointments simultaneously meant breaching the constitutional term of office of several NCJ members to date. Such a Council currently has a decisive influence on the choice of candidates to judicial offices and candidates to senior judicial offices, as well as drafting the rules of judicial ethics, and can initiate disciplinary proceedings against judges. This process of appointment to the Council is not only a breach of Article 187 of the Polish Constitution,[24] but is also inconsistent with the CCJE standards according to which no less than a half of all members of councils of the judiciary should comprise judges appointed by their peers.

After all, in accordance with the applicable laws, from the beginning of the 'new' Council's existence, its main objective should have been to safeguard the independence of the courts and the impartiality of the judges, but this authority has not even taken one step in this direction. On the contrary, its members are publicly announcing their intention to initiate disciplinary proceedings against those judges who speak up in defence of the constitution, or judges who requested preliminary rulings from the Court of Justice of the European Union.

The new National Council of the Judiciary has also grossly reduced the criteria set for candidates to take up office in the Supreme Court, dropping the requirement for them to provide the case files of the cases they are handling for assessment, as well as preparing opinions on the candidates based on the case files provided. Under these circumstances it is perfectly reasonable to presume that the candidates were appointed on grounds other than their merits. The author of this article does not even have a shadow of a doubt that such a

[24] This provision of the Constitution clearly stipulates that the Polish parliament selects 6 members of the National Council of the Judiciary of whom 4 members are from the lower chamber and 2 are Senators (members of the upper chamber). Had the intention of the legislative authority been for the Polish Parliament to select more members of the NCJ, this would have been provided for in the Constitution.

significantly politicized procedure of appointment of the NCJ members has allowed the executive to gain political influence over who becomes a judge and which judge is to be promoted, both grossly contradicting the accepted standards for appointing judges arising from Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union. Worse still, the politicized National Council of the Judiciary then selected candidates for the majority of judicial offices in the Supreme Court including all judicial offices of the newly-established Disciplinary Chamber and Extraordinary Complaint and Public Affairs Chamber.

Recently, as was previously the case with the Constitutional Tribunal, the National Council of the Judiciary has taken steps not so much to perform its constitutional function of the body safeguarding the independence of the courts and the impartiality of judges, but quite the opposite – steps which are in conflict with its constitutional objectives.

In particular, on 9 November 2018,[25] the National Council of the Judiciary published a statement declaring that the President of the Criminal Chamber of the Supreme Court, Stanisław Zabłocki, is 'unworthy' of his judicial office, as he enforced the Order of the CJEU of 19 October 2018 on the adoption of the interim measures and, having been previously forced to retire prematurely, returned to the office of the President of the Criminal Chamber of the Supreme Court and cancelled the sessions scheduled by the newly appointed judge of this Chamber. It should be noted that Judge Stanislaw Zabłocki is one of the greatest legal authorities in Poland, who, in the 1980s, acted as an attorney for the representatives of the anti-Communist opposition and finalized the rehabilitation of Poland's national hero, Captain Witold Pilecki. The associations of judges[26] protested against this NCJ Resolution and resolutions of the assemblies of judges were passed.[27]

Next, on 12 December 2018, the National Council of the Judiciary passed a Resolution,[28] according to which '*the public use of infographics or symbols by a judge which are unequivocally affiliated to or may be identified with a political party, a trade union or a social movement established by a trade union, a political party or other politically active organizations*' constitutes '*behaviour that can undermine confidence in the independence and impartiality of a judge*'. The objective of this Resolution, as directly admitted by a member of the National Council of the Judiciary, was to prevent judges from wearing T-shirts with a distinctive, three-coloured word 'constitution', worn by many judges as a declaration of their support for upholding the rule of law and independence of the judiciary in Poland. The design and colours of the caption, which by implication resembles the distinctive 'Solidarity' caption from the 1980s, was designed to advocate a social movement opposing breaches of the rule of law in Poland. It can be concluded from the wording of the Resolution adopted by the body

[25] http://www.krs.pl%2Fpl%2Faktualnosci%2Fd%2C2018%2C11%2F5576%2Cstanowisko-krajowej-rady-sadownictwa-z-dnia-9-listopada-2018-r&usg=AOvVaw2srok-8DGaZo3Pcj2mxNDI, accessed on 13/01/2019.

[26] http://themis-sedziowie.eu/aktualnosci/stanowisko-stowarzyszenia-sedziow-themis-z-dnia-09-11-2018-roku/, accessed on 13/01/2019.

[27] Resolution no. 3 of the Assembly of the Regional Court Judges in Kraków of 19 November 2018 http://themis-sedziowie.eu/materials-in-english/resolutions-of-the-assembly-of-representatives-of-judges-of-the-regional-court-in-krakow-of-19-november-2018/, accessed on 13/01/2019.

[28] http://www.krs.pl%2Fpl%2Faktualnosci%2Fd%2C2018%2C12%2F5630%2Cuchwala-krajowej-rady-sadownictwa-z-12-grudnia-2018-r-dotyczaca-wykladni-10-zbioru-zasad-etyki-zawodowej-sedziow-i-asesorow-sadowych&usg=AOvVaw1EzuAGqlLpg7uNEjsl_gGZ, accessed on 13/01/2019.

currently operating as the National Council of the Judiciary that the word 'constitution' used by judges indicates their politicization, whereas systematic breaches of the constitution by the executive and legislative authorities constitute a rightful privilege of those powers. As the Council's Resolution was adopted on the grounds of its statutory right to interpret the Rules of Judicial Ethics, it should be expected that any breach of the provisions of the Resolution can result in the initiation of disciplinary proceedings against judges.

The Deputy Disciplinary Commissioner of the Ordinary Court Judges, Michał Lasota, initiated disciplinary action with respect to Dorota Lutostańska, judge of the Regional Court in Olsztyn, in January 2019. He summoned the judge to submit a written declaration in the preliminary disciplinary proceedings (so-called "explanatory activities", see sub-chapter VI.3) regarding a situation in which she was wearing a T-shirt with the word 'constitution' at a group photograph being taken by judges commemorating the centenary of Poland regaining its independence.[29]

The next controversial statement of the National Council of the Judiciary was published on 10 January 2019. This statement was a response to the resolutions in which the assemblies of the regional courts and the courts of appeal expressed their concerns about the legal status of the National Council of the Judiciary and refused to issue opinions on candidates to higher judicial offices of the ordinary courts until the CJEU examines the requests of the Supreme Court[30] and the Supreme Administrative Court[31] for a preliminary ruling regarding the legal status of the National Council of the Judiciary. The National Council of the Judiciary passed a resolution stating that the absence of opinions on candidates provided by self-governing judicial bodies, namely the assemblies of judges, does not constitute an obstacle to the National Council of the Judiciary issuing its own assessments of the candidates.[32]

The above two statements and the resolution of the National Council of the Judiciary, adopted over the past 2 months, unequivocally indicate that, by condemning a Supreme Court judge for abiding by the CJEU Order, silencing judges protesting against breaches of the Constitution and finally contesting the authority of the self-governing judicial bodies for participating in the process of promoting judges, this body is one hundred percent subordinated to the executive and fulfils its directives intended to politically subordinate the courts.

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29 https://www.archiwumosiatynskiego.pl%2Fwpis-w-debacie%2Frzecznik-dyscyplinarny-sciga-sedzie-z-olsztyna-za-koszulke-konstytucja-pierwsza-taka-sprawa%2F&usg=AOvVaw2idExAfDlLk3IFZXBPHr-o, accessed on 03/03/2019.

30 http://www.sn.pl%2Faktualnosci%2FSitePages%2FKomunikaty_o_sprawach.aspx%3FItemSID%3D236-271e0911-7542-42c1-ba34-d1e945caefb2%26ListName%3DKomunikaty_o_sprawach&usg=AOvVaw3_jvTTKezlAC3l3E8PXkgT, accessed on 02/03/2019.

31 The case was examined by the CJEU on 19 March 2019, it is still pending. Opinion of Advocate General is expected on 23 May 2019.

32 http://www.krs.pl/pl/aktualnosci/d,2019,1/5658,stanowisko-krajowej-rady-sadownictwa-z-10-stycznia-2019-r-dotyczace-skutkow-podjecia-przez-organ-samorzadu-sedziowskiego-uchwaly-o-odroczeniu-zaopiniowania-kandydatow-na-wolne-stanowiska-sedziowskie, accessed on 13/01/2019.

IV. An increase in the administrative supervisory powers of the Minister of Justice over the courts and 'soft' means of harassing judges.

The acquisition of political control over the courts through the 'great reform' of the justice system over the past 3 years is being implemented comprehensively, including with the use of 'soft' measures related to the strengthening of the administrative supervisory powers over the courts by the Minister of Justice.

Overall, the powers of the Councils of the Courts (elected by the judges) and the self-governing judiciary bodies, namely the assemblies of judges of individual courts, have been restricted. For instance, an appeal against changes in the scope of a judge's duties cannot be filed with the Council of the given court, but needs to be filed with the National Council of the Judiciary, which is politicized through the election of its judge-members by Parliament. The Council has also lost the power of a binding objection to the appointment of a given candidate to the post of president of the court's division and has been deprived of the right to object to appointments of judge-visitors, a right that has recently been transferred to the Minister of Justice – Prosecutor General. Being at the service of the politicians, a judge-visitor can cause a lot of misery to an ordinary judge if a biased inspection of a judge's office is carried out on the instructions of a politically-appointed president of that court.

Until recently, Article 86 § 6 of the Act on the Organization of Ordinary Courts provided that if a president of a court objects to a judge's additional employment in the form of educational activities, the judge had the right to appeal against this decision before the Council of the competent court. This provision has now been repealed and the judge is no longer entitled to appeal against such a refusal. The lack of right to appeal means that an arbitrary, non-appealable refusal for taking up additional employment, by new, politically-appointed court presidents can easily become an additional tool of repression.

As already mentioned in Chapter I of this report, the amendments to the Act on the Organization of Ordinary Courts enabled the Minister of Justice to appoint the presidents of the courts at his own discretion, with no involvement of the self-governing judiciary bodies, while, in the 6-month interim period, it allowed him to arbitrarily dismiss the presidents at that time. The presidents have a significant influence on a judge's working conditions, including by granting annual leave, allowing the judge to take part in training or additional paid work of judges, as well as making decisions on the transfer of a judge between divisions of the court. Such powers of the presidents, combined with their direct dependence on the Minister of Justice (to whom they owe the judicial office and by whose decision they can be dismissed on undefined grounds) mean that they can become instruments for applying pressure on politically inconvenient judges. This scenario already applies to Waldemar Żurek, a judge of the Regional Court in Kraków, well-known for criticizing the current 'reform' of the judiciary, who was transferred to a different division with a different set of responsibilities without any substantive reason and in the absence of any legally adopted resolution of the Council of the Court. Although, an appeal could be filed in the past to the council of the appeal court, which had been nominated by judges, the politicized National Council of the

Judiciary[33] is currently the appropriate body for considering appeals. It should be added that transferring a judge between divisions can also be a way of preventing an 'inconvenient' judge from hearing a specific case.

Furthermore, given that the Minister of Justice currently has the power to appoint court directors at his own discretion and not through contests, who, in turn, by managing the administrative personnel, are able, for instance, to deprive the judge of a good court recorder or assistant, assigning him an inexperienced person instead, or to move a judge to an office which he will need to share with several other people, the possibilities of indirectly harassing individual judges become even greater. A judge 'thrown' into new and unfamiliar duties, deprived of decent working conditions, is more likely to pass an erroneous judgment or prolong the proceedings, which is, in turn, only a step away from initiating disciplinary proceedings against him.

In summary, the significant increase in the administrative supervisory powers of the Minister of Justice – Prosecutor General over the courts with the simultaneous reduction in the powers of the self-governing judicial bodies has resulted in the emergence of instruments of effective administrative harassment of individual judges from outside, which has enabled the use of various 'soft' forms of harassment and repression of inconvenient judges, thereby breaching the principle of judicial impartiality.

V. The new mode of disciplinary proceedings against judges and members of other legal professions.

1. Inquisitorial model of conduct, namely the special powers of the Minister of Justice.

However, the true 'icing on the cake' among the instruments created within the 'great reform', which are used to subordinate the judiciary to the political factor, is the new mode of disciplinary proceedings against judges and the members of other legal professions, which awards the Minister of Justice such significant powers that it is dangerously close to a model of inquisition proceedings.

This is because the Minister of Justice – Prosecutor General appoints the Disciplinary Commissioner of the Ordinary Court Judges and his two deputies.[34] In turn, this Officer appoints the deputy disciplinary commissioners of the appeal courts and the regional courts from six candidates presented to him by the general assemblies of judges of those courts.[35]

It is also worth noting that, in larger regional courts (more than 60 judicial posts), the Disciplinary Commissioner of the Ordinary Court Judges may appoint more deputy

[33] It should be added at this point that, with respect to Judge Żurek, the new NCJ declared that no appeal may be filed against the decision of the court president regarding his transfer between divisions justifying this by the fact that there was no change in adjudicating division, even though he was transferred from the appeal division to the first instance, which has a very different set of responsibilities.

[34] Article 112 § 3 of the Act on the Organization of Ordinary Courts (Journal of Laws of 2001, item 1070, as amended).

[35] Article 112 § 6 – § 13 of the Act on the Organization of Ordinary Courts.

disciplinary commissioners after obtaining the consent of the Minister of Justice, if this is justified by the interests of the justice system. Such a solution suggests the intention to increase the number of disciplinary proceedings, whereby – almost certainly not by chance – this can be introduced in the larger courts and, therefore, where the resistance of the judges to the unconstitutional changes and subordination of the judiciary to the political factor is greatest.

Likewise, the Minister of Justice specifies the number of judges in the individual disciplinary courts at the appeal courts at his own discretion,[36] as well as appointing all judges personally to those courts. The Minister's nominations are binding on the judges, regardless of whether they agree to take up office or not, with no right of appeal against the Minister's decision.[37] The Minister of Justice may nominate a specific *ad hoc* disciplinary commissioner (that is, the Disciplinary Commissioner of the Minister of Justice) in any judge's case, which disqualifies the competent officer[38] from the proceedings and is equivalent to a request to initiate proceedings,[39] whereby, the Minister of Justice is generally one of the entities that has the powers to request the initiation of disciplinary proceedings. Finally, if a case applies to disciplinary misconduct that satisfies the criteria of an intentional crime prosecuted by public action, the Disciplinary Commissioner of the Minister of Justice can also be appointed from among the prosecutors recommended by the State Prosecutor. Should such a situation take place, the Minister of Justice – Prosecutor General will be able to give binding instructions to the disciplinary commissioner and hence 'manually control' the proceedings in question. Of concern is that Article 231 of the Penal Code (PC), which has long been criticized for the lack of clarity in its specification of the criteria of a crime (a public official overstepping his/her powers or neglecting duties) gives the subservient prosecution service the potential ability to classify disciplinary delicts (torts) or even a judicial activity as a crime.[40]

In this way, a politician related to the group exercising executive authority has a direct influence on who prosecutes and who tries judges in disciplinary proceedings. The authority of the Minister of Justice – Prosecutor General to assign a specific prosecutor to a specific judge's case constitutes another example of a direct influence of a political nature on the disciplinary proceedings against judges. Although the function of the Disciplinary Commissioner of the Minister of Justice ends when the decision refusing to initiate disciplinary proceedings becomes final, or to discontinue the disciplinary proceedings or when the decision concluding the proceedings becomes final, the expiry of his function in this mode does not bar the Minister of Justice from re-appointing the disciplinary commissioner and reopening the same case.[41] In turn, according to Article 112 b § 4 of the Act on the Organization of Ordinary Courts, this means a request to reopen the proceedings in the same

[36] Article 110 c of the Act on the Organization of Ordinary Courts.
[37] Article 82 c of the Act on the Organization of Ordinary Courts.
[38] Article 112 b § 1 of the Act on the Organization of Ordinary Courts.
[39] Article 112 b § 4 of the Act on the Organization of Ordinary Courts.
[40] This way of thinking is not alien to some prosecutors, which is indicated by the attempts to classify the decisions of active judges on the allocation of cases to other judges in this way (the case of Zakłady Chemiczne 'Police') or the unprecedented disciplinary proceedings against Judge Agnieszka Pilarczyk from Kraków, the excuse for which was the alleged overpayment of fees for court experts – doctors, which constitutes a challengeable decision, incidental to pronouncement of the judgment. This last example is significant as the party to the proceedings, to the detriment of which the judge passed the unfavourable decision was the current Minister of Justice – Prosecutor General, Zbigniew Ziobro.
[41] Article 112 b § 5 of the Act on the Organization of Ordinary Courts.

case and with respect to the same judge, who, in this way, can be kept in a state of being a perpetual suspect.

As if that was not enough, the Minister of Justice – Prosecutor General is entitled to object to a decision of the disciplinary commissioner refusing to initiate proceedings against a judge. Furthermore, such an objection is binding on the officer and obliges him to handle the proceedings in accordance with the Minister's instructions,[42] while the right to object is not qualified by any quantitative or temporal restrictions (except that the Minister of Justice has a deadline of 30 days to appeal against any decision, which, after all, is a very long time) and therefore, the appeal can be renewed and, once initiated, the disciplinary proceedings against the judge can practically last forever.

These powers authorize the Minister to take over full control of the course of any disciplinary proceedings at the pre-court stage to such an extent as would enable keeping the judge in a state of being a perpetual suspect.

The disciplinary proceedings are formed in such a way that the Minister of Justice can not only initiate disciplinary proceedings against a specific judge, but can also choose the most important disciplinary commissioners, personally assign a disciplinary commissioner of his choice to a given judge on a case-by-case basis. Therefore, he has the power to keep a judge in a state of perpetual accusation and furthermore, the Minister of Justice nominates the members of the disciplinary court of the first instance and thus establishes an inquisitorial model of proceedings. The fact that the person who is entitled to nominate a disciplinary commissioner and to select the membership of the court of the first instance is an active politician of the executive authority is one of the main arguments proving that the disciplinary proceedings against judges are politicized.

2. Special authorities at central level, namely politicization of criminal and disciplinary proceedings against judges.

In order to present a full picture of the special treatment of judges during disciplinary and criminal proceedings being conducted against them, four special authorities which were established at central level with the objective of placing judges under 'special supervision' need to be described.

a) Task Force of the Minister of Justice.

The most intriguing special purpose body to deal with proceedings against judges was established at central governmental level by the Minister of Justice – Prosecutor General on 10 September 2018.[43] Reporting directly to the Minister of Justice, the 'Task force at the office of the Minister of Justice in proceedings taken against judges and trainee judges' has the objective of '*preparing analyses and presenting recommendations to the Minister of*

[42] Article 114 § 9 of the Act on the Organization of Ordinary Courts.

[43] https://www.oko.press%2Fziobro-powolal-specgrupe-do-scigania-sedziow-i-robienia-im-dyscyplinarek-wiceminister-piebiak-na-czele%2F&usg=AOvVaw25P8AJ82mPVWBw8JjfCF-G, accessed on 13/01/2019.

Justice' on disciplinary proceedings with respect to judges.[44] Importantly, the Deputy Minister of Justice, Łukasz Piebiak, chairs this task force and is well known for his function as a 'personnel manager' for the judiciary. The task force also includes the Disciplinary Commissioner of the Ordinary Court Judges appointed by the Minister of Justice and his two deputies, as well as the member of the commission on disciplinary liability of judges established within the 'new' National Council of the Judiciary. Given that the task force consists of disciplinary commissioners who decide to initiate disciplinary proceedings against judges and can take over any case handled by the deputy disciplinary commissioners of the regional and appeal courts, who are also the people within the task force responsible for advising the Minister of Justice on the steps to be taken during the disciplinary proceedings, it should be acknowledged that this is a direct manifestation of the political factor affecting disciplinary proceedings against judges. Such a solution simultaneously constitutes a complete denial of the principle of impartiality of the body handling the proceedings which can be concluded with a substantial penalty, including being removed from office.

The absence of any specific indications of the task force's responsibilities in combination with its membership suggest that the task force's actual activities focus on selecting those judges who should be harassed on political grounds, as well as establishing the type of harassment to be applied to a specific judge. The fact that the Prosecutor General is a member of the task force indicates that the arsenal of recommended measures contains not only actions in disciplinary proceedings but also criminal prosecution.

It seems paradoxical that even in the 1990s, namely at the time that the level of violent organized crime peaked in Poland, it was never considered such a serious problem that it was worth establishing a standing task force at the Ministry of Justice to combat it.

Interestingly, according to the official statement published on the website of the Ministry of Justice,[45] 'The task force analyses the issue of the rules of professional ethics of judges. The aim is to help draw up a list of good practices based on existing regulations, which should be followed by judges both in their professional activities and in everyday life. The analysis can become a basis for introducing possible amendments to the legal acts, as well as the Rules of Judicial Ethics.' The situation in which the same people decide what kind of behaviour of judges is permissible and what is forbidden and simultaneously prosecute judges in disciplinary proceedings is another inquisitorial feature of the disciplinary proceedings, which is characteristic of systems heading towards a monopoly of power. Moreover, neither an Act of Parliament, nor a Regulation of the Minister of Justice, which brought the Task Force of the Minister of Justice to life, authorized this body to prepare the rules of professional ethics of judges (such power is granted to the National Council of the Judiciary by the Act on National Council of the Judiciary).

The mere fact that such units have been formed as this special task force or the Internal Affairs Department of the State Prosecution Service discussed below, both being subordinated to the Minister of Justice, in the situation in which the number of disciplinary delicts (torts),

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44 https://bip.ms.gov.pl/pl/ministerstwo/dziennik-urzedowy-ministra-sprawiedliwosci/2018/download,3554,267.html, accessed on 18/02/2019.

45 https://www.ms.gov.pl%2Fpl%2Finformacje%2Fnews%2C11724%2Czespol-doradczy-do-spraw-etyki-i-postepowan.html&usg=AOvVaw2ZN42UOpqwgJ7lGpPDlYhc, accessed on 18/02/2019.

as well as crimes committed by judges, is marginal unambiguously demonstrates the intention to harass judges with a view to subordinating them to the political factor. The disciplinary proceedings initiated in this way may also become a tool for the executive authority to personally control the staff of the justice system giving the ability to effectively remove judges who do not satisfy the government's expectations from office.

b) Internal Affairs Department of the State Prosecution Service.

The second body of central government which has the objective of handling disciplinary proceedings against judges is the Internal Affairs Department of the State Prosecution Service, which was established to '*conduct and supervise preparatory proceedings in cases of intentional crimes prosecuted by public indictment, committed by judges, prosecutors, trainee judges or trainee prosecutors*'. Therefore, this department's task includes prosecuting judges for crimes. The Minister of Justice – Prosecutor General established the Internal Affairs Department, while the positioning of this Department at the top of the prosecution service's organizational structure means that the Minister is not only its direct superior and supervisor, but also directly influences its operations.

It should be reiterated at this point that, pursuant to the Act on the Prosecution Service of 28 January 2016,[46] the functions of the Minister of Justice and the Prosecutor General[47] were merged, thereby returning to the model from the times of the Communist regime. The personal combination of the offices of the Minister of Justice and the Prosecutor General that was introduced by this Act was accompanied by a significant reduction in the criteria required from the candidate to the office of Prosecutor General, which enabled the appointment of an active politician to this post.[48] It is significant that the deep positioning of the Prosecutor General in the political scene was accompanied by a significant increase in his powers. In particular, the Prosecutor General currently has the authority to request operational and investigative procedures which are directly related to pending preparatory proceedings (this applies to invigilation of the control of the content of correspondence type and the use of phone tapping) as well as access to evidence obtained during those procedures. However, the Act on the Prosecution Service does not mention any conditions of admissibility and therefore no restrictions on such activity by the Prosecutor General, which gives rise to the risk of abuse.[49] The Minister of Justice also has the right to issue orders, including those referring to specific procedural steps in each case (Article 7 § 2 and § 3 of the Act), the right to revoke or

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[46] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000177/U/D20160177Lj.pdf, accessed on 02/03/2019.

[47] The personal union of the offices of the Minister of Justice and the Prosecutor General took place with the Act on the Prosecution Service entering into force on 4 March 2016. The merger of these two offices alone, accompanied by awarding broad supervisory and investigative rights to the Prosecutor General, means that, on the one hand, this same person becomes an active participant of all criminal proceedings through the subordinated prosecutors and, on the other, the authority supervising the courts, which became the basis of a complaint of the "old" National Council of the Judiciary filed with the Constitutional Tribunal regarding the scope of the so-called 'administrative supervision'. Hence one of the motions of the extraordinary congress of judges of 3 September 2016 advocating for the ordinary courts to be supervised by the first President of the Supreme Court.

[48] In particular, the Act of 2016 abandoned the requirement that a candidate to the post of Prosecutor General should have at least 10 years of experience as a prosecutor or an adjudicating criminal law judge. Consequently, the requirements regarding the qualifications of the Prosecutor General are currently lower that with respect to a prosecutor of the lowest level or even a trainee prosecutor.

[49] This is allowed by Article 57, para. 3 of the Act on the Prosecution Service of 2016.

change a decision of a subordinate prosecutor (Article 8 of the Act),[50] as well as the right to take over cases from subordinate prosecutors of any level (Article 9 § 2 of the Act), which makes him not only becomes the supervisor of the prosecutors but also a super-prosecutor equipped with typically investigative powers.

According to the applicable regulations, after the initiation of criminal proceedings, the prosecutor may apply for judicial immunity to be revoked, whereby the decision on this is made by the disciplinary court of the appeal court. In such a case, the appeal court is the Disciplinary Chamber of the Supreme Court elected by the new, politicized National Council of the Judiciary. 'Reasonable suspicion of having committed a criminal offence' is sufficient to revoke judicial immunity.[51] A positive decision of the disciplinary court, to open criminal proceedings on an indictable intentional offence with respect to a judge legitimizes the suspension of a judge in his duties, which is accompanied by the removal of his cases and a reduction in his remuneration by as much as up to 50% (without a statutory provision setting the maximum duration of the suspension).[52] In this way, by taking control of the politicized prosecution service and the newly-created disciplinary courts, the Minister of Justice has gained the potential for taking cases away from inconvenient judges.

The fact that the new body, the Internal Affairs Department of the State Prosecution Service, has been placed at the top level of the organizational structure of the prosecution service appears to suggest the existence of a serious issue with corruption among judges and prosecutors in Poland, which requires decided organizational measures. However, the argument that a specialized body of this type needed to be formed is undermined by the statistics. It transpires that during more than 2 years of its operation, having examined over 1100 complaints, requests and grievances, only 117 gave grounds for formal registration of the cases, whereby just 38 of the cases are currently pending, although there are only 7 proceedings against a specific individual, 5 of which apply to prosecutors and 2 to judges.[53] Given that Poland has approximately 10,000 active judges and over 6,000 prosecutors, such a number of proceedings should be considered marginal and insignificant,[54] which confirmed that the establishment of such a body, just as the special task force described above within the office of the Minister of Justice, lacks substantive justification. Therefore, the mere fact of their establishment could not be regarded as anything but an attempt to harass judges and prosecutors.

Experience shows that the employees of the new unit can go to some lengths to justify its existence, especially if the employer provides a 'motivational' remuneration system.

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[50] The literature on the subject rightly states that providing such extensive opportunities to the Prosecutor General to interference with pending proceedings means that he becomes a 'super-prosecutor' equipped with extensive investigative powers. Consequently, the powers of the current Minister of Justice – Prosecutor General, Zbigniew Ziobro, who is simultaneously a member of the Polish Parliament, formulated in this way constitute a breach of Article 103, para. 2 of the Polish Constitution, which provides that a prosecutor cannot simultaneously hold the office of a Member of Parliament.

[51] Article 80 § 2 c of the Act on the Organization of Ordinary Courts.

[52] Article 129 § 2 of the Act on the Organization of Ordinary Courts.

[53] Data from the beginning of August 2018, https://www.prawo.gazetaprawna.pl%2Fartykuly%2F1206379%2Cpatologie-wsrod-sedziow-i-prokuratorow.html&usg=AOvVaw1gvqMgjquGFrx4y7DDo5Z_, accessed on 03/03/2019,

[54] It should be noted that the establishment of the Internal Affairs Department is not the only distinct feature of the new organization of the prosecution service, which is lacking the required justification in the actual structure of crime. The establishment of units at the district prosecution level (and therefore at a very high level), which specialize in medical malpractice cases is equally unusual, although, those units are often also duplicated at the regional prosecution level.

Therefore, numerous attempts to initiate criminal proceedings against judges, the legitimacy of which is questionable, should be expected. The instigation of such proceedings will be all the easier that the so-called official offences of overstepping official rights or the failure to perform official duties (Article 231 PC) is evaluative in nature and exposed to broad interpretation, as will be elaborated on in point 3 of this chapter. However, to secure convictions in such 'forced' proceedings, broad political control over the judiciary from the ruling party is required, which, despite the utmost efforts, has not yet been achieved.

c) Disciplinary Commissioner of the Ordinary Court Judges, his deputies and the Disciplinary Commissioner of the Minister of Justice.

At first glance, a three-tiered structure of the authorities responsible for pre-court disciplinary proceedings against judges of the ordinary courts seems decentralized. However, on a closer examination of the powers of the disciplinary commissioners, it transpires that the provisions give the possibility of focusing disciplinary proceedings against a specific judge at central level.

In other words, in principle, the deputy disciplinary commissioners of the regional courts[55] handle disciplinary proceedings against judges of the district courts, while those at the appeal courts[56] handle proceedings against judges of the regional courts. The self-governing judiciary authorities (assemblies of judges of the given courts) influence the appointments of both categories of officers (namely those at the appeal courts and those at the regional courts).

However, the position of Disciplinary Commissioner of the Ordinary Court Judges, currently filled by Piotr Schab, a judge of the Regional Court in Warsaw, was introduced at the central level, together with the functions of two Deputy Disciplinary Commissioners of the Ordinary Court Judges, currently filled by Michał Lasota, President of the District Court in Nowe Miasto Lubawskie and Przemysław Radzik, President of the District Court in Krosno Odrzańskie.[57] Both the Disciplinary Commissioner of the Ordinary Court Judges and his two deputies are appointed by the Minister of Justice at his own discretion.[58] Although, in principle, the Disciplinary Commissioner of the Ordinary Court Judges and his two deputies are authorized to conduct proceedings only against the appeal court judges, as well as the presidents and vice presidents of the appeal courts and regional courts, a special provision allows them to take charge of proceedings from the deputy disciplinary commissioners of the regional courts and the appeal courts.[59] It can already be noticed that the Disciplinary Commissioner of the Ordinary Court Judges and his deputies are exhibiting a tendency to take charge of cases of particularly 'disobedient' judges, whereby, according to the rule that 'the end justifies the means', the officers operating at the central level happen to breach provisions on jurisdiction, as will be discussed below (see sub-chapter VI.5).

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55 Poland has 45 regional courts and the same number of respective disciplinary commissioners.

56 Poland has 11 appeal courts and the same number of respective disciplinary commissioners.

57 It should be added that both Michał Lasota and Przemysław Radzik were appointed by Minister of Justice- Prosecutor General Zbigniew Ziobro to the positions of the presidents of courts quite recently, in June 2018, which in combination with them being seconded by Zbigniew Ziobro to adjudicate in the Regional Court in Warsaw (which is a court of a higher instance) at the beginning of 2019, can be perceived to be a method of buying their loyalty to the political power.

58 Article 112 § 3 of the Act on the Organization of Ordinary Courts.

59 Article 112 § 1 a and § 3 of the Act on the Organization of Ordinary Courts.

Furthermore, the Minister of Justice can nominate a Disciplinary Commissioner of the Minister of Justice[60] at his own discretion from among the judges or prosecutors (in the case of intentional indictable offences), to conduct proceedings against a particular judge. An *ad hoc* disciplinary commissioner appointed in this way has the authority to either initiate proceedings or take over the proceedings from another disciplinary commissioner at any level.

d) Disciplinary Chamber of the Supreme Court.

Equally importantly, a court of the second instance in the disciplinary proceedings against judges of the Ordinary Courts, which is the Disciplinary Chamber of the Supreme Court, shares many features with a specialized court that are not included in the list of judicial authorities specified in Article 175 of the Constitution. This authority resembles a quasi-judicial institution, like those established in times of war, revolution or under totalitarian regimes, with its distinctive membership appointed according to a political key, while their loyalty is additionally reinforced by the 'motivational' reward system. Such authorities operate in a special procedure (usually restricting the right of defence) and their powers usually apply to a limited group of people. Judicial authorities of this type are formed to gain absolute certainty that they will adjudicate in accordance with the political will of the 'driving force of the nation'. The Disciplinary Chamber of the Supreme Court is clearly designed to ensure that it would punish or even eliminate disobedient judges and representatives of other legal professions from the profession.

According to the assumptions, the Disciplinary Chamber is a completely independent and separate unit, which, apart from its name and location, has practically nothing in common with the Supreme Court, except that it operates under its auspices. It has a separate President, whose status is so special compared with the presidents of other chambers that it is essentially on a par with the office of the First President of the Supreme Court (and in some respects enjoying even more authority),[61] a separate budget[62] and a separate chancellery.

It is worth emphasizing that the President of the Disciplinary Chamber of the Supreme Court not only enjoys full autonomy with respect to the First President of the Supreme Court, but has also a direct, administrative influence on the operation of the first instance disciplinary courts. In other words, the President of the Disciplinary Chamber of the Supreme Court not only has the authority to appoint presidents of the disciplinary courts at the appeal courts for a relatively short, 3-year term of office, but can also dismiss them during that term of office on unspecified and discretionary grounds such as '*the gross or persistent failure to perform official duties*', or if *'the continued performance of official duties is inconsistent with the interest of justice administration for other reasons*'.[63] As can be concluded from this

[60] Article 112 b of the Act on the Organization of Ordinary Courts.

[61] Article 20 of the Act on the Supreme Court; the importance of the President of the Disciplinary Chamber is evidenced by the fact that, among other things, any doubts as to which Chamber of the Supreme Court is to consider a given case is generally settled by the First President of the Supreme Court, whereas in the case of the Disciplinary Chamber, this lies within its president's exclusive responsibilities (Article 28 § 2 of the Act on the Supreme Court); furthermore, the First President of the Supreme Court cannot second any of the judges of the Disciplinary Chamber to adjudicate in another Chamber without the consent of the President of the Disciplinary Chamber (fourth sentence of Article 35 § 3 of the Act on the Supreme Court).

[62] Article 7, paragraph 4 of the Act on the Supreme Court.

[63] Article 110 b § 1 and § 2 of the Act on the Organization of Ordinary Courts.

description, the position of the presidents of the disciplinary courts of the appeal courts is so weak that it would not be difficult to ensure they are subservient. After all, the authority of the President of the Disciplinary Chamber of the Supreme Court goes even further because he is able to '*view the operations of the disciplinary court of the first instance*'.[64] In practical terms, this latter power, which enables him to request the president of the appeal court to provide the files of a case that is pending before the court of the first instance at any time appears not to have any substantive justification, although it could easily indicate to a first instance court that a case is of particular significance. This power, accompanied by the direct influence of the President of the Disciplinary Chamber of the Supreme Court over who serves as the president of the first instance disciplinary court at the appeal court is an indication of a significant deterioration in the independence and impartiality of the first instance disciplinary courts. Finally, pursuant to Article 110 § 3 of the Act on the Organization of Ordinary Courts, the President of the Disciplinary Chamber of the Supreme Court arbitrarily nominates the first instance disciplinary court which has the jurisdiction to hear a judge's case related to any disciplinary offences. Such 'flexible competence' of the first instance disciplinary courts gives rise to concerns that the particular disciplinary court, in which judges are assessed as the most obedient, may become a body used for dealing with special issues. In the light of these arguments, there can be no doubt that the powers of the President of the Disciplinary Chamber of the Supreme Court with respect to the disciplinary courts are much broader than the powers of the First President of the Supreme Court over the structure of the ordinary courts.

What makes the assessment of the independence of the disciplinary chamber and the impartiality of its judges so negative is the fact that it no longer consists of the 'old' Supreme Court judges, but of newly-appointed people, whereby the method of appointing the judges to this Chamber has changed. In other words, the procedure of appointment of the members of this Chamber has become politicized, which was achieved by law, in breach of Article 187 of the Constitution, in such a way as to transfer the right to appoint 15 judges – members of the National Council of the Judiciary – from the self-governing judicial bodies to the Parliament, where the ruling party has an absolute majority.[65] Next, the new unconstitutionally-appointed and politicized National Council of the Judiciary has also grossly reduced the criteria set for candidates to take office in the Supreme Court, dropping the requirement for them to provide the files of the cases they are handling for assessment, as well as preparing opinions on the candidates based on these case files. Apart from checking the formal requirements (which, after all, was a highly superficial check[66]), this contest was limited to an interview lasting several minutes, which demonstrates that its nature was fictitious. Under these circumstances it is perfectly reasonable to presume that the candidates were appointed to the Disciplinary Chamber of the Supreme Court on grounds other than their merits.

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64 Article 112 c of the Act on the Organization of Ordinary Courts.

65 These are: nine judges nominated by the Law and Justice party, two members of the lower house of Parliament and two senators (members of the upper house of Parliament) who are members of the Law and Justice party and finally, a representative of the Minister of Justice – a member of a party which is in coalition with the Law and Justice party, which gives a total of 14 votes in a Council of 25 members.

66 The fact that the assessment of the formal criteria was conducted superficially is evidenced by the fact that two candidates with unexpired disciplinary convictions passed through the 'sieve' of the contest procedure. The President refused to hand them the appointments after their disciplinary convictions were disclosed by the press.

Consequently, the procedure described above cannot be assessed as a contest based on merits; five out of ten judges, and therefore half of the disciplinary chamber consists of prosecutors who are not accustomed to impartiality and, until recently, were subordinated to the Minister of Justice – Prosecutor General and hence a politician whose official instructions were binding on them. The chamber also consists of the presidents of the ordinary courts who were appointed to their offices by the current Minister of Justice – Prosecutor General.

A discussion regarding the composition of the newly-established Disciplinary Chamber of the Supreme Court could not fail to refer to the fact that, although as many as 63 candidates took part in the contests to the offices of this chamber, only 12 of them were appointed to 16 vacant posts. Having rejected two candidates who had disciplinary convictions, the President was left with ten judges and, therefore, 6 vacant posts in the disciplinary chamber remain to this day. It cannot be ruled out that the vacant posts were left deliberately in the Disciplinary Chamber, enabling the Minister of Justice to make temporary appointments from judges of the ordinary courts.[67] In such a case, the judges appointed by the Minister of Justice would be completely subordinated to him because the Minister of Justice is able to dismiss them from their offices at any time.

Another feature of the Disciplinary Chamber is the fact that there is an unprofessional element of its membership, namely the lay judges[68] appointed by the Senate (upper house of Parliament in which the ruling party has an absolute majority). The appointment of an unprofessional element to the Supreme Court, which is the highest judicial body, is globally unique and it is difficult to find any rational justification for it other than sentiment towards the populistic concept of 'the people's court', which, after all, arouses the worst possible historical connotations. Distinctively, unlike under the Criminal Procedures Code in a mixed membership (professional and non-professional) lay judges always have the majority of votes, whereas under the new disciplinary proceedings, the bench consists of two adjudicating professional judges and one lay judge alternatively, 3 professional judges and 2 lay judges. Therefore, in all cases the professional judges have the majority and the lay judges become the proverbial 'square peg in a round hole'.

Although work in the Disciplinary Chamber will be easiest in substantive terms in the Supreme Court, its members will earn 40% more than the members of the other chambers.[69] Furthermore, as was rightly noted in the opinion of the Bureau of Research and Analysis of the Supreme Court in its report on the members' bill on the Supreme Court of 18 July 2017 (Sejm publication no. 1727), every judge of this Chamber handles far fewer cases than judges of the other chambers of the Supreme Court.[70] The award of such high remuneration for work

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67 Such a possibility is provided for by Article 40 § 1 of the Act on the Supreme Court, although judges nominated by the Minister of Justice can be delegated for a period of 2 years at the request of the First President of the Supreme Court. The only formal requirement to be met by the seconded judge is 10 years of service as a judge.

68 Article 62, § 2 of the Act on the Supreme Court (Journal of Laws of 2018, item 5).

69 Article 48, paragraph 7 of the Act on the Supreme Court.

70 It is stated on page 21 of this Opinion that '*…in 2016, the Supreme Court received 61 disciplinary cases against judges of the Supreme Court and judges of the ordinary courts to be heard by a second instance court, 99 disciplinary cases related to other professions and 3 disciplinary cases of judges of the Supreme Court initiated by the disciplinary commissioner. The Supreme Court considered 33 cases on the nomination of the appropriate disciplinary court. Therefore, there were a total of 196 cases. Assuming that the level of such cases remains unchanged after the planned Act enters into force, a significant disproportion will be noticeable between burdens on judges of the Disciplinary Chamber and the judges of the other Chambers. In 2016, the number of cases received other than disciplinary claims*

in a chamber dealing with substantively the easiest work and simultaneously, less burdened with cases, could not be explained by arguments other than an attempt to buy the loyalty of its judges to the political authority. In such circumstances, it is hardly surprising that the additional remuneration of the judges of the Disciplinary Chamber is commonly referred to as '30 pieces of silver' by the ordinary court judges.

As the *ne peius* prohibition has been excluded from the proceedings in the Disciplinary Chamber, if a first instance court acquits someone from a disciplinary delict, the Disciplinary Chamber of the Supreme Court has the authority to overrule this decision and convict such a person.[71] In such a case, there is no right of appeal to a different judicial body, as it would also be considered by the Disciplinary Chamber, although its membership would be different.[72] At the very least, such a solution constitutes the deterioration of the constitutional principle of a two-tiered structure of courts (as discussed in greater detail in chapter 4.d of this report). This means that, every time that, regardless of the decision of the court of the first instance, the establishment of a judge's guilt and his sentencing will rest with a politically-appointed central authority largely consisting of subservient former prosecutors.

It is also important that the principle of random allocation of cases to judges, which was introduced in the ordinary courts, does not operate in the Supreme Court. It cannot be ruled out that this arrangement would permit the politically-appointed President of the Disciplinary Chamber to allocate individual cases to specifically chosen judges and to manipulate the bench, as is the current practice in the Constitutional Tribunal.[73] The implementation of such a solution is symptomatic in view of the basic assumptions of 'the great reform of the judiciary', which was to have been the assurance of transparency of the allocation of cases by precluding reporting judges from deciding on which case should be allocated to which judge. It seems clear that transparency ceases to be a priority in those cases over which the executive authority wants to keep political control.

In conclusion to the discussion on the Disciplinary Chamber of the Supreme Court, it would be worth considering its institutional position in the light of the provisions of the acts of international law that are binding on Poland, as well as the Polish Constitution. Both Article 6 (1) of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union contain a phrase according to which an independent and impartial tribunal should be established by law (emphasis added). In the light of the principles of the rule of law constituting the backbone of the ECHR, the Tribunal in Strasbourg accepts that the '*court*' must always be '*established by law*', because otherwise it would not have the legitimacy required in a democratic society for considering individual cases (*Lavents v Latvia*, § 81). Furthermore, the objective of the formulation of '*established by law*' contained in Article 6 (1) ECHR is to ensure that the organization of the court system does not depend on the discretion of the executive power, but is governed by the law laid

exceeded 11,000; taking into account the total number of judges authorized under Article 91 to adjudicate in Public Law and Private Law Chambers, this would mean that, statistically, each of the judges of these Chambers would have to handle 340 cases per year (11,000 ÷ 32), while the judges of the Disciplinary Chamber would receive only 16 cases (196 ÷ 12)'.

71 Article 121 § 3 of the Act on the Organization of Ordinary Courts.

72 Article 122 § 2 of the Act on the Organization of Ordinary Courts.

73 http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/stanowisko%20ZEP%20w%20sprawie%20manipulowania%20skladami%20sedziowskimi%2023_05.pdf, accessed on 13/01/2019.

down by Parliament (*Savino and others v Italy*, § 94). Since the act of law of the highest order laid down by Parliament is the Constitution, it is obvious that a court authority cannot be appointed on the basis of a normal statute which breaches the provisions of the Constitution. It arises from these considerations that the method of establishing a court authority cannot grossly breach the national laws because then the right of access to a court in the meaning of Article 6 ECHR is breached. This doctrine was developed in the judgment of 12 March 2019 in Guðmundur Andri Ástráðsson v Iceland *(application 26374/18),*[74] in which it was stated in para. 100 that *'In principle, a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 § 1 (DMD Group, A.S, cited above, § 61). It follows that a violation of this principle, like the principles under the same provision that a tribunal shall be independent and impartial, does not require a separate examination of whether the breach of the principle that a tribunal be established by law rendered a trial unfair. Furthermore, in the light of the requirement that a tribunal shall be established in accordance with national law, the Court is called upon to examine whether the domestic law has been complied with in this respect.'*

Prof. Włodzimierz Wróbel[75] prepared a comprehensive assessment of the institutional position of the Disciplinary Chamber of the Supreme Court in the light of the provisions of the Polish Constitution, as well as Article 6 (1) ECHR in the article bearing the title of '*Izba dyscyplinarna jako sąd wyjątkowy w świetle art. 175 ust. 2 Konstytucji RP*'[76] ['Disciplinary court in the light of Article 175 (2) of the Polish Constitution' – own translation]. In this article, Prof. Wróbel mentioned a number of exceptional features of the Disciplinary Chamber of the Supreme Court (some of them have been discussed above) encouraging him to draw an unambiguous conclusion, with which the author of this document fully agrees, that this Chamber, which constitutes an authority that is separate from the Supreme Court, is not included in the list of courts referred to in Article 175, para. 1 of the Constitution. Furthermore, the Disciplinary Chamber is essentially an exceptional court, the establishment of which in peacetime is prohibited under Article 175, para. 2 of the Constitution. This conclusion creates very serious repercussions. Since the Disciplinary Chamber is not a court, its decisions are not of the nature of court judgments in the meaning of Article 42, para. 3 of the Constitution. Furthermore, '*Since the decisions of the Disciplinary Chamber cannot be subject to cassation or any other form of appeal, in cases in which such judgments will be passed, the party will be deprived of the constitutional right to a fair trial. This is because this right is only exercised if the given specific case can be presented 'to the court' in the constitutional sense (...). Therefore, the establishment of a Disciplinary Chamber has resulted in the exclusion of many individual cases from the scope of consideration of the courts because the ability to file an appeal with the court has been ruled out in these cases (...). Meanwhile, if the courts, in the first instance, ruled in the constitutional sense (this applies in particular to the disciplinary judges) the exclusive competence of the Disciplinary Chamber to consider measures of appeal means that the constitutional principle of two-instance court*

[74] https://www.njb.nl%2FUploads%2F2019%2F3%2FCASE-OF-GU-MUNDUR-ANDRI--STR--SSON-v.-ICELAND.pdf&usg=AOvVaw2bYCrLMSHPduwqy9vUHtM5, accessed on 05/04/2019.

[75] This author is a professor of the Jagiellonian University, Head of the Chair of Criminal Law, Manager of the Department of Bioethics and Medical Law. He has been a judge of the Criminal Chamber of the Supreme Court since 2011.

[76] http://czasopismo.palestra.pl/upload/15/54/10/1554104640_.pdf, accessed on 05/04/2019.

proceedings (Article 176, para. 1 of the Constitution) ceases to be exercised in these cases. This situation means that, in the majority of disciplinary cases, the right of access to a court is limited, which can be contested in the future not only before the Polish authorities, but also before the European tribunals, including the European Court of Human Rights, with respect to Article 6 (1) of the European Convention on Human Rights' (ibid, p. 33).

3. Indescribability of types of punishable acts.

The initiation of disciplinary proceedings against judges will be even easier as the Act on the Organization of Ordinary Courts does not give a definition of a disciplinary delict (tort). Article 107 § 1 of the Act on the Organization of Ordinary Courts only reads '*a judge is subject to disciplinary liability for misconduct in service including for a gross breach of the provisions of the law and for a breach of the dignity of the office of judge (disciplinary misconduct)*', although no further definition of the concepts is provided. Given the lack of precise representation or even examples of the types of conduct that can result in disciplinary proceedings,[77] the classification of disciplinary delicts is evaluative in nature and left to the discretion of the judiciary and doctrine.[78]

How significant interpretative discrepancies can arise from the evaluative nature of the criteria of a prohibited act can be illustrated with an example of crimes from the Act on Combating Drug Addiction regarding a considerable amount of narcotics (which is classified as a crime that is subject to a significantly longer sentence of imprisonment than other types). In this category of crimes, for a number of years, the Supreme Court regarded a considerable amount of narcotics to mean an amount which could be used to intoxicate dozens of people, while the Appeal Court in Kraków considered a considerable amount to means several tens of thousands of individual doses of psychoactive substances.[79]

If such a discrepancy arose in a situation where there are no doubts about the independence of those courts and the impartiality of the judges in them, it is not difficult to imagine the scale of interpretative discretion that can arise in the newly-established Disciplinary Chamber of the Supreme Court. After all, the Chamber was appointed in a politicized procedure, while half of its members are prosecutors who, until recently, were subordinated to the Minister of Justice – Prosecutor General, who repeatedly, both in his comments as in his actions, indicated that he is an advocate of the political subordination of the justice system.

Under these circumstances, it can be expected that, in its decisions regarding selected judges who are inconvenient for the party, the Disciplinary Chamber of the Supreme Court, can set a very low threshold for satisfying the criteria of a disciplinary delict, while the abuse of such an interpretation in order to harass selected judges will be even easier that the extent of politicization of the disciplinary commissioners will enable the selective initiation of

[77] Such a method was applied in Article 16 § 1 PC to give a precise definition of the term preparation as a stage of committing an offence.

[78] The Rules of Judicial Ethics (resolution of the National Council of the Judiciary no. 16/03 of 19 February 2013) is only supplementary in nature.

[79] To understand how serious the problem was in practice, it would be sufficient to mention that an offence of producing narcotics and psychotropic substances in their basic form is subject to a penalty of between 1 month and 3 years imprisonment (Article 53, para. 1 of the Act on Combating Drug Addition) and 3 to 15 years if classified as a substantial quantity of narcotics (Article 53, para. 2 of the Act).

disciplinary proceedings. In practical terms, it can become apparent that one type of conduct could, in one instance, be assessed as sufficient to enforce a disciplinary penalty, while in other instances it would not give sufficient grounds for disciplinary proceedings to be initiated.[80]

The lack of a more detailed definition of the type of conduct that constitutes judicial disciplinary delicts raises the significance of the Rules of Judicial Ethics established on the basis of the resolutions of the 'old' National Council of the Judiciary in the process of interpreting this notion.[81] However, the problem is that these rules can be changed very easily, this time by way of a resolution of the new, politicized National Council of the Judiciary, which is already happening (see the end of Chapter III). Worse still, the Minister of Justice empowered Łukasz Piebiak's special task force, which is completely politicized and dependent on him, to develop the Rules of Judicial Ethics (see sub-chapter V.2.a).

It should be pointed out that, in the judgment in *Minister of Justice and Equality v LM* (C-216/18) of 25 July 2018, item 67, the Court of Justice of the European Union clearly stated that a system of disciplinary measures that is consistent with the requirement of the independence of the judiciary should contain norms specifying the conduct that constitutes disciplinary offences.

In turn, with regard to criminal proceedings initiated by a politically subordinated prosecution service, and, in particular, the Internal Affairs Department of the State Prosecution Service, which was extensively criticized for breaching the principle of categorization of acts prohibited by law, the master provision of 231 PC proved to be equally convenient. This provision penalizes '*a public official overstepping rights and failing to perform duties*' as an offence and enables the initiation of criminal proceedings against judges for a practically undefined range of conduct, whereby its extensive interpretation can significantly blur the boundary between criminal and disciplinary liability. For instance, based on this provision, disciplinary action has been initiated with respect to Judge Agnieszka Pilarczyk for allegedly paying excessive fees to court medical experts for preparing opinions[82] and action has been initiated against Judge Wojciech Łączewski for allegedly disclosing the personal details of operational officers in the statement of reasons of the judgment.[83] As far as the author of this report is aware, the most popular application of Article 231 PC with respect to judges is the attempt to assign responsibility to judges for the allegedly wrongful allocation of cases to

[80] Signs of discrimination of individual representatives of some legal professionals are currently already clearly noticeable, for instance, by comparing the method of treating Professor Marcin Matczak, who is critical of the pseudo-reforms in the justice administration, with respect to whom disciplinary proceedings were initiated by the Minister of Justice – Prosecutor General, as with respect to a legal counsel, for controversies taken out of context with an internet hater (for which, after all, the professor apologized) with the lack of disciplinary proceedings against Adam Tomczyński, Attorney-at-Law, who was newly appointed to the Supreme Court (being well-known for his vulgar and political Internet comments) or the failure to initiate proceedings against Professor Jan Majchrowski, who had been appointed to the office of the President of the Disciplinary Chamber of the Supreme Court (having ongoing disciplinary proceedings at the university because of the refusal to accept a student's course of study as a result of a private dispute with Professor Sadurski).

[81] http://www.krs.pl/pl/dzialalnosc/zbior-zasad-etyki-zawodowej-sedziow/c,18,uchwaly/p,1/4582,uchwala-nr-252017-krajowej-rady-sadownictwa-z-dnia-13-stycznia-2017-r, last accessed on 18/02/2019.

[82] Even though Judge Pilarczyk took decided and effective steps to reduce the cost of the expert opinions and despite the fee being based on an incidental order which is subject to judicial review in second instance proceedings.

[83] Such proceedings are conducted even though it arose from the case files available to Judge Łączewski that the data requested by the witnesses was not subject to any legally protected secrecy.

reporting judges in the period when the computerized system of random allocation of cases was not yet in force.[84] The most well-known example of such proceedings is the case regarding motions to take former members of the governing bodies of Zakłady Chemiczne 'Police' into custody, although, according to the information available to the author of this report, there are many more examples of similar cases conducted by the prosecution service.

In summary, it should be concluded that an undefined description of misconduct during service, as well as an offence of overstepping rights and failing to perform official duties, in combination with political subservience of certain prosecutors and disciplinary commissioners (especially those at central level), guarantees very easy access to taking up criminal prosecutions and disciplinary proceedings with respect to judges. It is important that, so far, these proceedings, at least from a formal point of view, were conducted in the *in rem* phase and not against specific people, which, after all, is hardly surprising, since the process of political subordination of judges of the ordinary courts has not yet been fully achieved, while the new system of disciplinary proceedings is still in its infancy (i.e. it has been specified at statutory level although, in practice, it is being implemented by trial and error, as will be discussed in chapter VI.3). These circumstances have meant that it has been difficult to count on achieving convictions in doubtful cases to date. Nonetheless, it should be pointed out that the mere fact that proceedings are lengthy, the obvious objective of which is to press any, even fictional charges on a judge, can cause a freezing effect among judges.[85]

4. Restriction of procedural rights of judges in disciplinary proceedings.

The position of a judge in disciplinary proceedings is further worsened by the serious limitation of the right to a defence which is manifested by, among other things, the fact that a hearing can take place even in the justified absence of the accused or his defence attorney, while unlawfully obtained evidence or evidence obtained without judicial control can be used, including evidence obtained from phone tapping. These factors mean that a judge's procedural position is less favourable, even if he is being charged with, for instance, a delay in producing a statement of reasons attached to the judgment, than the position of a person charged with either murder or even with an ordinary traffic offence.

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[84] It should be added that not only is it difficult to imagine an attempt to assign this offence to the allocation of the main categories of cases, where, before the introduction of the SLP system, cases were allocated according to a list of names of judges in the order in which they were received, but it appears to be practically impossible to allocate cases in different categories, where the principles of allocation were not strictly defined, while the practice of individual courts and judges differed.

[85] The previously mentioned example of Judge Pilarczyk is a good example here. Although the case is being handled '*in rem*' and not '*in personam*' the description of the offence, from which it arises that the case applies to '*the individual member of the adjudicating bench overstepping her authority and failing to perform official duties in case reference…*' unambiguously identifies the judge as the suspect, while regularly re-examining the employees of the department where Judge Pilarczyk works prevents her from forgetting about the Sword of Damocles hanging over her head. The question of how it is possible to keep proceedings open in such an absurd case for nearly 2 years is a secret of the prosecution service. It can only be presumed that the objective is not to end the proceedings but precisely to keep the proceedings alive for as long as possible, keeping the judge in a state of distress.

a) Preclusion of evidence at the pre-court stage of the disciplinary proceedings.

Significant objections from the point of view of upholding procedural guarantees of the accused in disciplinary proceedings are raised under Article 114 § 4 of the Act on the Organization of Ordinary Courts, which provides that the disciplinary commissioner is to serve the disciplinary charges on the accused immediately after they have been prepared and demand written explanations and written motions to take evidence to be delivered within fourteen days of the date on which the disciplinary charges are received by the accused. If this deadline is not met, motions to take evidence lodged by the accused after the expiry of the 14-day deadline may not be considered unless the accused proves that the evidence had not previously been known to him. It arises from this provision that evidence may be disregarded as much due to the failure to present the written explanations as due to the failure to disclose all available evidence. The adverse consequences arising from the failure to exercise the right to submit explanations within the prescribed, short time allowed, directly breaches the right to refuse self-incrimination and right to refuse to provide explanations as interpreted by the Strasburg Court under Article 6 of the ECHR. Such a solution would obviously be defective from the point of view of the right to a defence.[86]

Even if it were to be assumed that the strict rules of not considering evidence only apply to the failure to present the motions to take evidence within the 14-day deadline, the introduction of this preclusion of evidence means a departure from the principle of substantive truth in disciplinary proceedings. The departure from this principle in disciplinary proceedings against judges gives rise to controversy as, in 2016, the return to it was the ruling party's main argument for abandoning the adversarial model of criminal proceedings. Therefore, the Criminal Procedures Code does not currently contain provisions regulating the preclusion of evidence. The introduction of the preclusion of evidence in disciplinary proceedings means a significant deterioration in the position of the accused judge, even, for instance, compared to the position of an accused in the case of any minor offence, even though the potential disciplinary penalty of removal from the profession under the disciplinary procedure is certainly more severe than the most severe penalties prescribed for minor offences.

It should also be noted that the deadline of 14 days is very short for producing well-founded requests to take evidence, especially as the judge is unfamiliar with the evidence in the case at the initial stage of the proceedings while case files are only made available with the consent of the disciplinary commissioner (Article 156 § 5 CPC (Criminal Procedures Code) in connection with Article 128 of the Act on the Organization of Ordinary Courts). Under such circumstances, it may be difficult to establish which evidence could be relevant at later stages of the proceedings.

b) Use of unlawfully obtained evidence in disciplinary proceedings.

Similarly, Article 115 c to the Act on the Organization of Ordinary Courts, which introduced the ability to use unlawfully obtained evidence and evidence obtained without the court's control,[87] including evidence from phone tapping, against the accused should be

[86] E.g. judgment of the ECHR in Saunders v the United Kingdom, case no. 19187/91 of 17 December 1996.
[87] This takes place by applying Articles 168b, 237 and 237a of the Criminal Procedures Code in disciplinary proceedings.

unequivocally critically assessed. The introduction of provisions enabling the use of unlawfully obtained evidence and evidence from phone tapping, with a few exceptions, encountered a wave of well-deserved criticism under the provisions of the Criminal Procedures Code, as they breach the provisions of the Constitution and guarantees arising from the right to a fair trial. The application of these provisions creates an imbalance of power of the parties to the disciplinary proceedings by legitimizing an uneven advantage of the prosecution, excessively restricting procedural rights and the judge's civic rights while simultaneously being disproportionate to the gravity of the disciplinary delicts. One can only wonder whether an intercepted private conversation between judges strongly criticizing actions taken by the Minister of Justice or the president of their court would give sufficient grounds to substantiate the initiation of disciplinary proceedings. An affirmative answer would suggest inadmissible, repressive interference with a judge's privacy, in breach of Article 8 of the European Convention of Human Rights.

As the vast majority of disciplinary proceedings apply to acts that do not satisfy the criteria of a crime, it should be concluded that their application under the institution of criminal procedures, which are designed to detect, prosecute and penalize perpetrators of the most serious crimes, is unfounded.

It is also a valid claim that the application of operational control over judges can threaten the privilege of confidentiality of judicial deliberation and a person's rights, as only strictly defined personnel should be granted access to information in the case files, while the information should only be used in the case being considered.

c) Limitation of the right to a defence in its substantive meaning.

From the point of view of safeguarding the formal right to a defence, Article 113 § 2 of the Act on the Organization of Ordinary Courts does not give rise to reservations, as this Article provides that, at the reasoned request of the accused judge, who cannot take part in disciplinary proceedings due to illness, the president of the disciplinary court or the disciplinary court itself can appoint a defence counsel. However, this absolutely righteous procedural guarantee has been nullified by Article 113a of the Act on the Organization of Ordinary Courts, which provides that '*procedures allowing for the appointment of a public defence counsel and the process of building a defence do not obstruct the course of proceedings*'. This is incompatible with the case law of the ECHR[88] and breaches the fundamental right of defence as a result of which the procedural guarantee becomes illusory. In fact, the situation cannot be ruled out that procedural steps would be taken which are of significance to the outcome of the case, before a public defence counsel is appointed or before he takes up defence, involving at least perusing the files and determining the line of defence. In this situation, the mere fact that a public defence counsel is appointed does not guarantee the right of defence.

A gross breach of the right of defence and the principle of equality of the parties is also manifested by Article 115a § 3 of the Act on the Organization of Ordinary Courts, which

[88] According to the ECHR case law, an accused should be afforded sufficient time and the actual possibility of preparing a defence (e.g. *The United Kingdom v France* or *Sadak and others v Turkey*).

authorizes the disciplinary court to continue proceedings, despite the justified absence of the accused judge and his attorney, unless its continuation adversely affect the object of the proceedings. This provision may prevent the accused from presenting arguments in his defence as he is absent for reasons which are out of his control, such as bedridden illness, whereby in such a situation, the proceedings can be continued, even if the defence counsel's absence is similarly justified. This situation suggests a completely inquisitorial nature of disciplinary proceedings, as the court could only hear the prosecution's case even if the accused was absent through no fault of his own. Such a procedure is grossly in breach of not only the constitutional right of defence but also the principle of equality of arms arising from Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms, which are also applicable to disciplinary proceedings.[89]

A breach of the principle of equality of arms and the right to a defence in substantive terms can also be found in Article 113b of the Act on the Organization of Ordinary Courts, which, in principle, rules out the application of the provision of the Criminal Procedures Code[90] precluding the continuation of activities in the absence of the accused in disciplinary proceedings, if there is no evidence that he has been notified, if the absence was justified, or if there is a good reason to suppose that such failure to appear was due to extraordinary circumstances.

d) Breach of the two-tiered structure of courts.

From the point of view of the principle of a two-tiered court structure (Article 176, para. 1 of the Constitution) serious doubts arise from the solution contained in Article 122 § 2 and Article 121 § 3 of the Act on the Organization of Ordinary Courts, according to which '*an appeal may be filed against a decision of the second instance disciplinary court with the same court, but with a different membership if the decision penalizes the accused with a disciplinary penalty despite an earlier decision of the court of the first instance to acquit the accused or discontinue the proceedings*' and '*Article 454 of the Criminal Procedures Code does not apply in appeal proceedings*'. In the light of the latter provision in criminal proceedings '*the appeal court shall not convict an accused who has been acquitted in the first instance proceedings, or with respect to whom the proceedings in the first instance have been discontinued or conditionally discontinued*'.

The provisions cited above read together indicate that it is admissible in disciplinary proceedings to '*overrule a judgment of a first instance court by passing a judgment to the detriment of the accused and removing the right to appeal to a higher instance court*'.[91] Therefore, while the criminal procedure rules do not allow for the conviction of a person previously acquitted by a court of the first instance or if a court of the first instance discontinues the proceedings against that person, because, in such a situation the appeal court is only allowed to set the decision aside and to refer the case back to the court of the first instance for re-consideration, together with its recommendations, such a situation is

[89] Judgment of the Grand Chamber of the ECHR of 23 June 2016 in *Baka v Hungary*, case no. 20261/12, § 100–119.
[90] Article 117 § 2 CPC.
[91] Quotation from page 22 of the Opinion issued by the Bureau of Research and Analysis of the Supreme Court on a member's bill on the Supreme Court (Sejm publication no. 1727) of 18 July 2917.

admissible under the disciplinary proceedings and is compensated for by the introduction of a so-called 'horizontal instance'. Although a horizontal instance sometimes appears in the Criminal Procedures Code, it applies to secondary and not the main issues (it is provided for by, for instance, Article 254 § 3 CPC). The doctrine provides that the principle of the two-tiered court structure, which has been introduced into Article 178, para. 1 of the Constitution, combined with Article 45 and Article 78 of the Constitution, is one of the fundamental elements of the right to a fair trial. Therefore, it is reasonable to question whether an appeal in the appeal system to the same level court with a different bench, challenging the decision on the main issue of disciplinary liability, and therefore an issue affecting an individual's constitutional rights and freedoms, satisfactorily meets the norms of protection of human rights arising from the Constitution.

Furthermore, an appeal to the same level of court with a different bench is only admissible if a court of the second instance, having previously decided to discontinue the case or acquit the accused, imposed a disciplinary penalty. It arises from this that, if a second instance court finds the accused guilty, but a penalty is not imposed, no appeal may be filed.

A further flagrant deterioration in a judge's position in appeal proceedings in disciplinary cases arises from Article 121 § 4 of the Act on the Organization of Ordinary Courts. In an ordinary criminal prosecution, the appeal court can only consider an appeal against a '*manifestly unjust decision*' to a broader extent than the limits of the appeal and the allegations raised if this were to result in a change of the judgment to the benefit of the accused (Article 440 CPC). However, in the disciplinary proceedings, if the appeal court finds that the decision issued is '*manifestly unjust*' it may also change the decision to the detriment of the accused *ex officio* regardless of the limits of the appeal and the allegations raised.

The case of Judge Alina Czubieniak

How great the possibility is of subjecting the disciplinary court to political control through the introduction of the admissibility of the Supreme Court Disciplinary Chamber to convict judges acquitted by the disciplinary court of the first instance is demonstrated by the case of Judge Alina Czubieniak, in which this Chamber issued a judgment on 22 March 2019. The case started from the detention by the police of a 19-year-old man on the suspicion of committing sexual activities (involving touching the body of a 9-year-old victim), who, after being interrogated by the prosecutor, followed by the court of the first instance, was temporarily arrested by a decision of that court. Although the suspect is mentally retarded and cannot read or write, a court-appointed defence counsel was only appointed after he was temporarily arrested. The defence counsel contested the decision on the application of a temporary arrest, while the judge who considered his appeal in the second instance was Alina Czubieniak, a judge of the Regional Court in Gorzów Wielkopolski with 35 years of experience of adjudication. The judge overruled the order to apply the temporary arrest acknowledging that the failure to appoint a defence counsel for the suspect even before the first hearing at the police station constituted a breach of the right to a defence. When pointing out the inconsistency of the provisions of the Polish criminal procedure with international standards, the judge inferred the obligation to provide a court appointed defence counsel to a

person who is particularly sensitive, even from the initial activities in the preparatory proceedings from provisions that apply at the stage of court proceedings.

A month later, after a re-trial, this time with the involvement of a defence counsel from the beginning, the suspect was arrested for more than a month, being detained in a jail with a medical centre, after which the experts concluded that he was lacking in sanity with respect to the offence of which he is accused and the proceedings were discontinued, whereas a precautionary measure was applied to the suspect involving referring him to therapy together with the obligation to wear an electronic bracelet.

When the local media wrote about this matter as a sensation using the catchy slogan "judge released a paedophile", noticing the media potential of this, the current Minister of Justice took an interest in the matter, followed by the local disciplinary commissioner at the Appeal Court. He accused the judge of committing a disciplinary delict involving the 'obvious and gross breach of the law'. Next, the Disciplinary Court at the Appeal Court disagreed with this assessment and acquitted the judge of the charges, although this did not end the matter, as the Minister of Justice and the disciplinary commissioner appealed to the Disciplinary Chamber of the Supreme Court. The Disciplinary Chamber took advantage of the lack of the *ne peius* principle and overturned the acquittal, convicting the judge to the penalty of a warning. The problem here is that, in the oral justification of the judgment concluding that the judge grossly breached the law, the judges of the Disciplinary Chamber relied on the literal wording of the provisions of the Polish Criminal Procedures Code into which the provisions of two European Union directives[92] had not been implemented, from which it unambiguously arises that the suspect should have a defence counsel from as early as the first activities taken up at the stage of the preparatory proceedings, which is of particular significance with respect to a suspect who is unable to assess the significance of the procedural activities taken with respect to him or understand the instructions given to him as a result of his mental condition. The judges of the Disciplinary Chamber also ignored the consistent line of judgments of the European Court of Human Rights,[93] which is upheld in the spirit of the Directives, even though the judgment representing it in *Płonka v Poland*[94] was widely commented on in the doctrine of Polish criminal law. In accordance with these Directives and the line of judgments of the Strasbourg Tribunal, the position that the judge breached the law when making a pro-EU and pro-constitutional interpretation of the provisions on proceedings appears indefensible.

Therefore, it should be accepted that, when issuing a judgment of the content in question, the judges of the Disciplinary Chamber of the Supreme Court

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92 Directive of the European Parliament and of the Council of 22 October 2013 (2013/48/EU) https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:32013L0048&from=PL (accessed on 30/03/2019). Directive of the European Parliament and of the Council of 26 October 2016 (2016/1919/EU) https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:32016L1919&from=PL, accessed on 30/03/2019.

93 Among others, Salduz v. Turkeyhttps://www.ms.gov.pl%2Fpl%2Forzeczenia-etpcz%2Fdownload%2C561%2C0.html&usg=AOvVaw1XwBNIWXMkRZcpGvhro2q- (accessed on 30/03/2019) or Panovits v. Cyprus, http://www.law.gov.cy%2Flaw%2Flawoffice.nsf%2FAll%2F7A0F4837FA7B415DC225742400384BC7%2F%24file%2FPanovits%2520v.%2520Cyprus.Judgment.Merits.10.12.08.doc&usg=AOvVaw0bAVaRg7bHf9twvEJE37NU, accessed on 30/03/2019.

94 https://www.orzeczenia-etpcz%2Fdownload%2C236%2C0.html&usg=AOvVaw30kYnPhbHg4kl95U50QZqp, accessed on 30/03/2019.

inadmissibly breached the sphere of judicial impartiality, groundlessly interfering in the wording of the judgment of the ordinary court.[95] Furthermore, the judges of the Disciplinary Chamber sent out a clear signal that they either disregard or are unfamiliar with the international standards on the assurance of the effective right to a defence as early as at the stage of preparatory proceedings. In this context, the circumstance that a former notary public, a former legal counsel and a lay judge comprised the adjudicating panel of the Disciplinary Chamber becomes particularly significant, whereby none of these people had previously had any adjudicating experience, nor had they had anything to do to a greater extent with the criminal procedure, the method of application of which they were assessing.[96] Given the degree of politicization of the procedure of choosing members of the Disciplinary Chamber of the Supreme Court, it is difficult to expect that the appeal, to which Judge Czubieniak was entitled, to another 3-person panel of this Chamber gave her a chance in the appeal instance, as a result of which she can only count on a settlement of the European Court of Human Rights after exhausting the national appeal route.

e) 24-hour procedure of revoking judicial immunity.

A further, new institution in disciplinary proceedings, which raises considerable concerns from the point of view of safeguarding the right to a fair trial, is the 24-hour procedure of revoking judicial immunity under Article 80 § 2da *et seq.* of the Act on the Organization of Ordinary Courts. This institution is applicable if the motion to grant consent for holding a judge criminally liable or a motion to grant consent for arresting a judge applies to a judge taken into custody after being caught in the act of committing a crime or an offence, which is punishable with imprisonment for at least 8 years, an offence of causing a road accident while under the influence of alcohol or narcotics, or just an offence of driving under the influence of alcohol or narcotics. Without negating the need for the expedited procedure of revoking a judicial immunity in such a case for pragmatic reasons, it seems that setting a 24-hour period for making such a decision was mainly caused by populistic reasoning and leads to an unnecessary limitation of the accused judge's procedural rights, all the more so that the organizational structure of the disciplinary courts has not been adapted to make such expedited decisions. The significance of a decision to revoke judicial immunity is even greater considering that it would imply the suspension of a judge's service and therefore the removal of cases from a judge and a reduction in his remuneration of up to 50%.[97]

From the point of view of maintaining an appropriate standard of procedural guarantees, the provision which actually states that the court should examine the disciplinary commissioner, the judge and the entity requesting the revocation of the immunity before making the decision to revoke judicial immunity, but, simultaneously, if they do not arrive, it may permit the

[95] This assessment is confirmed in the wording of resolution number 47/2019 of 29 March 2019 of the Regional Bar Association in Szczecin,http://themis-sedziowie.eu/materials-in-english/resolution-no-472019-of-the-regional-bar-association-in-szczecin-of-29-march-2019/ accessed on 30/03/2019.

[96] Position of the Polish Association of Judges 'Iustitia' of 24 March 2019 https://www.iustitia.pl/en/disciplinary-proceedings/2938-polish-judge-punished-by-the-new-disciplinary-chamber-of-the-supreme-court-for-a-correct-verdict, accessed on 30/03/2019.

[97] Article 129 § 2 of the Act on the Organization of Ordinary Courts.

revocation of the immunity, even in the absence of the defence counsel, is of concern.[98] The exceptionally short, 24-hour deadline for making the decision to revoke the immunity means that it should be expected that decisions made without examining some of the parties and in the absence of the defence counsel would rather become the rule rather than the exception. If the accused held in custody is under the influence of alcohol, he may still be unfit to take part in the hearing in such a short time.

Finally, as the literature on this subject has aptly described, the observance of a 24-hour deadline could be unrealistic for organizational reasons, all the more so that since the regulations do not prescribe any form of duty procedure for considering motions, '*The fundamental difficulty lies in the question of if the bench of the adjudicating court consists of judges working in three different courts, located several dozen or several hundred kilometres away from the appeal court, would it even be realistic to observe the 24-hour deadline for making the decision? Especially since before the merits of the case can be considered, some technical/organizational tasks need to be performed, such as drawing the members of the court, preparing the hearing, allowing the parties to read the files or rejecting the motion to allow them to view the files (Article 80 § 2f and 2g of the Act on the Organization of Ordinary Courts). Furthermore, at the hearing itself, the parties who have the right to participate in it and attend should be examined, whereby the decision itself should be justified ex officio in writing. All these activities need to be conducted in a dramatically short space of time. It is patently obvious that the judges adjudicating on the case need time to travel to the court, as well as time to consider the evidence, which, nota bene, can be quite lengthy as Article 115c of the Act on the Organization of Ordinary Courts clearly admits the possibility of using evidence obtained from operational activities (such as phone tapping) in disciplinary proceedings. On the side-line, in order to illustrate the scale of difficulty it should be pointed out that, if an unlucky judge from Olsztyn has been drawn to attend the appeal court in Białystok, he needs to travel 230 km, which means a journey of about 4.5 hours on county roads, preferably at night'.*[99]

In the light of the above comments, understanding that, in accordance with Article 248 § 1 CPC, the consideration of the motion to revoke a judge's immunity must be correlated with the deadline of a maximum of 48 hours, which, if exceeded, requires the detainee to be released, it is incomprehensible why the legislative authority did not set the same 48-hour, or for instance a 36-hour deadline for considering the motion to revoke a judge's immunity. Such a solution would not have significantly prolonged the proceedings, but would have enabled the accused's procedural rights to have been safeguarded to a considerably greater extent and would have reduced the detrimental impact of organizational difficulties on the proceedings.

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98 Article 80 § 2 e of the Act on the Organization of Ordinary Courts.

99 Małgorzata Tomkiewicz (in): *Sądy dyscyplinarne sędziów, czyli więcej pytań i odpowiedzi* [Eng.: Disciplinary Courts for Judges, namely more questions than answers] https://www.rp.pl%2FSedziowie-i-sady%2F311109989-Malgorzata-Tomkiewicz-Sady-dyscyplinarne-sedziow-czyli-wiecej-pytan-niz-odpowiedzi.html&usg=AOvVaw0nlavoyrcjn5HnyT-QsT2n, accessed on 13/01/2019. In this article, the author rightly indicated that very serious concerns can also be raised by the provisions on the disciplinary court's power to pass resolutions revoking immunity, as they suggest that this is a court in the region of which disciplinary proceedings are conducted and in emergency situations, also other cases (Article 110 § 2 of the Act on the Organization of Ordinary Courts) which is an '*obvious master provision which opens the possibility of choosing the court in a discretionary and unlimited manner*'.

f) Breach of the *ne bis in idem* principle in the pre-court stage of disciplinary proceedings.

A further breach of the right to a fair trial in disciplinary proceedings against judges can be found in pre-court disciplinary proceedings already mentioned in this report, which enable the judge to remain a suspect for a long time, which leads to permanent uncertainty as to the accused judge's legal position.

This especially applies to the authority granted to the Minister of Justice – Prosecutor General by Article 112b of the Act on the Organization of Ordinary Courts enabling him to nominate a prosecutor of his choice to the case of a specific judge. Although the role of the Disciplinary Commissioner of the Minister of Justice ends when the order refusing to initiate or to discontinue disciplinary proceedings becomes final or when the decision concluding the disciplinary proceedings becomes legally binding, the expiry of the role in this procedure does not preclude the Minister of Justice from re-appointing the *ad hoc* disciplinary commissioner to the same case, which, in turn, pursuant to Article 112b § 4b of the Act on the Organization of Ordinary Courts, will be tantamount to the requirement to re-open the proceedings in the same case and with respect to the same judge. In this way, a judge may be kept in a position where he is a perpetual suspect.

This leads to the disregard of the decisions made at the pre-court stage of the disciplinary proceedings. This is because it transpires that the discontinuation of the proceedings does not obstruct the same judge from re-opening the proceedings at any time and with no further conditions. The only restriction is the abnormally long times for convictions from disciplinary delicts to expire, as discussed below.

It should be noted that this is another measure which places a judge accused of a disciplinary delict in a less favourable position than an accused facing criminal prosecution. This is because, in accordance with Article 327 of the Criminal Procedures Code, criminal proceedings may be reinstated for the same crime at any time and without any further conditions but only if they are not conducted with respect to the same person. However, proceedings may be re-opened with respect to the same person at any time by means of a decision of the senior state prosecutor only if new or previously undisclosed circumstances or new evidence become available. Finally, in accordance with Article 328 of the Criminal Procedures Code, the Prosecutor General may reverse a final order discontinuing proceedings against a given person if they are considered groundless, although, in the case of a reversal to the detriment of the suspect, the order can only be reversed within one year, except where a court previously upheld the order to discontinue the proceedings.

Furthermore, in accordance with Article 114 § 4 of the Act on the Organization of Ordinary Courts, the Minister of Justice – Prosecutor General is authorized to object to the disciplinary commissioner's order refusing to initiate proceedings against a judge within 30 days of the service of the commissioner's decision. It should be emphasized that this provision sets an exceptionally long time for the Minister to file an objection, as it is over 4 times longer than the 7-day deadline for filing an appeal against a decision refusing to initiate proceedings in classic criminal proceedings and over twice as long as the 14-day deadline for filing an appeal

against a conviction in such proceedings. Such an objection is binding on the disciplinary commissioner and obligates him to initiate and conduct the proceedings in accordance with the Minister's guidelines, while the right to object is not subject to any quantitative restrictions, making it possible to renew an objection repeatedly, whereby disciplinary proceedings that are once initiated against a judge can, in practice, continue endlessly.

It is worth noting that the solutions described above, which are unique to disciplinary proceedings against judges and representatives of other legal professions, which could potentially lead to the continuation of a judge's status of a person who is a permanent suspect, are still under the full control of an active politician of the ruling party holding the office of Minister of Justice and simultaneously the Prosecutor General.

All the above demonstrates the groundless strengthening of the procedural position of the Minister of Justice at the expense of judges being potentially accused in disciplinary proceedings.

g) Extension of the limitation periods.

A further deterioration in the legal position of judges and representatives of other legal professions facing disciplinary proceedings, in comparison with the general provisions of criminal law, arises from Article 108 § 1 and § 2 of the Act on the Organization of Ordinary Courts introducing periods of limitation of a conviction, which, for offences and petty crimes, are substantially longer than those provided for by the general provisions. In accordance with the new regulations, the disciplinary limitation period is 5 years from the time the act is committed; whereas, if proceedings are initiated before the end of that period, the period of disciplinary limitation is 8 years from the time the act is committed. Consequently, if the act considered in the disciplinary proceedings is a petty offence, then, under the general provisions, its limitation period would be 1 year from the moment the act is committed and if proceedings are opened during that time, 3 years from the moment the act is committed, although, the rules governing disciplinary proceedings lead to an extension of the limitation period to a period that is as much as 5 times longer. Even in the case of petty crimes, the limitation period in disciplinary proceedings is clearly longer than that arising from the general regulations.[100] It should be noted that the extension of the limitation period described above would contribute to a deterioration in the legal position of a large proportion of judges facing disciplinary proceedings, as most of these proceedings are related to the improper performance of judicial duties by the judges and, if the proceedings apply to criminal acts, they most frequently apply to petty offences (e.g. road traffic offences). Simultaneously, pursuant to Article 108 § 4 of the Act on the Organization of Ordinary Courts, if disciplinary misconduct satisfies the criteria of a crime, then the disciplinary limitation period cannot end earlier than the limitation period provided for in the provisions of the Penal Code.

Finally, according to Article 108 § 5 of the Act on the Organization of Ordinary Courts, the limitation period in the case of disciplinary delicts, except for those constituting petty offences, is suspended for the duration of the disciplinary proceedings for the period from the

[100] For instance, private accusation offences have a limitation period of one year after the injured party finds out who the perpetrator is, but no longer than after 3 years from when the act was committed (Article 101 § 2 PC).

moment of submission of the motion to impose a penalty until the proceedings are concluded by a final judgment. This provision does not have a counterpart in criminal proceedings, as a result of which, even when a person charged with a serious crime is at large, time acts in his favour.[101]

It seems that such a significant deterioration in the procedural position of a judge facing disciplinary proceedings with respect to the extension of the limitation period for a conviction for a disciplinary delict, together with the Minister's aforementioned right to object to the refusal to commence disciplinary proceedings, enables the perpetuation of the state of permanent accusation of a judge. These solutions not only lead to uncertainty regarding the legal position of the accused but also breach the constitutional principle of equality before the law.

5. Course of typical conduct of disciplinary proceedings with respect to a 'defiant' judge.

Based on the above analysis of the new model of disciplinary proceedings, it would not be difficult to create a picture of the way in which disciplinary proceedings would be initiated and handled against selected judges.

As mentioned above, a special team (described in sub-chapter V.2.a, consisting of the Minister of Justice – Prosecutor General, as well as, among others, the Disciplinary Commissioner of the Ordinary Court Judges and his deputies) subordinated to the Minister of Justice will be responsible for selecting judges who are to be harassed and almost certainly also the method of harassment.

Furthermore, in principle, the case should be handled by the appropriate local disciplinary commissioners elected with the involvement of the self-governing judiciary authorities. However, since it is possible for the Disciplinary Commissioner of the Ordinary Court Judges and his Deputies or the *ad hoc* disciplinary commissioner nominated by the Minister of Justice to take over cases from defiant judges still at the pre-court stage, they will also be handled at central level and therefore under the strict supervision of the Minister of Justice.

The only stage of the disciplinary proceedings against the ordinary court judges excluded from centralization is the first instance court stage, although it should be remembered that all the first instance disciplinary court judges have also been appointed by the Minister of Justice at his own discretion.

This transitional decentralization, which, even so, creates a threat of a loss of full control over the course of given proceedings by the Minister of Justice, will not increase the accused's chances of a successful defence. It should be remembered that the Disciplinary Chamber of the Supreme Court selected by the politicized NCJ will even have the authority to single-handedly convict a person who had been acquitted by a court of the first instance. The receipt of a judgment in line with the expectations of the Minister of Justice is all the more likely that

[101] In criminal proceedings, if a convict is hiding from the law, this only suspends the limitation period at the stage of enforcement of the penalty, whereby the limitation period may be suspended for a maximum of 10 years (Article 15 § 3 of the Executive Penal Code).

half of that Chamber consists of recent prosecutors who lack the features of independence or are even accustomed to criminalizing the conduct of the accused. Furthermore, the membership of this Chamber can soon be bolstered with judges of the ordinary courts temporarily seconded to the Supreme Court by the Minister of Justice and therefore being entirely dependent on him.

It seems obvious that the new model of disciplinary procedures was designed to achieve full political control over pre-court procedures, the start of which, combined with the possibility of the almost unlimited extension of this phase of the proceedings enables a judge to be grilled in the media,[102] as well as in the last stage of the court proceedings, which is decisive for the final outcome of the case.

Even in the absence of specific disciplinary allegations with respect to a given judge, explanatory activities, followed by disciplinary proceedings, may be initiated by a proven method, namely as a consequence of 'anonymous' reports from citizens or alternatively, after visiting judges nominated by the Minster of Justice, or the disciplinary commissioners appointed by him, have 'trawled' through the judge's case files and personnel files. Given the lack of a defined list of disciplinary delicts, the grounds for initiating disciplinary proceedings can even be a delay in commencing official activities, which can easily take place with a substantial backlog of cases. In the event of the initiation of disciplinary proceedings, albeit brought on insignificant and insufficient grounds, the power of the Minister of Justice to finally object to the decision of the disciplinary commissioner refusing to open proceedings will enable such proceedings to be dragged out practically in perpetuity.

VI. Criminal and disciplinary measures, as well as measures taken under administrative supervision to date.

1. Review of the disciplinary and criminal proceedings against judges taken up to date.

Although the new mode of disciplinary proceedings with respect to judges was at an *in statu nascendi* stage until recently (due to the lack of a functioning Disciplinary Chamber of the Supreme Court), a number of politically motivated disciplinary actions have been initiated against judges, with a high probability of them being related either to cases that they have already settled, which had a political context, or arising from the actions and public statements of judges which were intended to safeguard the independence of the courts and the impartiality of judges. A number of steps taken against judges by the prosecution service subordinated to the Minister of Justice – Prosecutor General and hence a politician strictly affiliated with the ruling party should be assessed similarly, namely as being politically motivated.

[102] Publicizing a substantial number of disciplinary charges, even the most absurd ones, can permanently ruin a judge's good reputation, which cannot be reversed even by a possible acquittal at the end of the proceedings.

The author of this report has no doubt that the objective of those actions is to politically subordinate the judiciary by causing 'a freezing effect'[103] among judges and, in the long term, remove judges from their profession using the strictest of disciplinary penalties.

It should be pointed out that the list of disciplinary and criminal measures mentioned below, which have been taken against judges, is certainly not exhaustive[104]. However, this is hardly surprising as each of the two judges most 'appreciated' by the ruling party, namely Waldemar Żurek and Igor Tuleya, are already facing so many proceedings of various kinds handled in parallel (each of them has more than five) that they are themselves becoming confused in the proceedings. Likewise, Judge Monika Frąckowiak faced three explanatory disciplinary proceedings which gave rise to one disciplinary procedure regarding shortcomings in the method of handling her judicial duties. It is also worth drawing attention to another feature of the current method of handling disciplinary proceedings. Previously, if a judge was charged with several disciplinary acts, it was the rule to combine the disciplinary proceedings into one, which avoided the repetition of the same activities, e.g. examining the accused judges. However, proceedings are currently being handled separately, which causes an additional burden for judges due to the multiplication of the procedural steps in which they have to participate, which, after all, can obstruct them in practising their profession. It is difficult not to notice a deliberate element of oppression arising from such a method of handling matters, all the more so that if a judge is found guilty in the first case that is considered, this will constitute a material aggravating circumstance in the consideration of a further allegation filed against the same judge.

The list of disciplinary and criminal proceedings, which are presumably unjustified from the substantive point of view, which may invoke a so-called 'freezing effect' among judges includes:

1) an audit of the financial declaration of a member of the Association of Judges 'Themis', Waldemar Żurek, a judge of the Regional Court in Kraków and the former press officer of the National Council of the Judiciary,[105] who had repeatedly criticized various aspects of the pseudo-reform of the justice system,[106] conducted by the Central Anti-Corruption Bureau, lasting more than a year and a half;

2) the unprecedented decision to open criminal proceedings, formally handled at the *in rem* stage but in reality targeted at a judge of the District Court for Kraków-Śródmieście in Kraków, Agnieszka Pilarczyk, who had acquitted 4 doctors accused of a medical error,

[103] See the Amnesty International report of December 2018, https://www.amnesty.org.pl%2Fwp-content%2Fuploads%2F2019%2F02%2FPoland-briefing-GAC-Dec-2018.pdf&usg=AOvVaw23kMHbDDyemwa0lZ_1xkdV, accessed on 04/03/2019.

[104] A more exhaustive list of disciplinary proceedings with respect to judges and prosecutors is included in the report of the Justice Defence Committee (KOS) entitled 'A country that punishes. Pressure and repression of Polish judges and prosecutors', http://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS_eng.pdf, accessed on 05/04/2019.

[105] The audit and other measures taken against Judge Żurek were described in detail in Resolution No. 2 of the Assembly of Judges of the Regional Court in Kraków of 26 February 2018: http://themis-sedziowie.eu/wp-content/uploads/2018/05/Resolution-Assembly-of-Judges-of-Regional-Court-in-Krakow-of-26-Feb.pdf, accessed on 13/01/2019.

[106] Proceedings against Judge Waldemar Żurek were described, among other things, in the Amnesty International report of March 2018, https://www.amnesty.org%2Fdownload%2FDocuments%2FEUR3780592018ENGLISH.PDF&usg=AOvVaw1Sqkl2mPPUyT6WeRZu693D, accessed on 03/03/2019.

which allegedly resulted in the death of the father of the Minister of Justice – Prosecutor General Zbigniew Ziobro;[107]

3) criminal proceedings against Wojciech Łączewski, a judge of the District Court in Warsaw, regarding the alleged disclosure of confidential information regarding the personal details of two police officers in the statement of reasons attached to a judgment, in circumstances when it did not arise from the case files that the data was subject to any kind of legally protected secrecy;[108]

4) the initiation of criminal proceedings against superior judges of the District Court and the Regional Court in Szczecin who had assigned requests to reporting judges to extend periods of remand with respect to individuals accused of acting to the detriment of Zakłady Chemiczne 'Police';[109]

5) the initiation of disciplinary proceedings against Dominik Czeszkiewicz, a judge of the District Court in Suwałki who acquitted activists of a non-governmental organization protesting against an election campaign during the opening of a museum exhibition in breach of the electoral laws;[110]

6) the questioning of over 100 judges of the Regional Court and the Appeal Court in Kraków as witnesses by the Internal Affairs Department of the State Prosecution Service in a case on the degrading and inhumane treatment of Krzysztof Sobierajski, the former President of the Appeal Court in Kraków,[111] which took place in the state prison in Rzeszów; the procedures used by the prosecutors, involving the groundless questioning of judges, was negatively assessed by Resolution no. 6 of the Representatives of Judges of the Appeal Court in Kraków of 12 October 2018;[112]

7) taking up explanatory activities, and subsequently commencing disciplinary proceedings with regard to Judge Sławomir Jęksa of the Regional Court in Poznań who acquitted a self-government activist connected with the parliamentary opposition, who had been accused of committing a petty offence.[113] Furthermore, when Judge Jęksa sent the commissioner a statement in which he constructively, albeit unambiguously criticized the disciplinary activities taken with respect to him, explanatory proceedings were initiated

[107] The Assembly of Judges of the Regional Court in Kraków expressed its view in Resolution No. 3 of 26 February 2018, see link in footnote 105.

[108] https://www.wiadomosci.wp.pl%2Fskazal-mariusza-kaminskiego-teraz-jest-oskarzany-o-ujawnienie-tajnych-informacji-6242766436710017a&usg=AOvVaw3_P0vrX8c0uB3ciZdHBg3M, accessed on 03/03/2019.

[109] This situation was described in Resolution No. 3 of the Assembly of Judges of the Regional Court in Kraków of 26 February 2018, see footnote 105.

[110] These proceedings were described on the website of the Association of Judges 'Themis' at: http://themis-sedziowie.eu/wp-content/uploads/2018/05/Czeszkiewiczs-disciplinary-case..pdf, accessed on 13/01/2019.

[111] Resolution no. 4 was adopted on 24 May 2018 by the Assembly of Judges of the Regional Court in Kraków in this case: http://themis-sedziowie.eu/wp-content/uploads/2018/05/Resolutions-of-24-May-2018-ENG..pdf (accessed on 13/01/2019), followed by resolution no. 1 of the Assembly of the Appeal Court in Kraków of 28 May 2018.

[112] http://themis-sedziowie.eu/materials-in-english/resolutions-of-the-assembly-of-the-representatives-of-the-krakow-appellate-judges-of-12-october-2018/ accessed on 13/01/2019.

[113] https://www.oko.press%2Fjest-dyscyplinarka-dla-sedziego-jeksy-ktory-uniewinnil-joanne-jaskowiak%2F&usg=AOvVaw3hGX5yyLbgtMB0Hp6bbXhs, accessed on 03/03/2019.

with respect to him because of the alleged breach of the dignity of the office 'by submitting (...) a statement containing arrogant and slanderous content';[114]

8) the initiation of explanatory activities by the disciplinary commissioner with respect to retired prosecutor Wojciech Sadrakuła for taking part in educational activities about the Constitution for children and youths;[115]

9) the handling of explanatory activities by a deputy disciplinary commissioner with respect to Arkadiusz Krupa, a judge of the District Court in Łódź, who participated in educational activities for youths during the Pol'and'Rock Festival, which was combined with an audit of his case files over the past 3 years;[116]

10) initiation of explanatory activities by a deputy disciplinary commissioner with respect to Monika Frąckowiak, a judge of the District Court in Poznań, in connection with her comments in the media defending the impartiality of the judiciary and her participation in educational activities about law for youths during the Pol'and'Rock Festival.[117] During the disciplinary proceedings against Judge Frąckowiak, the deputy disciplinary commissioner also audited her case files for the past 3 years;

11) the summoning of Krystian Markiewicz and Bartłomiej Przymusiński from the Association of Judges 'Iustitia', as witnesses, by the deputy disciplinary commissioners, to give statements on their comments defending the impartiality of the judiciary and their participation in educational activities about law for youths during the Pol'and'Rock Festival;[118]

12) the ordering of an audit of all case files handled over the past 3 years by Olimpia Barańska-Małuszek of the District Court in Gorzów Wielkopolski, a member of the Association of Judges 'Iustitia', by the disciplinary commissioner of judges as a result of her comments in defence of the impartiality of judges and her participation in educational activities about law for young people during the Pol'and'Rock Festival;[119]

13) the questioning of Judge Włodzimierz Brazewicz of the Appeal Court in Gdańsk as a witness for his role as a moderator in a public meeting with the involvement of judge Igor Tuleya, which was held on 26 September 2018;[120]

14) disciplinary measures taken against Judge Jarosław Gwizdak, the former President of the District Court in Katowice, involving the disciplinary commissioner requesting Judge

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[114] https://www.wiadomosci.onet.pl%2Ftylko-w-onecie%2Fkolejna-dyscyplinarka-dla-sedziego-od-zony-prezydenta-poznania%2Fz8c4gck&usg=AOvVaw1j3kAfc955RNtag0palHdC, accessed on 31/03/2019.

[115] https://www.wiadomosci.onet.pl%2Fkraj%2Fprokurator-uczyl-o-konstytucji-dyscyplinarka-prawnicy-reaguja-smiechem-i-donosami-na%2Fpfyrj87&usg=AOvVaw0yoYedMUj9kxSBEAN1NZSo, accessed on 03/03/2019.

[116] https://www.wiadomosci.wp.pl%2Fsedzia-arkadiusz-krupa-na-celowniku-rzecznika-dyscyplinarnego-za-festiwal-owsiaka-6309785262475393a&usg=AOvVaw0ZNV25GNzbxCaZ6M4vVwHX, accessed on 03/03/2019.

[117] https://www.gloswielkopolski.pl%2Fpolandrock-2018-sedzia-monika-frackowiak-zdaniem-rzecznika-dyscyplinarnego-parodiowala-rozprawe-sadowa%2Far%2F13619158&usg=AOvVaw3IRde3zPfrPsQHSTFP7YxQ, accessed on 03/03/2019.

[118] https://www.rp.pl%2FSedziowie-i-sady%2F309209965-Dzisiaj-i-jutro-przesluchania-sedziow-w-KRS-przed-rzecznikiem-dyscyplinarnym.html&usg=AOvVaw3g2uJqedLrGvX9aO5-Yamf, accessed on 04/03/2019.

[119] http://www.tokfm.pl%2FTokfm%2F7%2C130517%2C23919139%2Csedzia-olimpia-baranska-maluszek-w-praworzadnym-panstwie-nie.html&usg=AOvVaw3R5cMFxgnWPiEqJLnFml3j, accessed on 04/03/2019.

[120] https://www.wiadomosci.onet.pl%2Ftylko-w-onecie%2Fjak-przesluchuje-sedziow-z-ca-rzecznika-dyscypliny-pelnomocnik-wyrzucony-z-sali%2Fyq8endl&usg=AOvVaw2TrLWC1FSkvukFAUEz0B3z, accessed on 04/03/2019.

Gwizdak to send personnel files and a professional opinion without notifying the judge that disciplinary proceedings had been opened against him, in response to the judge standing for election as councillor and Mayor of Katowice in the recent local elections;[121]

15) the summoning by deputy disciplinary commissioners of Judge Tuleya of the Regional Court in Warsaw and Judge Ewa Maciejewska of the Regional Court in Łódź to provide witness statements regarding the requests for preliminary rulings which they submitted to the Court of Justice of the European Union; furthermore, with regard to Judge Ewa Maciejewska, the disciplinary commissioner ordered an audit of all case files handled by the judge over the past 3 years; then, as a result of the requests for preliminary rulings addressed to the CJEU, Judges Ewa Maciejewska, Igor Tuleya and Kamil Jarocki of the District Court in Gorzów Wielkopolski were obligated by the disciplinary commissioner to submit written statements in the procedure of Article 114 § 2 of the Act on the Organization of Ordinary Courts, and hence at the stage of explanatory proceedings, which take place before the initiation of disciplinary proceedings.[122]

16) the summoning of Dorota Lutostańska, judge of the Regional Court in Olsztyn by Disciplinary Commissioner of the Ordinary Court Judges, Michał Lasota, to submit a written statement in the course of explanatory activities regarding a situation in which she was wearing a T-shirt with the word 'constitution' when a group photograph was being taken by judges commemorating the centenary of Poland regaining its independence.[123] On 28 March 2019 judge Lutostańska heard disciplinary charges of 'gross and obvious violation of the law', which was supposed to involve the judge not joining the consideration of the case of the offence of the people who dressed the stone statues of the 'Prussian women' in a T-shirt with the word 'Constitution', in the situation where the judge herself was photographed earlier in a shirt bearing the same word;[124]

17) Two explanatory proceedings, which were initiated with respect to Dorota Zabłudowska, a judge of the District Court in Gdańsk, are related to Paweł Adamowicz, the Mayor of Gdańsk who was murdered in January 2019. The judge was summoned by the Deputy Disciplinary Commissioner of the Ordinary Court Judges because, immediately after Mayor Adamowicz was murdered, on 13 January 2019, she posted a single-sentence commentary in Twitter stating: 'This is what hate speech leads to'. The reason for the initiation of the second explanatory proceedings with respect to Judge Dorota Zabłudowska was that she received an 'Equality Prize' from Mayor Adamowicz in December 2018, which was awarded to people acting in support of human rights. According to the Commissioner, the acceptance of such a prize from the Mayor of Gdańsk, who had been working with the opposition party, 'Civic Platform', in the past was supposed to be evidence of the politicization of the judge, even though the Mayor

[121] http://www.polsatnews.pl%2Fwiadomosc%2F2018-12-21%2Fsedzia-startowal-w-wyborach-na-prezydenta-miasta-teraz-zajmuje-sie-nim-rzecznik-dyscyplinarny%2F&usg=AOvVaw0bN4BprNUqUjAq4TRIxTSl, accessed on 04/03/2019.

[122] https://www.wiadomosci.onet.pl%2Ftylko-w-onecie%2Frzecznik-dyscypliny-nie-daruje-pytan-do-tsue-kolejny-sedzia-na-celowniku%2Fvwn2dnd&usg=AOvVaw0TKxeGASs6UOBtUdKPHdj7, accessed on 04/03/2019.

[123] https://www.oko.press%2Frzecznik-dyscyplinarny-sciga-sedzie-z-olsztyna-za-koszulke-konstytucja-pierwsza-taka-sprawa%2F&usg=AOvVaw27f5zqlCLAAku4QDUp6gbm, accessed on 03/03/2019.

[124] https://www.tvn24.pl%2Fwiadomosci-z-kraju%2C3%2Fsedzia-z-zarzutem-dyscyplinarnym-orzekala-w-sprawie-dzialaczek-kod%2C922512.html&usg=AOvVaw3Vn4Ssod2XL6IIPirVdsy3, accessed on 31/03/2019.

was not a member of the jury awarding the prize, whereas his role boiled down to handing her the prize during the ceremony;[125]

18) The conviction described at the end of sub-chapter V.4.d) of this document of Judge Alina Czubieniak with a penalty of a warning by the Disciplinary Chamber of the Supreme Court for the 'gross and obvious violation of the law', involving overturning the temporary arrest of a mentally retarded perpetrator for a paedophilic act, with respect to whom proceedings were being conducted in the initial phase without the involvement of a defence counsel.[126] Furthermore, when the judge criticized the method in which public proceedings are being conducted with respect to her before the Disciplinary Chamber in the media calling them a 'tragifarce', the Deputy Disciplinary Commissioner of the Ordinary Court Judges initiated explanatory proceedings with respect to her.

2. Political motives behind disciplinary and criminal proceedings against judges.

In order to fully appreciate, on the one hand, the implications of the harassment of judges in the form of excessive and unfounded activity of the newly-appointed disciplinary commissioners and, on the other hand, the objective of this harassment, it is worth categorizing the cases in which disciplinary action or criminal prosecutions have been raised against judges.

Firstly, disciplinary activities have been raised against judges in response to public criticism of the pseudo-reform of the justice system by the judges. Such measures were taken with respect to, among others, Judges Waldemar Żurek, Monika Frąckowiak, Krystian Markiewicz, Bartłomiej Przymusiński and Olimpia Barańska-Małuszek. The conclusion that disciplinary proceedings of this type against judges, who, contrary to the apparent reform of the justice system, are not surrendering to the attempted restrictions on independence of the judiciary, must be assessed as politically motivated needs no major analysis. The disciplinary action with respect to Judge Lutostańska, who demonstrated her commitment to the rule of law by wearing a T-shirt bearing the word 'constitution', and finally the explanatory proceedings with respect to Judge Zabłudowska because of the acceptance of the 'Equality Prize' awarded to people acting in support of human rights, should be similarly assessed.

Another issue of particular interest to the disciplinary commissioners is that of the educational activities of judges for children and youths, involving simulations of court hearings or giving lectures on the Constitution. In this respect, the deputy disciplinary commissioners took action against Judges Arkadiusz Krupa, Krystian Markiewicz, Bartłomiej Przymusiński, Olimpia Barańska-Małuszek and Monika Frąckowiak, as well as a retired prosecutor Wojciech Sadrakuła. As the educational activities for the public fully comply with the Rules of Judicial Ethics and are a natural field of activity of the judicial associations, even such activities cannot be assessed differently to being politically motivated. It seems that educating young people that courts should be a separate entity, independent of political factors, is inconsistent

[125] https://www.rp.pl%2FSedziowie-i-sady%2F303059953-Sedzia-Dorota-Zabludowska-musi-sie-tlumaczyc-rzecznikowi-dyscyplinarnemu-z-Nagrody-Rownosci.html&usg=AOvVaw0OBi01pwC9Gpmb1JMe_enE, accessed on 31/03/2019.

[126] https://www.wiadomosci.onet.pl%2Ftylko-w-onecie%2Fizba-dyscyplinarna-sn-nabiera-rozpedu-sedzia-z-dyscyplinarka-za-sprawiedliwy-wyrok%2Fn1bf22e&usg=AOvVaw1n89hjdqSOvgO2RbYqvTNR, accessed on 31/03/2019.

with the interests of the executive. Judge Arkadiusz Krupa almost certainly 'fell into disfavour' for being an author of satirical cartoons in which, on the one hand, he exposes the shortcomings of the judicial profession and critically illustrates the so-called 'great reform' of the justice system, which simultaneously classifies him as belonging to the former group of judges who are liable to disciplinary proceedings. After all, this accumulation of 'negative' behaviour on the part of a judge resulted in the special 'curiosity' and inventiveness of the disciplinary commissioner, who initially accused the judge of wearing an authentic judicial robe to take part in a simulated hearing (although judicial robes are worn at simulated hearings at both the National School of the Judiciary and Public Prosecution in Kraków and at example lessons for children) and then accused the same judge of putting on and wearing a black T-shirt and denim shorts under the judicial robe. It should be added that the festival was held in mid-summer during an exceptional heatwave. It is worth adding that the simulation of the case took place on location, inside a big tent and not on the premises of a public institution, where strict dress code needs to be followed.

In turn, the summoning of over 100 judges of the Regional Court and Appeal Court in Kraków by the Internal Affairs Department of the State Prosecution Service[127] to be examined as witnesses was officially arranged in connection with the investigation on the ill-treatment of the former President of the Appeal Court in Kraków while he was in prison. Given that the prison in question is located 200 km away from Kraków and that any knowledge the Kraków judges could have had came from press reports, it should be accepted that the sole purpose of those procedures was to attempt to harass members of the Assemblies of Judges of the Kraków Courts which passed resolutions criticizing the degrading and inhumane treatment of the judge in prison. Therefore, the actions taken by the prosecution service should be considered an attempt to intimidate judges in order to silence the self-governing judicial bodies.

Similarly, the recent measures taken by the Deputy Disciplinary Officer of the Ordinary Court Judges, who requested the President of the Regional Court in Poznań and the President of the Appeal Court in Kraków on 16 January 2019 to provide certified copies of the Resolutions passed by the Assemblies of those courts together with the disclosure of the minutes of the meetings, as well as the attendance list and the names of the authors of the Resolution and who distributed it by email.[128] It should be added that the resolutions of these courts criticized, among other things, the activities of the unconstitutionally appointed National Council of the Judiciary,[129] while the Resolution of the Appeal Court in Kraków also criticized the recent unfounded disciplinary and criminal proceedings against ordinary court judges.[130] It arises from the presentation of the Disciplinary Commissioner that he collects this information within an investigation into an alleged disciplinary delict, whereby it should be inferred that the authors of the draft resolutions accepted by the assemblies of judges are to be the potential accused. It clearly arises from this that, according to the Disciplinary

[127] This institution is described in sub-chapter V.2.b) of this report.

[128] https://oko.press/rzecznik-dyscyplinarny-chce-hurtowo-scigac-sedziow/, accessed on 24/01/2019.

[129] http://themis-sedziowie.eu/aktualnosci/uchwaly-zgromadzenia-ogolnego-sedziow-apelacji-poznanskiej-z-dnia-3-stycznia-2019-roku/, accessed on 24/01/2019.

[130] http://themis-sedziowie.eu/materials-in-english/resolutions-of-the-assembly-of-the-representatives-of-the-krakow-appellate-judges-of-12-october-2018/, accessed on 24/01/2019.

Commissioner the self-governing judicial bodies are not allowed to criticize bodies appointed in the opinion of many authors in breach of the Constitution which, through their activities, contribute to the surrender of the courts to political control.

In turn, when standing for office in the local elections as an independent candidate, while on unpaid leave, Judge Jarosław Gwizdak did not breach the Act on the Organization of the Ordinary Courts in any way. It seems that the disciplinary proceedings taken up against him arose from the large number of votes he received in the election to the office of Mayor of Katowice because, by achieving third place and receiving 11% of the votes, he became a real competitor of the ruling party's candidate.

Finally, the disciplinary commissioners demonstrate significant activity in defence of the 'good name' of the newly-established disciplinary authorities, which is evidenced by the explanatory proceedings initiated with respect to Judge Sławomir Jęksa and Judge Alina Czubieniak, who criticized the steps taken with respect to them by the Deputy Disciplinary Commissioner of the Ordinary Court Judges and the Disciplinary Chamber of the Supreme Court. Ignoring the at least doubtful justification of these acts, because none of these judges used abusive or slanderous descriptions with respect to the disciplinary authorities, no doubt the actions taken with respect to Judge Jęksa grossly breached his right to a defence. How else is an accused to defend himself if his written statement sent to the disciplinary authority in response to that authority's summons (which was not publicized and did not include arrogant and slanderous content) constitutes grounds for initiating further explanatory proceedings with respect to him?

Even so, the largest number of disciplinary proceedings and criminal prosecutions are taken up with respect to the judicial activity of judges. The most spectacular steps of this type taken recently applied to summons addressed to judges, who referred requests for preliminary rulings to the CJEU, ordered by the Deputy Disciplinary Commissioner of the Ordinary Court Judges, Michal Lasota, to provide written explanations, namely Judges Igor Tuleya, Ewa Maciejewska and Kamil Jarocki. As transpires from the wording of the summons sent in the procedure of Article 114 § 2 of the Act on the Organization of Ordinary Courts, the deputy commissioner believes that the request for preliminary rulings could have constituted a 'judicial excess'. In response to Amnesty International's letter of 4 January 2019,[131] Disciplinary Commissioner of the Ordinary Court Judges Piotr Schab stated that the explanatory activities had been taken up with respect to these judges to establish whether '*the requests for the preliminary rulings in a breach of the provisions of Article 267 TFEU (...), caused a breach of the appropriate course of proceedings in the substantive cases in which the requests were submitted*'. It arises from the wording of this comment that, for some unknown reason, the disciplinary commissioner is usurping the right to assess the validity of a request for a preliminary ruling, a prerogative that lies exclusively in the authority of the Court in Luxembourg. Furthermore, it is impossible to guess what he meant by stating that the requests of the CJEU could have resulted in '*a breach of the appropriate course of proceedings in the substantive cases*' in the situation in which a request for a preliminary ruling is frequently a right and sometimes even an obligation of the courts and is a typical

[131] No. RDSP 713-27/18.

element of the proceedings, which additionally has the objective of assuring the right course of action, preventing a defective ruling and the need to repeat the proceedings. After all, it should be noted that, at the request of the court requesting the preliminary ruling, the CJEU can examine the matter in an expedited procedure, which is especially applied in cases where a temporary remand has been ordered. In the light of the above, the commissioner's statement seems incomprehensible.

The author of this report has no doubts that, by requesting the judges to produce written statements, as part of the explanatory activities, which can subsequently trigger disciplinary proceedings, the Deputy Disciplinary Commissioner of the Ordinary Court Judges strictly executes policies of the ruling political party, while being fully at the service of the Minister of Justice – Prosecutor General, who appointed him to the office. It should be borne in mind that the Minister of Justice – Prosecutor General applied to the Constitutional Tribunal on 5 October 2018 for the declaration of non-compliance of Article 267 TFEU with the Polish Constitution to the extent to which it affords the right to refer requests for preliminary rulings on the system, form and organization of the judicial authority.[132] The Minister's question addressed to the Constitutional Tribunal was an obvious attempt to discredit any future order of the CJEU to the extent to which it could adversely affect the pseudo-reform of the Polish justice system, the main objective of which is to subordinate the judiciary to the political factor. The disciplinary measures employed against judges who had submitted requests for preliminary rulings are clearly politically driven and aim to invoke a 'freezing effect' potentially deterring courts from submitting further requests for preliminary rulings contesting changes to the Polish justice system which are incompatible with European Union law.

Similarly, other criminal and disciplinary proceedings against judges in response to the judgments passed by them have an unambiguously political context, as they all relate to judges who had convicted individuals connected with the current ruling party.

Especially, Judge Agnieszka Pilarczyk, who acquitted doctors accused of a medical error, allegedly leading to the death of Zbigniew Ziobro's father, the father of the current Minister of Justice – Prosecutor General.[133]

Judge Wojciech Łączewski sentenced Mariusz Kamiński,[134] the former head of the Central Anti-Corruption Bureau, unconditionally to 3 years imprisonment for the abuse of his authority, after which Mariusz Kamiński was pardoned by President Andrzej Duda and currently holds the post of a Minister – Coordinator of the Secret Service.[135]

Criminal prosecution was initiated with respect to the reporting judges in Szczecin, who had assigned requests to apply temporary periods of custody, after the court refused the

[132] https://ipo.trybunal.gov.pl%2Fipo%2Fdok%3Fdok%3DF694069373%2FK_7_18_pg_2018_10_04_ADO.pdf&usg=AOvVaw2XHGhTF3uBUmdOJO-iO8Ee, accessed on 04/03/2019.

[133] https://www.tvn24.pl%2Fwiadomosci-z-kraju%2C3%2Fproces-ws-smierci-ojca-ziobry-jak-zmienialo-sie-prawo%2C717991.html&usg=AOvVaw04L_9nxDi5-9kCSFT2gSg9, accessed on 07/03/2019.

[134] The Association of Judges 'Iustitia' passed a resolution in defence of Judge Łączewski: https://www.iustitia.pl%2F83-komunikaty-i-oswiadczenia%2F2453-uchwala-z-dnia-1-sierpnia-2018-r-w-sprawie-zapowiedzi-rzecznika-rzadu-o-usunieciu-sedziego-wojciecha-laczewskiego-z-urzedu&usg=AOvVaw1t4dl-ppwRsSY45Qrovu-8, accessed on 13/01/2019.

[135] https://www.oko.press%2Fczy-sad-najwyzszy-zdazy-rozpatrzec-sprawe-bylego-szefa-cba-mariusza-kaminskiego%2F&usg=AOvVaw3QtY7ZX2DOLm6-FdAJUF3g, accessed on 07/03/2019.

prosecution's motion to take the accused into custody for acting to the detriment of the 'Police' chemical works.[136] Significantly, the prosecutors received a report of alleged mismanagement on the part of the former board, which was submitted to the prosecution service by the new management board that is affiliated with the ruling political party.

Finally, in addition to filing a request for a preliminary ruling, Judge Igor Tuleya acquitted Doctor Mirosław G. from the majority of the charges, which was a prestigious and personal failure on the part of the current Minister of Justice – Prosecutor General, Zbigniew Ziobro at the time of his first term of office as a Prosecutor General in 2007, as well as setting aside the prosecution service's order to discontinue proceedings regarding the relocation of the Parliamentary voting to the Sala Kolumnowa (Pillar Chamber), as a result of the crime reported by the parliamentary opposition.[137] Furthermore, having examined the prosecution files, Judge Tuleya reported an alleged offence of perjury to the prosecution service, which was committed by 230 members of Parliament, the vast majority of them being members of the Law and Justice party (among them being such prominent personalities as Jarosław Kaczyński, the current Prime Minister, Mateusz Morawiecki, the former Prime Minister, Beata Szydło, the Minister of Internal Affairs, Joachim Brudziński, the Minister of Defence, Mariusz Błaszczak, the Speaker of the Sejm, Marek Kuchciński and the Minister of Justice – Prosecutor General, Zbigniew Ziobro).[138]

Groundless disciplinary proceedings were initiated against Judges Dominik Czeszkiewicz and Sławomir Jęksa after they had acquitted people protesting against the abuse of power by the current governing party.

This analysis of the grounds on which criminal and disciplinary proceedings were initiated against the judges leads to two conclusions. First, until recently, the initiation of any type of disciplinary action or, all the more so, criminal proceedings in any of the above situations would have been inconceivable to date.[139] Grounds for such proceedings could not have been stated as educational activity conducted by judges or constructive criticism of changes in the justice system directly affecting working conditions within the justice system or adjudication activities which are verifiable in the normal course of appeal proceedings. The second indisputable conclusion is that judges, who are considered inconvenient by the ruling party, are currently persecuted on political grounds in Poland.

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[136] https://www.www.tvn24.pl%2Fpomorze%2C42%2Fszczecin-afera-policka-sledztwo-w-sprawie-skladow-sedziow-umorzone%2C851321.html&usg=AOvVaw2z3HYDYHS3mCyBwxju1X6U, accessed on 07/03/2019.

[137] https://www.tvn24.pl%2Fwiadomosci-z-kraju%2C3%2Fsedzia-tuleya-wydal-decyzje-ws-obrad-16-grudnia-pelne-uzasadnienie%2C800305.html&usg=AOvVaw1rXzOUPQLDxuyJYFC_bARv, accessed on 07/03/2019.

[138] The full text of Judge Tuleya's notice is available at: https://www.natemat.pl%2F260375%2Csledztwo-ws-sali-kolumnowej-igor-tuleya-twierdzi-ze-politycy-klamali&usg=AOvVaw1SVd50CCVJwK2Ap4mfDL98, accessed on 13/01/2019.

[139] P. Skuczyński prepared a very interesting analysis of the potential disciplinary liability of judges for judicial activity in: *Bezpośrednie stosowanie Konstytucji RP przez sądy a odpowiedzialność dyscyplinarna sędziów* [Eng.: Direct application of the Polish Constitution by the courts and disciplinary liability of judges], https://depot.ceon.pl/bitstream/handle/123456789/14574/Bezposrednie_stosowanie_Konstytucji_RP_przez_sady_a_odpowiedzialnosc_dyscyplinarna_sedziow.pdf?sequence=1&isAllowed=y, accessed on 04/03/2019.

3. Principle of 'free assessment of the procedure' by the disciplinary commissioners.

In assessing the questioning of the judges to date by the deputy disciplinary commissioners, it is not difficult to notice that these procedures do not satisfy any high procedural standards; on the contrary, the commissioners seem to follow principle of 'free', if not discretionary assessment of the rules of procedure.

The mere fact that judges were summoned and questioned as witnesses in circumstances from which it clearly arises that the proceedings are designed to 'match' judges to disciplinary charges in the future, is a process that is intended to circumvent the law. Proceedings of this type were taken up against, among others, Judges Włodzimierz Brazewicz, Igor Tuleya and Ewa Maciejewska. However, in accordance with Article 307 § 2 of the Criminal Procedures Code, which applies to disciplinary proceedings because of the reference to Article 128 of the Act on the Organization of Ordinary Courts, at the stage of explanatory activities, as regulated by Article 114 of the Act on the Organization of Ordinary Courts[140] (which can lead to proper pre-trial disciplinary proceedings), no actions requiring the preparation of minutes are undertaken, so no witnesses are questioned. Coercing someone, who can potentially be accused of committing a disciplinary delict, to give testimony under the sanction of criminal liability for refusing to do so, constitutes a breach of the right of defence (by circumventing the right to remain silent) and the principle of procedural loyalty.

Even the new disciplinary rules breaching the principles of a fair trial only provide for the ability to summon a judge at the stage of explanatory activities to make an oral or written statement on the subject matter of the case (Article 114 § 2 of the Act on the Organization of Ordinary Courts) whereby the submission of such a statement is a judge's right and not his obligation. Therefore, the disciplinary commissioners are also breaching the recently set rules.

In turn, the disciplinary action of the Deputy Disciplinary Commissioner of the Ordinary Court Judges, Michał Lasota, involving summoning the judges who had submitted requests for preliminary rulings to the CJEU namely Igor Tuleya, Ewa Maciejewska and Kamil Jarocki, to submit written statements, under Article 114 § 2 of the Act on the Organization of Ordinary Courts took place in conflict with the provisions on court jurisdiction recently introduced by this Act, which is discussed further in a later sub-chapter of this report.

Another act which is in breach of the principles of proceedings was the removal of the legal representatives of the judges who were being examined as witnesses, which was experienced by Judges Włodzimierz Brazewicz and Igor Tuleya. A person can be represented by a legal representative who is not a party to the proceedings by virtue of Article 87 § 2 CPC if

[140] This regulation provides that:
Article 114. § 1. The disciplinary commissioner shall take up explanatory activities at the request of the Minister of Justice, the president of the appeal court or the president of the regional court, the board of the appeal court or the board of the regional court, the National Council of the Judiciary, as well as on his own initiative, after initially establishing the circumstances that are necessary to conclude that there are signs of a disciplinary offence. The explanatory activities should be conducted within thirty days of the date on which the disciplinary commissioner performs his first activities.
§ 2. As part of the explanatory activities, the disciplinary commissioner may summon a judge to submit a written statement on these activities within fourteen days of the date of receipt of the summons. The disciplinary commissioner may also take an oral statement from the judge. The judge's failure to submit a statement shall not stop the proceedings.
§ 3. If grounds arise for instituting disciplinary proceedings after conducting the explanatory proceedings, the disciplinary commissioner shall initiate the disciplinary proceedings and prepare disciplinary charges in writing.
(…)

'*required by the interests of the person in the proceedings*'. Although Article 87 § 2 CPC allows for the refusal of a legal representative's participation in proceedings if '*the interests of the person do not require this*', such a circumstance certainly does not arise if a judge is examined as a witness but the clear intention to attribute disciplinary liability to him is obvious. In these circumstances, the role of an attorney formally acting as a legal representative is close to a function of a defence counsel which means that his presence constitutes an anticipation of the right of judge being questioned to a defence. This situation fully materialized during the pending proceedings with respect to Igor Tuleya and Ewa Maciejewska, who were subsequently summoned by the deputy disciplinary commissioner to submit written statements in the procedure of Article 114 § 2 of the Act on the Organization of Ordinary Courts in connection with their requests for preliminary rulings, as a part of the explanatory activities, which can directly lead to the initiation of disciplinary action.

This problem becomes even more burdensome if the disciplinary commissioner questioning a judge as a witness fails to caution him about the content of Article 183 CPC on his right to decline answering questions if doing so were to expose him to criminal liability. Precisely such a situation took place during the questioning of Włodzimierz Brazewicz after his legal representative was asked to leave the examination proceedings.

Furthermore, the refusal to allow a legal representative to participate in examination proceedings is challengeable under Article 302 § 2 CPC, while the submission of an appeal should suspend the examination. In the case of the said examinations of the judges, the disciplinary commissioners did not suspend the examinations and the appeals were never considered. Another issue is that, while the Criminal Procedures Code specifies the prosecutor's immediate supervisor as the body that is competent for considering the appeal (Article 303 § 3 CPC), the Act on the Organization of Ordinary Courts does not mention the body that is appropriate for considering the appeal, which cannot simultaneously deprive a person potentially facing disciplinary liability of his procedural rights.

After all, while handling the proceedings against Judge Brazewicz, Disciplinary Commissioners, Michał Lasota and Przemysław Radzik, behaved exceptionally disloyally which is evidenced by the fact that, when the judge was being examined as a witness on 6 November 2018, they assured him that his legal representative is not necessary because no further disciplinary proceedings would be conducted against him, whereas it later transpired that one of those commissioners had already prepared a letter to Judge Brazewicz, dated 30 October 2018 ordering him to submit a written statement in connection with other alleged disciplinary delicts. This type of conduct cannot be described as anything but a deceitful attempt to extort information for the purposes of disciplinary proceedings, combined with a breach of the principle of prohibiting the forcing of self-incrimination.[141]

The right to a fair trial was similarly breached by the Deputy Disciplinary Commissioner of the Ordinary Court Judges who requested the management of the Appeal Court in Gdańsk to provide information on whether Judge Brazewicz had faced disciplinary proceedings between 2005 and 2007. It should be noted that, even if the judge had committed a disciplinary delict

[141] See the Amnesty International report of February 2019, https://www.amnesty.org/download/Documents/EUR3798002019ENGLISH.PDF, accessed on 4/03/2019.

at that time, the disciplinary penalty would have already expired. Therefore, the disciplinary penalization should have been regarded as non-existent and that there are no grounds for requesting information on this.

In conclusion, it should be stated that it is difficult to find grounds for initiating disciplinary proceedings with respect to the judges listed above, while the initiation of the pseudo-disciplinary proceedings in question, which, in many cases grossly breach the sphere of judicial impartiality, could, under ordinary circumstances in certain cases, give grounds for initiating the disciplinary proceedings against the disciplinary commissioners themselves under Article 231 § 1 PC.

The opinion of the author of this report is not isolated, as Professor Katarzyna Dudka prepared an opinion, having examined the initial stage of the disciplinary proceedings against Judge Monika Frąckowiak, in which she concluded that provisions that are applicable to disciplinary proceedings, namely Article 10 § 1 and Article 17 § 1, item 1 of the Criminal Procedures Code, enable the initiation of such proceedings only if there is a reasonable suspicion that a disciplinary delict has been committed and such proceedings may only be conducted to the extent that arises from the notice of this offence. Later in the opinion, the author rightly stated that, based on the limited information contained in the notification of the disciplinary delict, the disciplinary commissioner does not have the right to request more information on the stability of judgments, the timeliness of taking up proceedings, the average number of cases being handled or potential challenges of a superior's instructions over a period of almost 3 years. According to the author of the opinion, such actions, which Ewa Siedlecka, the editor of the weekly magazine *Polityka* described as 'trawling' through the case files[142] satisfies the criteria of a crime under Article 231 § 1 PC.[143] So far, however, the prosecution service, which is subordinated to the Minister of Justice – Prosecutor General, being an instrument of repression with respect to judges, guarantees that the disciplinary commissioners are untouchable.

It should be noted that other politically-controlled entities such as the Central Anti-Corruption Bureau also take part in the repressive actions against judges.[144]

4. A sweet beginning of a bitter end.

At this point, it would be appropriate to refer to some of the arguments formulated by the Disciplinary Commissioner of the Ordinary Court Judges, Piotr Schab, in his position of 8 January 2019[145] regarding the publication on the Onet website[146] about the groundless

[142] It should be pointed out that a similar method of 'trawling' through case files' was also used with respect to Judges Ewa Maciejewska, Włodzimierz Brazewicz and Olimpia Barańska-Małuszek.

[143] https://www.iustitia.pl/2777-opinia-prawna-prof-zw-dr-hab-katarzyny-dudka-w-sprawie-dotyczacej-dzialan-rzecznika-dyscyplinarnego-przeciwko-ssr-monice-frackowiak, accessed on 13/01/2019.

[144] The incessant investigations of the financial declarations filed by former NCJ spokesperson, Judge Waldemar Żurek should be mentioned in this context.

[145] No. RDSP 713-1/19.

[146] Magdalena Gałczyńska's article: *Sądny rok dla sądów, czyli "ekscesy" rzeczników dyscypliny. Jak i za co rządzący zamierzają karać sędziów?* [Eng.: The Year of Judgment for the Courts, 'the excesses' of the disciplinary commissioners. How and for what the ruling party intends to punish the judges?].

initiation of disciplinary proceedings against judges, as well as in the response of 4 January 2019[147] to Amnesty International's approach to the Disciplinary Commissioner requesting him to stop disciplinary proceedings against the judges who submitted requests for preliminary rulings to the CJEU.

The fundamental argument emphasized by the Disciplinary Commissioner of the Ordinary Court Judges in both of these sources is the assertion that the authors with whom the disciplinary commissioner is holding a discussion have no right to raise accusations on him for instigating disciplinary proceedings either against judges who had requested preliminary rulings of the CJEU, or against Judge Jarosław Gwizdak. From a purely formal point of view, the disciplinary commissioner is correct, insofar as no decisions have been made to press charges to date in the proceedings he mentioned against the judges. This does not change the fact that disciplinary proceedings have been taken up with respect to a number of judges, including those to whom the disciplinary commissioner's letters apply, involving either their examination as witnesses or demands to submit written statements in the explanatory proceedings (Article 114 § 2 of the Act on the Organization of Ordinary Courts) or the inspection of the case files and personal portfolios of the judges. Contrary to the disciplinary commissioner's assertions,[148] the inclusion of terms in the summons such as '*potential judicial excess*' or '*breach of the appropriate course of proceedings*' unambiguously indicates that the activities being taken up may still be heading towards disciplinary charges being pressed against the judges. After all, in accordance with Article 114 § 3 of the Act on the Organization of Ordinary Courts,[149] explanatory proceedings are intended to establish whether there are any grounds for initiating disciplinary proceedings. Therefore, the assertion that none of the summoned judges has any cause for concern is simply a case of pulling the wool over their eyes.

After all, it should be emphasized that there are several reasons why the majority of the politically motivated criminal and disciplinary actions against judges are still at their initial phase and hence at the explanatory stage or the *in rem* stage and not at the *in personam* stage.

Firstly, the option to initiate politically motivated disciplinary proceedings against judges has only appeared very recently. The Disciplinary Commissioner of the Ordinary Court Judges and his deputies were only appointed in June 2018, whereas the judges of the Disciplinary Chamber of the Supreme Court were appointed on 20 September 2018, whereby further organizational activities were required for those institutions to start to operate. Consequently, the first proceedings before the Disciplinary Chamber were held as late as on

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https://www.wiadomosci.onet.pl%2Ftylko-w-onecie%2Fsadownictwo-jak-rzad-zamierza-karac-sedziow%2Fvkq07dd&usg=AOvVaw3SgyaJQe52vxFIP6Eo020T, accessed on 13/01/2019.

147 No. RDSP 713-27/18.

148 A quotation from Disciplinary Commissioner Piotr Schab's letter to Amnesty International of 04/01/2019 (No. RDSP 713-27/18) '*the entirely erroneous argument presented on page 1 of your letter of 20 December last year is reflected in a false conclusion complementing it – namely, that the examination of judges as witnesses was intended to 'allegedly obtain information' and it essentially had the objective of 'pressing charges against them*'. *Given the obvious conflict of this statement with the facts, the question arises about the objective of forcing such a radical argument rejecting the impartiality of a Polish state authority.*

149 Article 114 § 3 of the Act on the Organization of Ordinary Courts '*If there are grounds for initiating disciplinary proceedings after having conducted explanatory proceedings, the disciplinary commissioner initiates disciplinary proceedings and prepares disciplinary charges in writing*.'

5 December 2018. Therefore, the new mode of disciplinary proceedings against judges has only recently received operational capability.

Secondly, an obstruction to continue the course of the politically motivated disciplinary activities against judges can be their almost artificial nature. In the situation in which when some of the media are still independent and scrutinize every move made by the disciplinary commissioners, it is difficult to conduct obviously groundless proceedings or even proceedings that ridicule the disciplinary commissioners, which, after all, could ultimately discredit the new model of disciplinary proceedings in the eyes of the public. It seems that a similar mechanism operates with respect to politically motivated criminal proceedings which are focused around judges. No judge has been charged in either the case related to the alleged payment of the excessive fee to the experts by Judge Agnieszka Pilarczyk or in the case of assigning reporting judges from Szczecin to the examination of the motions of the line judges to apply a temporary arrest in the Zakłady Chemiczne 'Police' case. Both proceedings are in the *in rem* stage although, in Judge Pilarczyk's case, the description of the act to which the proceedings apply unambiguously indicates that she is the only potential suspect, while the prosecutor's argument that the contestable decision on the level of the fee for the experts could be a crime is absurd. The fact that the proceedings in such a simple case as that which applies to Judge Pilarczyk has been in progress for almost 2 years and that the proceedings regarding Zakłady Chemiczne 'Police' were first discontinued and are currently pending, having been re-opened, suggests that, in these cases, nobody is expecting charges to be pressed, but this has more to do with drawing them out over a longer period to produce a 'freezing effect' on the judges. In the situation in which the process of political subordination of the judiciary is far from a 'successful' end, referring such cases with indictments to the court would not suggest that the prosecutors would have a chance of success.

However, it seems highly probable that, if the pseudo-reform of the judiciary system continues together with further staff replacements among judges guaranteeing greater influence of the political factor on the functioning of the courts, indictments regarding those cases will be issued.

The third and almost certainly most important factor that can slow down the disciplinary and criminal proceedings against judges is the situation related to the proceedings taking place against Poland in the CJEU. Given the high level of public support of Poland's membership of the European Union, entering into an open conflict with EU institutions, in particular the CJEU, during the year of the parliamentary elections (to be held in October – November 2019) could prove too risky for the ruling party.

5. Centralization of disciplinary proceedings against selected judges.

Another feature that is unique to the proceedings at the pre-court stage under the new procedure of disciplinary proceedings is the tendency of the Disciplinary Commissioner of the Ordinary Court Judges and his two deputies to centralize proceedings by taking charge of cases of particularly 'disobedient' judges, whereby, according to the rule that 'the end justifies

the means', the disciplinary commissioners operating at the central level happen to breach the provisions on jurisdiction, as will be discussed below.

In principle, the Disciplinary Commissioner of the Ordinary Court Judges and his two deputies have the jurisdiction to hear cases of appeal court judges, as well as presidents and vice-presidents of the regional and the appeal courts.[150] According to Article 112 a § 1 a and § 3 of the Act on the Organization of Ordinary Courts, the Disciplinary Commissioner of the Ordinary Court Judges and his deputies also have the authority to take over cases from the deputy disciplinary commissioners operating at the regional court or the appeal court, although the provisions cited contain a significant restriction. In other words, it arises from their content that the Disciplinary Commissioner of the Ordinary Court Judges and his deputies can only take over a '*case being handled by the deputy disciplinary commissioner at the regional court*' or the appeal court. The wording of the provisions formulated in this way unambiguously indicates that the Disciplinary Commissioner of the Ordinary Court Judges and his deputies are only authorized to take over cases from the deputy disciplinary commissioners of the regional court or the appeal court in which a 'local' disciplinary commissioner has already been performing some activities in disciplinary proceedings. However, no provision of the Act on the Organization of Ordinary Courts authorizes the Disciplinary Commissioner of the Ordinary Court Judges and his deputies to take the first disciplinary activities against judges of the district or regional courts.

As current practice shows, in 'sensitive' cases, the deputy disciplinary commissioners of the ordinary courts are excessively eager to benefit from taking over cases. A distinctive example of this is the case of Judge Waldemar Żurek who was transferred to a different division by the new court president, Dagmara Pawełczyk-Woicka, in breach of the regulations (without obtaining the required opinion of the council of the court in the appropriate procedure), while he was informed about the right to appeal against it to the National Council of the Judiciary at the time this decision was served to him. Having exercised the right or appeal, but before being served the decision of the National Council of the Judiciary, the judge had refused in writing to take up his service in the new division until his appeal had been settled, which was enough for the new President to inform the disciplinary officer of the appeal court that Judge Waldemar Żurek has committed a disciplinary delict. However, shortly afterwards, the Deputy Disciplinary Commissioner of the Ordinary Courts, taking advantage of the said regulation, took over the handling of the case for which the pretext was the involvement of the disciplinary commissioner at the appeal court in Kraków in the meeting of the Assembly of Judges of the Kraków Appeal Court of 12 October 2018 which adopted, among other things, resolution no. 3 criticizing the President of the Regional Court in Kraków for initiating disciplinary proceedings against Judge Żurek.[151] The fact that this was purely an excuse to transfer the case to central level related to the lack of the political power's 'confidence' in Tomasz Szymański,[152] Deputy Disciplinary Commissioner of the Appeal Court in Kraków, is

[150] Article 112 § 6 of the Act on the Organization of Ordinary Courts.

[151] http://themis-sedziowie.eu/aktualnosci/uchwaly-zgromadzenia-przedstawicieli-sedziow-apelacji-krakowskiej-z-dnia-12-pazdziernika-2018-roku/, accessed on 13/01/2019.

[152] This is almost certainly related to the fact that Tomasz Szymanski, the Kraków Deputy Disciplinary Commissioner previously declined opening disciplinary proceedings against Judge Waldemar Żurek after notifying a right-wing

the fact that the Kraków disciplinary commissioner did not take part in the voting on the resolution regarding Judge Żurek but deposited an electronic voting device for the duration of the voting, which was recorded in the minutes of the Assembly.[153]

As for Judge Monika Frąckowiak, the situation arose in which the competent Deputy Disciplinary Commissioner of the Regional Court refused to open proceedings, although, in order to conduct further disciplinary activities, the case was then taken over by a Deputy Disciplinary Commissioner of the Ordinary Court Judges.

The intention to centralize the most politically sensitive disciplinary proceedings against judges is demonstrated by the method of taking disciplinary action with respect to all three judges of the ordinary courts who submitted requests for preliminary rulings to the CJEU, namely, Igor Tuleya, Ewa Maciejewska and Kamil Jarocki. In other words, the disciplinary proceedings against these judges, involving the demands on them to submit written statements in the procedure of Article 114 § 2 of the Act on the Organization of the Ordinary Courts, were not initiated by the territorially competent deputy disciplinary commissioners but directly by the deputy disciplinary commissioners of the ordinary court judges. It can be concluded from these considerations that the Deputy Disciplinary Commissioner of the Ordinary Court Judges initiated disciplinary action against the said judges without being authorized to do so, in breach of the regulations on jurisdiction.

As the requests for the preliminary rulings of these judges undermine various aspects of the so-called 'reform of the justice system' being implemented by the government, it must almost certainly have been declared necessary at political level to concentrate the disciplinary proceedings in the hands of the most trusted and politically subservient people, who, being in the office in Warsaw, have day-to-day contact with the representatives of the Minister of Justice, if only within the activities of the special task force referred to in sub-chapter V.2.a. Those people do not hesitate to abuse their powers, as they have trust in the protective umbrella of the Minister of Justice covering them.

These considerations lead to the conclusion that the Disciplinary Commissioner of the Ordinary Court Judges and his Deputies, relying partially on the '*ius caducum*' right, can handle cases, in practice not chosen by chance, of any judge adjudicating at any level of the ordinary courts. This demonstrates the exceptional 'flexibility' of the powers on the disciplinary commissioners and the method of their interpretation by the disciplinary commissioners which means that these regulations practically cease to be of any significance from the point of view of their guarantee function. Every judge needs to expect the possibility that disciplinary proceedings against him may be handled at central level at the pre-court stage or from the beginning or at any moment.

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publisher that the fact that Judge Żurek read out the position of the presidium of the National Council of the Judiciary outside the Supreme Court in Warsaw was supposed to have constituted a manifestation of his political commitment.

153 https://www.krakow.sa.gov.pl/dzialalnosc/Lists/InformacjeRzecznikadsKarnych/DispForm.aspx?ID=65, accessed on 13/01/2019.

6. Repressive measures taken in administrative mode, including their 'domino effect'.

The matter of taking disciplinary action against Judge Włodzimierz Brazewicz by firstly questioning him as a witness and then 'trawling' through his personal files is interesting from the point of view of the motives behind the activities taken by the disciplinary commissioner. The attempt to justify the assertion that Judge Brazewicz was involved in political activity through the attendance of several local authority politicians at an open meeting attended by approximately 450 people is bordering on the absurd. It seems in this instance that the reason for the disciplinary proceedings was the fact that Judge Igor Tuleya, intensely targeted by the executive, was one of the main speakers at the meeting moderated by Judge Brazewicz. That is how the disciplinary commissioner is trying to send a clear message to the other judges to 'stay away from Tuleya'.

After all, this is not an isolated example of a 'secondary' or even a 'domino effect' oppression of judges undertaken to indirectly strike at those who are most involved in upholding the rule of law. Similar situations are related to Judge Waldemar Żurek, the former spokesperson of the National Council of the Judiciary, although it should be clearly pointed out that they were not taken in disciplinary or criminal proceedings, but in the mode of administrative supervision exercised by the court presidents appointed by the current Minister of Justice – Prosecutor General. Here, Rafał Dzyr, the President of the Appeal Court in Kraków, dismissed Judge Pawel Rygiel, a judge of the Appeal Court in Kraków, from the post of visiting judge before his tenure expired, after the judge did not find any shortcomings in the inspection of the cases handled by Judge Żurek, which he was conducting on the instructions of President Rafał Dzyr as a consequence of an anonymous report about the judge. It is worth mentioning that no substantive allegations were raised about the quality of the work of Appeal Court Judge Pawel Rygiel, as a visiting judge.

A much greater scale was achieved by the actions taken against judges of the Kraków courts by Dagmara Pawełczyk-Woicka, the President of the Regional Court in Kraków, and Zbigniew Ziobro, the Minister of Justice – Prosecutor General, in connection with Judge Waldemar Żurek's dismissal from the position of the spokesperson of that court. Here, three judges of the Regional Court in Kraków, namely, Judges Agnieszka Włodyga, Janusz Kawałek and Joanna Melnyczuk, were dismissed from their functions of managers of divisions after they resigned from membership of the Council of the Regional Court in Kraków in protest of the dismissal of the spokesperson of the Regional Court, Judge Waldemar Żurek, which they considered was conducted in the wrong procedure. In turn, another person who resigned from the Council for the reasons mentioned above, District Court Judge Ewa Ługowska, was dismissed from the office of the President of the District Court in Wieliczka by the Minister of Justice – Prosecutor General. It should be emphasized that all these judges, who were dismissed from their offices because of their support for Judge Żurek, were highly regarded functional judges against whom no complaints regarding their work had ever been raised.[154]

[154] At the assemblies and meetings, the judges of the Kraków courts expressed their concerns about the personnel changes

President Dagmara Pawełczyk-Woicka also transferred Judge Waldemar Żurek, the former spokesperson of the National Council of the Judiciary, from the civil appeal division to the first instance civil division in breach of the procedures, because of the lack of resolution of the Council of the Regional Court assessing the validity of the changes in the judge's responsibilities in the prescribed mode. The repressive nature of this transfer is evidenced by the fact that, immediately after the transfer, the judge was assigned dozens of cases that had been building up for several months without progressing any further. Furthermore, when handing him the decision on the transfer, the court president informed the judge about his right to appeal to the National Council of the Judiciary, whereas when Judge Żurek exercised the right of appeal and when waiting for the decision on the transfer to become final and refrained from taking up the new cases for a short time, the court president instantly reported his commitment of a disciplinary delict involving the negligence of his judicial duties, even though the judge could not take up the new cases on the basis of a non-final decision.[155]

Attention should also be drawn to the fact that the Ministry of Justice recently started to introduce a number of changes to the organization of the justice system involving, for instance, the merger of large divisions of courts of the first instance as a result of which some divisions of courts will cease to exist and their current managers will lose their offices. Such operations are performed even though current practice shows that divisions with more than 15 judges are dysfunctional. It can be argued that the actual objective of at least some of the organizational changes could be the intention to relieve judges of their functional positions if they are active on the field of battle over the rule of law or have displeased officials from the current ruling party in past judgments. This argument is confirmed by the fact that a judge from the former group to be dismissed from office in the procedure described above is Bartłomiej Przymusiński, the spokesperson of Poland's largest Association of Judges, Iustitia.[156]

VII. European standards of disciplinary proceedings against judges.

The issue presented in the title of this chapter has recently become especially applicable not only in doctrinal or systemic terms, but also in the pragmatic dimension. This became so as a result of a series of requests for preliminary rulings by the ordinary courts (in Warsaw, Łódź

made by President Dagmara Pawełczyk-Woicka, the manifestations of which are described in point 2 of the Resolution of the Assembly of Judges of the Regional Court in Kraków of 26 February 2018: http://themis-sedziowie.eu/materials-in-english/resolution-of-the-assembly-of-representatives-of-judges-of-the-regional-court-in-krakow-of-26-february-2018/ (accessed on 13/01/2019), the wording of Resolution no 5 of the Assembly of Kraków Appeal Judges of 16 April 2018, http://themis-sedziowie.eu/materials-in-english/resolutions-of-the-assembly-of-judges-of-the-krakow-appeal-court-from-april-16-2018/, accessed on 13/01/2019, as well as the wording of Resolution no. 1 of the Assembly of Judges of the Regional Court in Krakow of 24/05/2018. http://themis-sedziowie.eu/materials-in-english/resolutions-of-the-of-the-assembly-of-judges-of-the-regional-court-in-krakow-of-24-may-2018/, accessed on 13/01/2019.

[155] The Assembly of Kraków Appeal Judges addressed this matter in the position of 12 October 2018, in Resolution no. 3, which was passed at that time, http://themis-sedziowie.eu/materials-in-english/resolutions-of-the-assembly-of-the-representatives-of-the-krakow-appellate-judges-of-12-october-2018/, accessed on 13/01/2019.

[156] https://www.wiadomosci.onet.pl%2Ftylko-w-onecie%2Fministerstwo-tnie-wydzialy-w-sadach-funkcje-traci-rzecznik-iustitii%2F62clvj4&usg=AOvVaw1bRir2lEsbzmak5aPJgRO5, accessed on 07/03/2019.

and Gorzów Wielkopolski) to the Court of Justice of the European Union, which were triggered by the changes in the Polish model of disciplinary proceedings against judges and directly refer to the potential abuse of disciplinary proceedings to enforce political control over court judgments, which is in breach of European Union law.

European law theoreticians pointed out that, especially with regard to requests for preliminary rulings submitted by the Regional Courts in Warsaw and Gorzów Wielkopolski, it was possible to have doubts as to whether the cases involved an element of European Union law as, consequently, the Court could declare that the actions are inadmissible. Paradoxically, however, by taking disciplinary action with respect to these judges as a result of their requests for preliminary rulings, the Deputy Disciplinary Commissioner of the Ordinary Court Judges, almost certainly unintentionally, on the one hand, confirmed the argument contained in the requests for the preliminary rulings that the new procedure of handling disciplinary proceedings has become so politicized that it can be used to harass judges and, on the other hand, gave the cases an element of European law.

If Poland does not fulfil the obligations regarding the independence of the judiciary arising from European Union law, the European Court can obligate the state to stop the infringement forthwith, whereas, if the Polish government fails to comply with the judgment, at the request of the Commission, the European Court may impose a continuous or periodic fine. As can be seen, the Court's judgment can give rise to serious financial consequences for Poland and, in view of the authority of the Court, its impact on Poland's general position in the European Community will be significant.

The compliance of the Polish justice system with the European norms after the so-called 'great reform' has already been examined by the Court of Justice of the European Union. The criteria of the potential assessment of the Polish justice system have already been formulated (almost certainly not exhaustively) in points 62–67 of the judgment of 25 July 2018 in *Minister of Justice and Equality v LM*. The Court devoted a separate point in the justification of the judgment in the case in question to the requirement to regulate the system of disciplinary measures against judges to prevent a risk of them being used as a system of political control over the content of judicial decisions.[157] In this context, the Court drew attention to the requirement for a system of rules specifying conduct constituting disciplinary offences, the assurance of the right of defence in disciplinary proceedings, as well as the ability to effectively contest the judgments of the disciplinary bodies. As transpires from the above discussion, these issues under the new model of disciplinary proceedings in Poland give rise to very serious concerns from the point of view of safeguarding the right to a fair trial. Given that the grounds for formulating the above criteria are Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, originating from Article 6 of the ECHR, there are no contraindications to using the extensive case law of the Strasbourg Court

[157] § 67 of the statement of reasons in Minister of Justice and Equality v LM, C-216/18 PPU, judgment of 25 July 2018, http://curia.europa.eu/juris/document/document.jsf;jsessionid=8931122E8B0795EED54962D8DBF52569?text=&docid=204384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2903684, accessed on 07/03/2019.

to conduct an assessment of more detailed aspects of the new mode of handling disciplinary proceedings.[158]

The ECHR confirmed in a number of judgments that the requirements of a fair trial which are appropriate in civil cases are also applicable to disciplinary proceedings against judges, provided that national law does not rule out the court route in this respect (ECHR judgment of 5 February 2009 in *Olujić v Croatia*, case 22330/05, § 34–43). The norms arising from Article 6 of the ECHR not only apply to these proceedings which can result in a removal of a judge from office. They are applicable in the case of the ability to impose more lenient disciplinary penalties (see judgment of 20 November 2012 in *Harabin v Slovakia*, case no. 58688/11, §§ 118–124; judgment of the Grand Chamber of the ECHR of 23 June 2016 in *Baka v Hungary*, case no. 20261/12, §§ 100–119). In the light of the cited judgments, there is no doubt that likewise the judges against whom disciplinary proceedings are being conducted are entitled to a fair trial, a court hearing and respect of the principles of equality of arms expressed in Article 6 (1).

As already mentioned, in the light of the said ECHR case law, the requirements of a fair trial arising from Article 6 ECHR precisely for civil cases apply to disciplinary proceedings against judges. Their scope is, in many respects, narrower than the scope of rights in criminal cases, as it does not encompass the right to remain silent and the related prohibition of self-incrimination, the right to a defence, the presumption of innocence or the prohibition to use unlawfully obtained evidence. In this situation, it seems reasonable to wonder whether the Court of Justice of the European Union is able to examine the system of disciplinary proceedings against judges, even in the context of certain criteria of reliable proceedings which are appropriate to criminal cases. According to the author of this report, such a question deserves an affirmative answer. In accordance with Article 52 (3) of the Charter of Fundamental Rights of the European Union, the norm of protection afforded by European Union law should be at least as high as the norms guaranteed by the European Convention on Human Rights and Fundamental Freedoms, although there are no contraindications for the norms to exceed the said standard of protection. The fact that a broader interpretation of these rights is permitted by the CJEU is reaffirmed in paragraph 67 of the judgment in case C-216/18, stating that one of the procedural rights to be observed in disciplinary proceedings against judges is the right of defence and therefore the right to a fair trial in criminal but not civil proceedings.

In the context of the European norms on disciplinary proceedings against judges, it is worth mentioning opinion no. 3 of the Consultative Council of European Judges (CCJE), dated 19 November 2002,[159] which applies, among other things, to disciplinary proceedings against judges. This Opinion contains, among other things, recommendations for statutory regulations regarding the conduct of judges which may constitute grounds for imposing disciplinary penalties on them, types of disciplinary sanctions (which should be proportional to the gravity

[158] According to Article 52(3) of the EU Charter of Fundamental Rights "*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*.

[159] http://rm.coe.int/opinia-nr-3-rady-konsultacyjnej-sedziow-europejskich-ccje-do-wiadomosc/168078bbe5 (accessed on 08/01/2019).

of the offence), as well as the procedure regarding disciplinary proceedings. The next recommendation applies to the appointment of a disciplinary commissioner for judges who should check the grounds for initiating disciplinary proceedings. Judgments in disciplinary proceedings should be issued by an independent body complying with the procedure assuring a full right of defence, whereby the members of that body should be appointed by an independent authority consisting of a significant number of judges selected by professional peers. Finally, in accordance with the CCJE's recommendations, there should be an appeal procedure with respect to the first instance body before a court. As transpires from the discussion in chapter V of this report, in the light of the above recommendations, very serious doubts under the new model of disciplinary proceedings introduced in Poland can arise from the at least imprecise description of disciplinary delicts, safeguarding the full right of defence for the accused judges and the politicized mode of appointment to the disciplinary bodies, namely both the disciplinary commissioners and the members of the disciplinary courts.

As mentioned above, in view of the requests for preliminary rulings filed with the CJEU by Judges Ewa Maciejewska, Igor Tuleya and Kamil Jarocki, the Luxembourg Court will have the opportunity to address the new mode of disciplinary proceedings in Poland, assessing it in the light of the European Union law.

VIII. Conclusions.

The assertion presented by the media, that the sole objective of the so-called 'great reform of the justice system' lies in a one-off replacement of judicial personnel with a view to replace the key judicial office holders by those subordinated to the Minister of Justice is an overly-optimistic simplification of matters. The authors of the 'reform of the justice system' were far more ambitious. It is more about such softening of the guarantee of independence of the judiciary which would enable the political power, on the one hand, to influence decisions on who is to become a judge and who is to be promoted (this was the objective of the changes in the procedure of appointing judges – members of the National Council of the Judiciary) and, on the other, to have an influence on court proceedings in individual cases.

Given the broad spectrum of powers of the Minister of Justice – Prosecutor General described above, encompassing equally administrative supervision over courts, as well as interference with the process of disciplinary action and political control over criminal proceedings with respect to judges, it should be accepted that, after the recent legislative changes, the political power represented by the Minister of Justice has become significantly better equipped with instruments for harassing judges, which facilitates applying pressure to judges and, in the future, removing them from cases or even removing them from judicial office.

In view of the administrative supervision of the courts, which was extended substantially through the 'great reform', the Minister of Justice will also be able to apply 'soft' means of harassment through the presidents and directors of courts whom he appointed, for instance through transfers between court divisions or the application of various types of other

inconveniences in fulfilling judicial functions,[160] which, with a significant overload of cases allocated to a judge, will make it easy to initiate disciplinary proceedings for the improper performance of duties.

The main tool for harassing judges will be the disciplinary proceedings in which the Minster of Justice, with his extensive powers, will be holding a 'gun' to the heads of the judges with his 'finger on the trigger'. Given the detailed measures described above which have been entered into the new model of disciplinary proceedings against judges, it will be no exaggeration to conclude that a judge will become more suspicious than the accused in criminal proceedings, while he will have a far more restricted ability to defend himself.[161] This multifaceted deterioration of the procedural rights of judges in disciplinary proceedings, regarding, among other things, politicization and centralization of disciplinary proceedings, the restriction of the right to a defence, the introduction of the preclusion of evidence, the extension of the limitation period for convictions in disciplinary delicts, a breach of the two-instance court system, accompanied by the rules discussed above enabling the judge to be permanently in the state of being a suspect, not only leads to a breach of the constitutional principle of equality before the law and the prevention of discrimination (Article 32 of the Constitution) but also directly breaches the principle of impartiality of judges (Article 178 para. 1 of the Constitution). The extensive range of powers of the Minister of Justice with respect to disciplinary proceedings encompassing, on the one hand, his direct influence on the appointment of the disciplinary commissioners and judges of the disciplinary courts and, on the other hand, his extensive range of procedural rights justify the conclusion that this is an inquisitorial model of conduct.

As the Minister of Justice is simultaneously the Prosecutor General with extensive investigative powers, as well as tools for direct control over his subordinate prosecutors, it can be assumed that, in order to further discredit defiant judges, criminal proceedings will also be opened in support, probably most frequently on the basis of the master provision of Article 231 of the Penal Code.

Politically motivated interventions with the use of disciplinary or criminal proceedings or measures of administrative supervision will certainly be applied in individual cases with respect to judges who handle sensitive cases, such as a case in which a party is a politician (or someone from the political environment) or a state-owned enterprise or a private company financially connected with a politician or the ruling party or an action related to State Treasury property. 'Special supervision' may similarly apply to disciplinary proceedings for a selected group of professionals, e.g. judges, doctors[162] or even high-profile cases presented in the media in which it is easy to gain political capital. The problem is that it is difficult to

[160] Such actions can include a worsening of the working conditions of selected judges by depriving them of the support of experienced administration staff or hindering taking advantage of annual leave, as well as forms of additional employment or further education.

[161] Prof. Laurent Pech and Patryk Wachowiec did not hesitate to describe the new mode of disciplinary proceedings with respect to judges as 'kangaroo disciplinary proceedings' in their accurate report on the current situation of the Polish judiciary in the light of the ineffective action of the EU authorities to date, https://www.verfassungsblog.de%2F1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii%2F&usg=AOvVaw2d21DVlYKdq4E8IhdfQLKG, accessed on 24/01/2019.

[162] This is suggested by the establishment of bodies dealing with criminal proceedings in cases of medical errors, for substantively unjustified reasons, within two levels of prosecution offices.

predict which case has such potential. That said, every judge can feel threatened. Judges protesting against a breach of the constitution and the politicization of the judiciary, especially activists of judicial organizations and judges involved in legal education for children and young people, will also continue to be of interest to the Minister of Justice.

These tools have enabled politicians to gain a direct influence over who is to become a judge and which judge is to be promoted, as well as with respect to which judge should disciplinary proceedings be initiated and then continued and who will handle such proceedings both at the pre-court stage and in court. Therefore, it should be accepted that this is about a carefully planned 'production line' which gives the ability to promote only subservient judges and obstructs work, which, in extreme cases can result in the removal from the profession of those judges who do not succumb to pressure with the use of disciplinary proceedings.

The measures recently taken, which are described in chapter VI of this report, such as the unjustified transfer of judges between divisions, 'trawling' through their case files and personal files, summoning them to questioning or to submit written statements in explanatory proceedings, unequivocally indicate that the Minister of Justice intends to use those tools to the fullest, including in order to influence the course of proceedings. The situation in which Judge Ewa Maciejewska is being called to the disciplinary commissioner and her files are 'trawled' through only because she had requested a preliminary ruling from the CJEU, and the disciplinary proceedings against Judges Igor Tuleya and Kamil Jarocki opened on the same grounds cannot be construed differently.

Worse still, as a result of the limitations placed on the authority of the self-governing judicial bodies and the politicization of the National Council of the Judiciary, other than the activity of independent media, judicial associations and non-governmental organizations, judges who are put under pressure will not be able to count on institutional support. Unfortunately, members of the judicial associations who are most actively advocating independence of the judiciary need to expect disciplinary proceedings to be opened with respect to them, as a result of their alleged politicization.

Attention should also be drawn to the consequences of the 'great reform' of the justice system for the average citizen. The question arises of: if these measures of harassment are only to be applied to a reasonably small number of judges adjudicating on particularly sensitive cases or those safeguarding judicial independence, can there be talk of the whole of the judicial system being 'rotten', to the detriment of the level of protection of civic rights and freedoms? Unfortunately, such a question formulated in this way, should only be answered in the affirmative because of the 'freezing effect' among judges inspired by both the soft and hard measures of repression. A judge's will in the adjudication process should not be constrained by external factors that are not related to the case. Every case must be judged entirely on the merits and the applicable provisions of the law, according to a judge's knowledge, experience and conscience. Judicial impartiality ends when provisions which should safeguard judicial impartiality are formulated in such a way that, before judgment is passed, a judge has to weigh up which outcome would be more beneficial to him – even from the point of view of his own career path. The situation is even worse if a judge starts to hesitate on whether to pass a specific righteous judgment, concerned about potential repercussions. The effect of crushing

institutional safeguards of judicial impartiality is that the citizens will lose confidence that when adjudicating, judges will be guided exclusively by the merits of the case. The vision of a state in which judges are either politically appointed or are invigilated and intimidated by disciplinary proceedings being conducted in breach of the right of defence constitutes a real threat to civic rights and freedoms in Poland.

Furthermore, the solutions described in this report mean that the Polish judiciary has ceased to satisfy the criterion of independence of external pressure, especially from the Minister of Justice representing the political factor. Therefore, after the implementation of these previously discussed changes, the generally assessed Polish justice system does not satisfy the criteria of Articles 47 and 48 of the Charter of Fundamental Rights and Freedoms, or Article 6 ECHR and does not guarantee citizens the right to a fair trial before an independent and impartial court. The assessment will certainly be confirmed by the decisions of the Courts in Strasbourg and Luxembourg. The consequence of these judgments if the Polish government continues to have a hard-line position will mean that at least fines will be imposed on the country, while the State Treasury will be liable for compensation. If the position of the Polish authorities is not significantly softened after the penalties are imposed, the so-called PolExit will be at stake in the longer term. This is related to the fact that, in the long run, Poland's membership of the European Union will not be possible in the situation in which the fundamental values on which the European Community is built are constantly being systematically breached, as a result of which the Polish legal system will become unable to guarantee the level of protection of civil rights and freedoms which is comparable to those of other EU countries.

It would probably come as a surprise to someone who is less aware that, with such a significant level of political control over disciplinary proceedings, it has been mainly soft measures of harassment that have been imposed to date on judges, while politically inspired disciplinary proceedings against them have not produced any spectacular results to date. In particular, the proceedings against none of the 'defiant' judges have come to an end with the imposition of a harsh penalty, such as a transfer to a different office or removal from the judicial office. This partially arises from the fact that the respective provisions were implemented relatively recently and the new institutions responsible for disciplinary proceedings were established even later and have not yet had the time to 'gather momentum'.

The author of this report believes that the main factor slowing down the momentum of criminal and disciplinary proceedings against judges is the situation related to the ongoing proceedings against Poland before the CJEU, as a result of the motion of the European Commission, as well as the requests for preliminary rulings from the Polish courts. In a situation where 75% of the population supports Poland's membership of the European Union, entering into an open conflict with its institutions, especially the CJEU, during a year of parliamentary elections would be too risky for the ruling party. The escalation of groundless and clearly politically inspired disciplinary proceedings against judges, especially if they end in the removal of judges from the profession, could add fuel to such a conflict.

Therefore, it seems that, until the Parliamentary elections, namely October or November 2019, 'soft' disciplinary actions will be mainly applied to defiant judges, just as to date, but

with greater intensity, such as in a form of summons to examinations as witnesses, requests to present written statements in the explanatory procedure or ‘trawling’ through the files of adjudicated cases, or alternatively personal files. This can be proportionally compared to the practice in the Middle Ages of ‘presenting the tools of torture’ before the executioner performs his actions. In view of the position to date of the decided majority of the judicial environment, doubts can arise as to whether the use of such means of ‘persuasion’, even in combination with the measures of administrative pressure, would be sufficient to assume political control over the judiciary this year.

However, these considerations do not mean that the new mode of disciplinary proceedings against judges, created with such significant effort and resources, which – from the legislative and organizational point of view – has already reached full operational capacity, would not be fully implemented if ‘more convenient circumstances’ arise. Experience shows that, if someone buys an axe and spends time sharpening it diligently, he is not doing this just to hang it on the wall. Even if he was forced to do so temporarily he will reach out for it at his first opportunity.

About the author:

Dariusz Mazur is a criminal court judge who is currently the Head of the Third Criminal Division of Regional Court in Kraków. He is also the spokesman of the Association of Judges 'Themis' (the second largest association of judges in Poland). He specializes in international cooperation in criminal matters on which he lectures at the Polish National School of Judiciary and Public Prosecutors and the European Judicial Training Network (EJTN). In 2016, he was awarded the title of European Judge of the Year 2015 by the Polish Section of the International Commission of Jurists (ICJ) for the statement of grounds for the decision regarding the refusal to extradite Roman Polański to the USA.

The author of this article has been an ordinary court judge for more than 20 years and he has never had any connections with any political parties or political groups in Poland. He asserts that, although judges must not become involved in any political action, they have the right and sometimes even the duty to take part in a public debate on the protection of the democratic rule of law, especially the separation of powers, as well as the independence of the courts and the impartiality of judges. This article shows how deeply concerned he is with the fact that these principles may be violated in Poland.

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