



POLAND 2019: THE STATE OF THE JUDICIARY

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Cover photo: *Demonstration in Warsaw in front of the Senate, July 2018*
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1. INTRODUCTION

This briefing provides an update on the state of the independence of the judiciary in Poland after implementation of the “reforms” starting in 2016. The current situation is characterized by the ongoing harassment of judges who stand in defence of human rights and judicial independence. Such harassment is occurring in the context of a concerted media smear campaign – with alleged links to the Ministry of Justice – against certain judges. The government’s attempts to “reform” the judiciary have resulted in three separate infringement proceedings against Poland at the Court of Justice of the European Union (CJEU). Some judges in Poland have responded to reforms that undermine the independence of the judiciary by submitting over a dozen preliminary questions related to the reforms’ compliance with EU law to the CJEU.¹

Ongoing concerns over the independence of the judiciary in Poland are reflected in the increasing difficulties judges and prosecutors face in attempting to carry out their work without political pressure.

The information presented in this briefing draws on interviews with judges; interviews with journalists covering the situation of the judiciary; complaints of individual judges to the European Court of Human Rights; publicly available documents in relation to the proceedings against Poland at the CJEU; analysis of relevant legislation and international human rights standards; and media monitoring.

Amnesty International continues to call on the government of Poland to:

- Immediately stop using disciplinary proceedings against judges and prosecutors merely for their exercise of the right to freedom of expression; for their rulings and other legitimate activities.
- Amend the Law on the National Council of the Judiciary to ensure that members who are judges are elected by their peers and not by the executive and/or the parliament.
- Ensure that the self-governing judicial bodies are consulted prior to decisions of presidents of courts to transfer a judge to a different court division.

2. SMEAR CAMPAIGN AGAINST JUDGES

Wojciech Łączewski, a judge from the District Court Warszawa- Śródmieście, became a target of the Law and Justice party in 2015 after he found the former chief of the Anti-corruption Agency, Mariusz Kamiński, guilty of abuse of power by a public official.² In January 2019, the Regional Prosecutor in Kraków submitted a request for removal of Łączewski’s immunity on allegations of submitting false testimonies.³ On 11 February and 15 March 2019, there were two closed hearings of the Disciplinary Court in Krakow on this matter. Judge Dariusz Mazur told Amnesty International, “Only the disciplinary prosecutor(s), Judge Łączewski and myself, as his counsel, were present. On the same day, a few minutes after the hearings finished, a twitter account KastaWatch published information with details discussed in the closed court room”.⁴ On the day of the last hearing, 5 April at 11:13am KastaWatch, tweeted: “Our news[:] Łączewski stays with immunity. Court in Kraków a while ago discontinued the proceedings to remove his immunity... Hard core ignorance of the law... This is how the court in Kraków rolls.”⁵ The leak from a closed court hearing combined with the derogatory tone towards the Court in Krakow raises concerns over the use of KastaWatch and other social media accounts to leak information on judges and prosecutor within the smear campaign.

In August, an online media outlet, Onet.pl, published several articles linking the smear campaign against the judges with high-ranking officials in the Ministry of Justice. Drawing on testimonies of a whistle-blower with closed links to the Ministry who claimed to be directly involved in the smear campaign, Onet.pl revealed targeted efforts to discredit Krystian Markiewicz, the head of the Association of Judges, Iustitia, as well as

¹ See a graphic illustration by Laurent Pech: <https://twitter.com/ProfPech/status/1182314668439822336/photo/2>

² For further details of the case see: Amnesty International, *The Power of the Street: Protecting the Right to Peaceful Protest in Poland*. June 2018, pp. 34-35

³ This involves a case in which Judge Łączewski filed a complaint of abuse of personal data. The prosecutor closed the case in 2018 finding no breach. For details, see in Polish: <https://krakow.wyborcza.pl/krakow/7,44425,24387923,prokuratura-chce-pociagnac-do-odpowiedzialnosci-sedziego-laczewskiego.html>

⁴ Interview with Amnesty International, 22 October 2019.

⁵ Tweet on files with Amnesty International. In Polish (emojis edited out): “Nasz NEWS ŁĄCZEWSKI pozostaje z immunitetem Sąd w Krakowie przed chwilą umorzył postępowanie o uchylenie immunitetu Brak skargi oskarżenia Ignorancja prawna level hard Postanowienie jest nieprawomocne Tak się kręci Sąd w Krakowie.”

other judges critical of the “reforms”.⁶ Various twitter accounts, including primarily KastaWatch, were weaponized as part of the smear campaign.⁷ Following the Onet.pl revelations, the deputy Minister of Justice Łukasz Piebiak resigned.⁸ In September, the Assembly of Judges of the Regional Court in Warsaw, as well as the Regional Court in Katowice, called for an independent investigation of the allegations that a group with close ties to the Ministry of Justice was complicit in the campaign. A resolution of the Assembly of Judges of the Regional Court in Warsaw also stated that the office of the Disciplinary Prosecutor for Common Courts continued with the “harassment of judges who do not agree with the actions of politicians violating the independence of the courts.”⁹

3. NATIONAL COUNCIL OF THE JUDICIARY

On 19 November, the Court of Justice of the European Union (CJEU) will answer the question as to whether the reformed National Council of the Judiciary (NCJ) is a body capable of safeguarding the independence of judiciary in Poland, in compliance with EU law. Poland’s Supreme Court submitted this question to the CJEU on 30 August 2018.¹⁰ In his advisory opinion of 27 June 2019, the Advocate General of the CJEU concluded that “the manner of appointment of the members of the NCJ itself discloses deficiencies which appear likely to compromise its independence from the legislative and executive authorities,” because the 15 judicial members of the NCJ are no longer appointed by the judges, but instead by the Sejm (the lower chamber of the Parliament). This means the majority of 23 of 25 members is coming from the legislative and executive branches.¹¹ The Advocate General further clarified that:

- a. the mission of the judicial councils is to safeguard the independence of courts and judges, which means that they must be free from any influence from the legislative and executive authorities;
- b. in order to guarantee the continuity of functions, the mandates of the members of judicial councils should not be replaced at the same time or renewed following parliamentary elections;
- c. selection, appointment and/or promotion of judges are among the most widely recognised functions of judicial councils, and the procedures must be carried out by judicial councils that are independent of the legislative and executive authorities.¹²

While awaiting the decision of the CJEU on the NCJ, several self-governing judicial bodies (assemblies of judges at individual courts) suspended nominations for new judges. As recently as 21 October, the Assembly of Judges of the Regional Court in Lublin argued that the suspension of nominations was justified by concerns that, if the CJEU concludes the NCJ is not independent from the legislative and executive authorities, the integrity of the entire appointment procedure would be in doubt.¹³

The European Court of Human Rights (ECtHR) is currently deliberating on the case of Jan Grzęda,¹⁴ a judge of the Supreme Administrative Court, who has argued a breach of his ECHR right to a fair hearing after his tenure on the NCJ was prematurely and summarily terminated in March 2018 following the entry into force of the amendment of the Law on NCJ. Because the law does not provide for judicial or administrative challenge of premature termination of a mandate of an NCJ member, Grzęda could not appeal it. In his

⁶ Articles are available in English: <http://themis-sedziowie.eu/materials-in-english/onet-investigation-troll-farm-at-the-ministry-of-justice-or-we-do-not-put-in-jail-for-doing-good/> and: <http://themis-sedziowie.eu/materials-in-english/troll-farm-at-the-ministry-of-justice-part-3-judges-organize-smear-campaign-against-the-president-of-the-supreme-court/>

⁷ <http://wyborcza.pl/duzyformat/7,127290,25137625,heitowani-sedziowie-boja-sie-zmasowanych-atakow-nasze.html>

⁸ <https://www.theguardian.com/world/2019/aug/21/top-polish-official-resigns-over-alleged-harassment-of-judges>

⁹ <https://www.iustitia.pl/en/activity/informations/3338-report-on-the-current-situation-in-the-judiciary-in-poland-22-09-2019>

¹⁰ http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=236-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach

¹¹ Opinion of Advocate General Tanchev, 27 June 2019, para. 132.

¹² Opinion of Advocate General Tanchev, paras. 125, 127, 128.

¹³ <https://www.iustitia.pl/81-uchwaly/3389-zgromadzenie-przedstawicieli-sedziow-okregu-sadu-okregowego-w-lublinie-w-trosce-o-zachowanie-wlasciwego-przebiegu-procedury-nominacyjnej-na-zwolnione-stanowiska-sedziowskie-odracza-posiedzenie-w-sprawie-opiniowania-kandydatow-do-objecia-urzedu-sedziow-sadow-rejonowych-na-obszarze-okregu-so-w-lublinie>

¹⁴ *Grzęda v Poland*, Complaint lodged on 14 September 2018, Application number 43572/18. The ECtHR communicated the case to the government of Poland on 9 July 2019. Amnesty International jointly with the International Commission of Jurists was granted the leave to intervene in the case on 7 November 2019.

complaint to the ECtHR, Judge Grzęda has argued that Poland violated the civil limb of his right to fair trial under Article 6.1., and also deprived him of a procedure through which he could contest the early termination under Article 13 of the European Convention on Human Rights.

4. DISCIPLINARY PROCEEDINGS AGAINST JUDGES

The government's continued targeting through disciplinary proceedings of certain judges and prosecutors based on their defense of the independence of the judiciary is an ongoing serious concern for Amnesty International and other human rights organizations, professional bodies, and experts on the rule of law. That concern apparently is shared by the European Commission, which referred Poland to the CJEU in October 2019 over the system of disciplinary proceedings.

In the meantime, the Disciplinary Prosecutor for Common Courts – a new post created within the “reform” of the judiciary – continued with dozens of proceedings against judges. These proceedings targeted, among others, Judge Sławomir Jęksa from the District Court in Poznań for a ruling in which he acquitted a protester who used strong language during a women's rights rally in 2017; and Judge Olimpia Barańska-Małoszek from the District Court in Gorzów Wielkopolski and Judge Waldemar Żurek from the Regional Court in Kraków for their statements in the media in which they criticized the “reforms” of the judiciary.¹⁵

Amnesty International has researched in depth eight cases of judges investigated by the office of the Disciplinary Prosecutor for Common Courts and raised serious concerns over the lack of guarantees against the deliberate misuse of disciplinary proceedings against judges in Poland. These concerns were summarized in a report published in July 2019, *Poland: Free Courts, Free People*.¹⁶ Four months on, the disciplinary cases against these judges are still pending.

JUDGE MONIKA FRĄCKOWIAK

Judge Monika Frąckowiak from the District Court in Poznań Nowe Miasto i Wilda has been targeted by politicized disciplinary investigations and a negative media campaign for her criticism of the government's continuous attacks on the independence of the judiciary over the last two years. In the summer of 2018 Judge Frąckowiak participated in a moot court hearing during a music festival, raising awareness about the importance of a fair trial. At first, in October 2018 the deputy Disciplinary Prosecutor for Common Courts started to investigate Judge Frąckowiak for “offending the dignity of an office” for her actions at the festival. He later closed the proceedings without pressing any disciplinary charges, but in April 2019, he decided to press charges against the judge for late delivery of written judgments.¹⁷ He disregarded evidence in her support, including an assessment of a supervising judge who issued a positive opinion on the work of Judge Frąckowiak.¹⁸ The disciplinary case landed with the Appeal Court in Lublin, which in June 2019 returned the case to the deputy Disciplinary Prosecutor and ordered him to ensure the evidence presented by other judges is taken into consideration, that her witnesses are heard and that she has access to the files in the proceedings¹⁹. The court in Lublin also criticized that the only evidence against Judge Frąckowiak was statistical data about her performance. The deputy Disciplinary Prosecutor failed to consider other circumstances, including Judge Frąckowiak's workload.²⁰ The deputy Disciplinary Prosecutor appealed the decision at the Disciplinary Chamber of the Supreme Court. The legitimacy of the Disciplinary Chamber, however, is currently the subject of a review by the CJEU. In June 2019, the Advocate General issued an opinion that the Disciplinary Chamber of the Supreme Court “does not satisfy the requirements of judicial independence under EU law”.²¹

The deputy Disciplinary Prosecutor continues to focus attention on Judge Frąckowiak. On 23 October, he opened a new case against her on the same grounds and evidence as the proceedings from May 2019.²²

¹⁵ <http://rzecznik.gov.pl/wp-content/uploads/2019/08/Komunikat-Waldemar-Z-Olimpia-BM.pdf> and also: <http://rzecznik.gov.pl/wp-content/uploads/2019/10/Komunikat-Waldemar-Z.pdf>

¹⁶ Amnesty International, *Poland: Free Courts, Free People*. July 2019, pp. 11-22, p. 25

¹⁷ <http://rzecznik.gov.pl/wp-content/uploads/2019/04/Komunikat-RDSSP-wniosek-Monika-F.pdf>

¹⁸ Amnesty International, *Poland: Free Courts, Free People*. July 2019, p. 19

¹⁹ <https://prawo.gazetaprawna.pl/artykuly/1431182,sedziowie-dyscyplinarki-oskarzyciele-sedziow.html>

²⁰ <https://prawo.gazetaprawna.pl/artykuly/1431182,sedziowie-dyscyplinarki-oskarzyciele-sedziow.html>

²¹ Opinion of Advocate General Tanchev, para 130.

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=A34F11B1F12ECF243422BF2E737D81C8?text=&docid=215565&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=480696>

²² <http://rzecznik.gov.pl/wp-content/uploads/2019/10/Komunikat-Monika-F.pdf>

5. PUNITIVE TRANSFERS OF JUDGES

Amnesty International notes with concern that in some cases, the powers of the presidents' of courts may have been weaponized to transfer judges known for upholding human rights to different court divisions. In particular, Amnesty International has been monitoring the transfer of Judge Łukasz Biliński from the District Court Warszawa- Śródmieście; and the transfer of Judge Żurek from the Regional Court in Krakow.

Judge Biliński

Judge Biliński is known for adjudicating in several cases against protesters in Warsaw. For example, Judge Biliński has ruled that three protesters were “not guilty” of the offence of “disrupting a lawful assembly” when they attempted to block or jumped through the barriers separating a monthly pro-government assembly from the rest of the pedestrian zone in central Warsaw. The Judge concluded that this monthly demonstration did not qualify as a public assembly because it was not accessible to the general public, in particular to counter-protesters. The Judge held that the protesters were exercising their right to freedom of expression and that they did not pose a real threat to the monthly assembly.²³

On 5 March 2019, Judge Biliński acquitted 40 persons charged with an attempted blockade of an assembly of the National Radical Camp (ONR) and All Poland's Youth (MW). While admitting that the attempted blockade had the character of a minor offence, it did not amount to a socially harmful act (*czyn szkodliwy społecznie*). In October 2019, the decision was upheld by the Regional Court in Warsaw.

On 17 June 2019, the head of the District Court Warszawa-Śródmieście decided to move Judge Biliński from the criminal to the civil (family) division of the court. On 22 July 2019, the president of the Regional Court in Warsaw reviewed the transfer and decided that Judge Biliński should return to the criminal division of the District Court on the grounds that the President of the District court failed to consult the College of the Court prior to the transfer decision. Despite this ruling, Judge Biliński was in fact transferred to the civil division. He has stated that he considered the decision to be a punishment for his rulings in the cases against protesters.²⁴

Judge Żurek

In September 2018, the President of the Regional Court in Kraków decided to transfer Judge Waldemar Żurek from the second (appeal) civil division of the court to the first civil division. Judge Żurek, as well as other observers, including Poland's Commissioner for Human Rights, has stated that the transfer was a *de facto* demotion.²⁵ The Association of Judges, Iustitia, stated that the transfer amounted to “an attempt to intimidate judges taking a public stand against politicization of the justice system.”²⁶ Pursuant to the amendment of the Law on Common Courts (Article 22a.5 and 6), the power to review a complaint of a judge concerned about substantive change of their post – including a transfer to a different division – is no longer within the remit of the College of Judges²⁷ at a respective appeal court, but sits with the National Council of the Judiciary (NCJ).²⁸ Although Judge Żurek had turned to the NCJ, it decided to discontinue his complaint without any justification in October 2018.²⁹ Judge Żurek therefore turned to the Supreme Court, where the case was taken up by the Extraordinary Chamber (Izba Kontroli Nadzwyczajnej), a new body created as a result of the “reform”. In March 2019, the Extraordinary Chamber rejected the appeal as inadmissible.³⁰ Judge Żurek argued that the decision, made by a single judge in the Extraordinary Chamber, is not valid because its members were appointed by the NCJ, which does not meet EU law requirements for the independence of judiciary. Subsequently in May 2019, the Civil Chamber of the Supreme Court submitted preliminary questions to the CJEU seeking clarification as to whether the Extraordinary Chamber is an independent court within the meaning of the EU law.³¹

In addition, Judge Żurek has faced several disciplinary proceedings, including the most recent one for a statement in which he answered a journalist's question about what will happen if the Constitutional Tribunal

²³ Amnesty International, *The Power of the Street*. 2018, p. 25

²⁴ Interview with Amnesty International, 21 October 2019.

²⁵

<https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20prezesa%20S%C4%85du%20okr%C4%99gowego%20w%20Krakowie%20w%20sprawie%20przeniesienia%20s%C4%99dziego%20Waldemara%20C5%BBurka.pdf>

²⁶ <https://www.iustitia.pl/dzialalnosc/informacje-oswiadczenia/uchwaly/2448-uchwala-zarzadu-ssp-iustitia-oddzialu-w-warszawie-w-sprawie-proby-przeniesienia-sedziego-waldemara-zurka-przez-prezesa-sadu-okregowego-w-krakowie-dagmare-pawelczyk-woicka-do-innego-wydzialu-sadu>

²⁷ A judicial self-governing body established by the law.

²⁸ <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>

²⁹ <https://krakow.wyborcza.pl/krakow/7.44425.24061190.decyzja-krs-o-umorzeniu-sprawy-odwolania-zlozonego-przez-sedziego.html>

³⁰ <https://www.rp.pl/Sedziowie-i-sady/303089956-SN-odrucil-odwolanie-sedziego-Waldemara-Zurka-od-decyzji-o-przeniesieniu-do-innego-wydzialu-sadu.html>

³¹ <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20CZP%2025-19.pdf>

decides that appointments to the National Council of the Judiciary (NCJ) do not comply with EU law.³² In the interview, Judge Żurek questioned the legitimacy of Poland's Constitutional Tribunal arguing that it does not operate in line with principles of constitutionality. He answered that questioning the appointments of NCJ members would have far reaching consequences for Poland's judiciary and could lead to massive chaos. This is because NCJ has in the meantime appointed number of judges who in their turn have issued hundreds of decisions.³³

CONCLUSION

As a result of the government's "reform", there are three main mechanisms through which the legislative and executive branches have exerted control over the judiciary: the disciplinary proceedings; the operation of the politicized National Council of the Judiciary; and the powers of the presidents of courts to transfer judges between the court divisions.

It has been four years since the beginning of the judicial reforms undertaken by the Polish government, and two years since the European Commission launched Article 7(1) of the Treaty on European Union proceedings. European Union member states have a collective responsibility to help reset the course of judicial reform and restore respect for human rights and judicial independence in Poland. Amnesty International urges the General Affairs Council to use the dialogue with Poland within the proceedings under Article 7.1 TEU to urge the government of Poland to address all of the recommendations of the European Commission to restore the independence of the judiciary and halt the harassment of judges.

³² Statement of the Disciplinary Prosecutor in Polish: <http://rzecznik.gov.pl/2019/10/komunikat-rzeczniaka-dyscyplinarnego-sedziego-piotra-schaba-dotyczacy-skierowania-wniosku-do-sadu-dyscyplinarnego-o-rozpoznanie-sprawy-dyscyplinarnej-waldemara-z-sedziego-sadu-okregowego-w-krakowie/>

³³ Interview with Judge Żurek in Polish: <https://www.prawo.pl/prawnicy-sady/pytania-sedziego-sn-o-status-sedziow-wskazanych-przez-poprzednia,440587.html>

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POLAND 2019: THE STATE OF THE JUDICIARY

This briefing provides an update on the state of judicial independence in Poland. The situation is characterized by ongoing harassment of judges who stood in defence of the rule of law and human rights and by media smear campaign against judges with alleged links to the Ministry of Justice.

Four years since the beginning of the changes undertaken by the government, and two years since the European Commission launched 7(1) of the Treaty on European Union proceedings, there are three main mechanisms through which the legislative and executive branch has become capable to exert control over the judiciary: the disciplinary proceedings; the operation of the politicized National Council of the Judiciary; and the powers of the presidents of courts to transfer judges between the court divisions.

The European Union member states have a collective responsibility to help reset the course of judicial reform and restore the respect for the rule of law. Amnesty International therefore urges the General Affairs Council to use the dialogue with Poland within the proceedings under Article 7.1 TEU and urge the government of Poland to address all of the recommendations of the European Commission and halt the harassment of judges.