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www.themis-sedziowie.eu e-mail: stowarzyszenie@themis-sedziowie.eu

Judges under special supervision, that is “the great reform” of the Polish justice system¹.

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prepared by Dariusz Mazur
Judge of the Regional Court in Krakow
Spokesman of the Association of Judges "Themis"

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

For the last three years we have been witnessing in Poland the so-called “great reform” of the justice system which concerns hundreds, if not thousands, of amendments to several pieces of legislation, including the Basic Laws, such as the Law on Ordinary Court Organisation, the Law on the National Council for the Judiciary, and finally, an entirely new Law on the Supreme Court. In this landmark for the justice system, it is worth asking a question: whether the objective of implementing the “great reform of the justice system”² is aimed at – as per reassurances of representatives of the executive power – contributing to an increase in the level of independence of courts, accelerating court proceedings, ensuring the effectiveness of disciplinary proceedings against judges, decommunizing the courts, eradicating apparent corruption of the Polish judiciary? Unfortunately, an answer to questions formulated like this is unequivocally negative.

Within the wording of the implemented statutes there is not even one which could have any influence on acceleration of the proceedings, although the creation of the extraordinary appeal, introduced by the Law on the Supreme Court, can effectively contribute to the prolongation of a number of proceedings³, not to mention a significant deterioration in the level of safeguards in legal proceedings. It should be noted that, although in the field of effectiveness of court proceedings in Poland much remains to be improved, nonetheless the average effectiveness of court proceedings falls within the average European level⁴.

The effectiveness of disciplinary proceedings against judges has always been at an incomparably higher level than the effectiveness of the actions to waive the parliamentary immunity, not to mention proceedings against politicians before the State Tribunal⁵.

Considering that the judges of the Supreme Court were lustrated many years ago and 30 years after the change of the state system, the average age of a Polish judge is around 42, thus, there could be no dispute surrounding a realistic need for decommunization of the judiciary. Claims of common corruption in the Polish justice system are simply unfounded⁶.

² It mainly covers the amendments to the Law on the Ordinary Courts Organisation of 12 July 2017 (Journal of Laws 2017, heading 1452), amendments to the Law on the National Council of the Judiciary of 8 December 2018 (Journal of Laws 2018, heading 3) and the Law on Supreme Court of 8 December 2018 (Journal of Laws 2018 heading 5).

³ It makes it possible to appeal, lacking clarity and general criteria, final judgments passed over the last 20 years by any court in Poland. Decisions on allowing appeal will be made by a politicized National Council of the Judiciary judges of the newly appointed Extraordinary Claim and Public Affairs Chamber of the Supreme Court.

⁴ <https://www.ec.europa.eu/transparency/fregdoc/frep/f1/f2017/fpl/fcom-2017-167-f1-PL-MAIN-PART-1.PDF&usg=AOvVaw194POTsMBIZKeEjAK1Hcva>, accessed on 13.01.2019.

⁵ The occasionally quoted argument that the ineffectiveness of the disciplinary proceedings is proven by the fact that between 2011-2015 in more 300 disciplinary proceedings “only” 11 judges were struck off, is a false argument. It has to be taken into account that such penalty, sometimes called “a career death penalty”, is an equivalent of a life sentence in criminal proceedings and many of the proceedings against judges do not relate to the commission of an offence but acts of far less gravity, e.g. failing to observe the time bar for producing a statement of reasons.

⁶ According to written information obtained by the Association of Judges “Themis” from the Supreme Court in a period of 10 years, from 1 January 2008 to 31 December 2017, there was just one disciplinary action against a judge, with a charge of corruption http://themis-sedziowie.eu/wp-content/uploads/2018/02/IMG_2899-e1519303114485.jpg, accessed 13.01.2019.

Finally, I am prepared to give half my kingdom to anyone who can find within the aforementioned legislation even one measure increasing the independence of the Polish judiciary.

Thus, what is the real objective of the so-called “great reform of the judicial system”? The answer is simple and unambiguous. In a short perspective, it is about a purge within the personnel of the judicial system and in the long run, it is about its subordination to the political factor, with the Minister of Justice in particular.

Thanks to the amendment of the Law on the Ordinary Courts Organisation in a period of 6 months from when the law entered into force, the Minister of Justice, discretionarily and often by using untrue or fabricated statistical data on the effectiveness of courts, dismissed around 150 Presidents and Vice Presidents of Ordinary Courts of various instances and before the terms of their offices expired⁷. What is even worse, the main criteria, as it may seem, for appointment of their successors were not their merits but the level of their loyalty to the Ministry of Justice. It indicates that the vacant offices of the dismissed Presidents were filled with people lacking experience in court management and even those with disciplinary penalties. Moreover, many of those people were “on credit” (in respect of their powers) delegated to adjudicate in courts of higher instance, which was a kind of additional bonus.

The total “purge” was conducted in the National Council of the Judiciary, which used to play a fundamental role in safeguarding the independence of the judiciary. Meanwhile, contrary to Article 187 of the Constitution as well as recommendations of the Council of Europe⁸, the principle of appointment of 15 judges-members of the Council by the judges was departed from. This prerogative was conveyed to Parliament, at the same time terminating the tenure of the current members of the Council. Moreover, as disclosed by media, a number of personal and private connections between judges-members of the new Council with the Ministry of Justice are so significant that it can be easily regarded as an additional body of the executive power⁹.

The new Law on the Supreme Court was originally designed to enable a purge in the personnel of the Polish highest judicial authority. The lowered retirement age for judges was itself designed to secure removal of about 40% of judges and, simultaneously, lead to termination of the constitutionally safeguarded term of office of the First President of the Supreme Court. Furthermore, the increased number of judges, consequential to the

⁷ That is, about 20 % of all Presidents and Vice Presidents, which fails to illustrate the actual scope of the cleansing; it can be mentioned that for every 11 Presidents of the Ordinary Courts of the highest instance (that is the Appeal Courts) as many as 10 were replaced. Furthermore, the scale of the changes would have been certainly greater if it was not for the Associations of Judges calling not to take offices of Presidents who were dismissed before the expiry of their offices and the solidarity of many judges rejecting appointments.

⁸ Opinion no 10 of the Consultative Council of European Judges (CCJE) of 2007 stating that, in a Judicial Council composed of various professionals, its majority shall be composed of judges appointed by fellow judges (point 18 and 25). Moreover, in point 19 it was underlined that the composition shall be free from the influence of the Parliamentary majority, the executive and from any affiliation with political parties. Similar Opinions were passed by the General Assembly of the European Network of Councils for the Judiciary (Opinion of 23 May 2008), the Council of Europe (Recommendation 94/12) and are also included in the European Charter on the Statute for Judges of 1998.

⁹ Judges-members of the new National Council of the Judiciary are mostly judges recently employed in the Ministry of Justice or for a few months before being appointed to the NCJ, who were promoted by the Minister of Justice to the offices of Presidents of courts replacing Presidents dismissed before expiry of their office.

establishment of two new Chambers, will soon result in the majority of members of the Supreme Court being newly appointed. The ruling party plans regarding personnel changes failed to be fully realised due to the Order of the European Court of the European Union, of 19 October 2018, in case ref no C-619/18 R¹⁰, an application of the European Commission. The Order was passed to adopt interim measures by which Poland was obliged to immediately suspend the application of the national provisions lowering the retirement age for the justices of the Supreme Court. Consequently, on 17 December 2018, the President signed a statute¹¹ resuming service for over 20 justices of the Supreme Court who had been forced to retire before the expiry of the term of office. This partial failure of the pseudo-reform of the justice system does not alter the fact the National Council for the Judiciary became politicized and subsequently appointed judges to the Extraordinary Claim and Public Affairs Chamber as well as judges of the Disciplinary Chamber, providing politicians with a guaranteed influence and control over the legitimacy of parliamentary elections and control over the disciplinary proceedings against judges and representatives of other legal professionals.

A conclusion drawn from the above description is indeed depressing. The only objective of the so called “great reform of the justice system” is focused on personnel changes within the justice system and its subordination to political factors, especially, the Minister of Justice with a view to creating a system of mono-power by which the State authority is built on spreading fear amongst its citizens, who are deprived of effective legal protection.

The Ministry of Justice often reaches for a faulty and demagogical argument that certain measures implemented by the “reform” are in operation in some other European States. Firstly, certain measures derive from judicial tradition and culture of a given State and thus, within a national judicial system, their operation may differ from how they would operate in Poland¹². Secondly, measures adopted by some States, accompanied by other factors, create a coherent system in which a weak element can be compensated for, all achieved by an emphasis on some of its elements more than others. The creation of a new system comprised of the weakest and commonly criticised pieces of measures from other

¹⁰https://www.curia.europa.eu%2Fjcms%2Fupload%2Fdocs%2Fapplication%2Fpdf%2F2018-10%2Fcp180159en.pdf&usg=AOvVaw2rkq5FV8-R_7qXw39P3fYO, accessed on 13.01.2019.

¹¹ Statute of 21 November 2018, Journal of Laws 2019 r., heading 2507, <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180002507/O/D20182507.pdf>., accessed on 3.03.2019.

¹² There are European States where the Prosecutor General is more subordinated to the Minister of Justice (e.g. Germany or Belgium), however, this solution due to a highly- and well-grounded legal culture and political class does not raise challenges about independence of the prosecution. In Poland the political class certainly does not observe the norms of independence of the judiciary, as indicated by comments made by the current Prosecutor General-Minister of Justice, Zbigniew Ziobro, who whilst summarising the conclusions of the Assembly of Lawyers in Katowice, of 3 March 2017, suggested that judges who directly apply the Constitution or international Law Acts can expect disciplinary actions. Similar in tone was a comment by the Vice Minister of Justice, Łukasz Piebiak, in a television interview in January 2018, announcing expulsion from professions for “black sheep”, meaning judges who do not “stand on the side of the State” in proceedings before them. It is a highly concerning occurrence if members of the Ministry of Justice challenge judges’ right to rely on primary law and recommend judicial partiality on account of the country; it is an unacceptable practice to suggest that judges will face disciplinary liability if the “recommendations” are not followed.

States reminds of a process of creating a monster by doctor Frankenstein in the well-known novel by Mary Shelley. Therefore, it can be predicted that the introduction of so many changes undermining judicial independence will lead to the creation of a dangerous caricature of an independent judicial system in which the highest authorities, such as the Constitutional Court, the National Council of the Judiciary or the Supreme Court will gain not just marginal status but will become the executive's instrument of exercising influence over the judiciary. This is how the system of the Polish state is being transformed from a system founded on "the rule of law", where the law is mainly concentrated on restricting the executive power so that the rights and freedoms of the people are observed, to a system of "rule through law" in which the law is first and foremost utilised by the executive as a tool to achieve political goals at the expense of the deterioration of safeguards of the rights and freedoms of its citizens.

Professor Jerzy Zajadło described it in an apt and laconic way: "their goal is to transform judges and courts into compliant executors of the aforementioned central power – to an extent equal to the one already achieved for the legislative and the executive powers. Courts so defined would cease to mean "courts" and it would be difficult to find an adequate term to match their function". Further, the professor stated that: "it is not only about the elimination of, known from the more recent or more distant past, instances of the so-called judges on call. It is about a model warranting the existence of those judges, who would not even require a call reminding them what the executive expects from them (strictly speaking – a so-called political decisions headquarters); they are expected to understand it, feel it and even envisage the sovereign's desires"¹³.

The report further provides a systematic presentation of a brief summary of measures taken and legislative initiatives which have taken place over the last 3 years under the framework of the so-called "great reform" of the judicial system and which seeks the judiciary's subordination to the political power. The author of this report emphasises 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. The black PR campaign against judges.

Political subordination of the judiciary required significant legislative changes and would have been substantially more challenging, if not impossible, had the judiciary enjoyed reputation as a high authority in the eyes of society. To secure the success of the political power's hostile interception of the judiciary, it was necessary to get "armed" by involving the media in intense and negative propaganda campaigned by politicians of the ruling party and paid for from public funds. A significant part of this campaign was also conducted abroad. To use military terminology – a "protection of the flank" from a foreign attack in the form of a

¹³https://www.oko.press%2Fzajadlo-pis-bduje-niedemokratyczne-panstwo-bezprawia%2F%3Ffb_comment_id%3D2045719322140616_2045772772135271&usg=AOvVaw14vofxQdpqY-qw2KIVkL1S, accessed on 13.01.2019.

potential intervention of supranational bodies which safeguard the rule of law. Fortunately, this was not entirely successful.

The most spectacular manifestation of a campaign defaming judges was conducted in September 2017 in the so-called “billboard campaign”¹⁴ engaging television, the press and the internet. The cost of the campaign was estimated at 9 million zloty (more than 2 million euro). This is comparable to the costs of the presidential election campaign in Poland. The campaign was run by the Polish National Foundation, an institution established during the current term of Polish Parliament under the auspices of the Law and Justice party. It is financed by the 17 largest state-owned companies under the management of the ruling party’s nominees. Notwithstanding its statutory obligation to promote the Polish best interests abroad, the main objective of the media campaign was to undermine the authority of the Polish judiciary.

The government claimed that the campaign was designed to promote the great reform of the judicial system. However, in fact, it was a part of a black PR campaign portraying the Polish judiciary in a distorted mirror, describing with prejudice disciplinary proceedings faced by some judges or their alleged or actual judicial errors. Although some of those situations did happen, others were presented in a distorted or even utterly false way. One of the “true” examples employed by the campaign referred to a judge who stole a sausage from a shop. This situation has indeed occurred but the website providing the story failed to mention that at the time of the incident the judge had been retired for many years and what is more, he had been suffering from serious mental health problems. For the benefit of the campaign, judges were named “an extraordinary caste”. In respect of the choice of colours, the campaign used black and white on the billboards and the internet. Judges were displayed on the black side and were depicted as classical examples of corruption, lack of competence and indolence. Generally, the campaign tried to belittle the whole group of professionals and relied on more or less accurate negative examples and thus, on the principle of collective responsibility.

One of the judges accurately commented on the “billboard campaign” stating that “a situation, where one branch of State powers pays to organise a negative campaign against the other branch of a State power of the same State, is so peculiar that even George Orwell or Monty Python would not come up with it”.

It is quite peculiar that, soon after the campaign began, some Law and Justice politicians stated that it was not run by the government or their political party. This statement seems to be difficult to believe in considering that the then current Premier Beata Szydło was present at the official inauguration of the campaign. Moreover, those responsible for the campaign had previously worked in the office of Premier Szydło, the campaign was entirely financed by state-owned companies and was nothing but a continuation of the government’s policy defaming judges which had already been initiated in public media, controlled by the government.

Although the opposition parties notified the prosecution that the campaign might have infringed the prohibition against financing political parties with public funds, other than

¹⁴ <https://www.oko.press%2Fulica-zagranica-czyli-dlaczego-billboardy-wisza-polsce-wyjasnienia-pis-kiepskiego-kabaretu%2F&usg=AOvVaw1PnMlSsm7laVum-2xYeJ-N>, accessed on 3.03.2019.

coming from the official grants as provided by the Act on Political Parties¹⁵, nonetheless, it seemed rather dubious that the Prosecution supervised by the Minister of Justice-the Prosecutor General was able to impartially and fairly assess whether the campaign in support of the reform promoted by the very same Minister of Justice-the Prosecutor General constituted an offence.

It has to be noted that it could not have been a coincidence that the “billboard campaign” was run on the one hand at the end of 2017, thus, shortly after numerous street protests persuaded President Andrzej Duda to veto the first and the most radical¹⁶ version of the legislation introducing “the great reform” of the justice system and, on the other hand, just before politicians of the ruling party successfully voted on the new versions of the most significant legislation regarding the judiciary.

Shortly after the billboard campaign, lasting about 2 months, was finished, newly appointed Prime Minister Mateusz Morawiecki joined the front lines of propaganda against the judiciary, this time mainly advocated abroad.

Firstly, on 13 December 2017, an article “Why is my government reforming the Polish judiciary” by Mateusz Morawiecki appeared on the pages of a weekly magazine, the “Washington Examiner”¹⁷. This publication defamed Polish judges. Its content implied that Polish judicial personnel is a residue of the Communist system and that the “old” National Council of the Judiciary has created a coterie, which no judge of first instance court can influence and thus, promotes “nepotism and corruption”. According to Mateusz Morawiecki, the previous system of allocation of cases to specific judges promoted their “corruption”. The Premier also stated that “in some instances, where a case seems more lucrative a bribe is required” and that the courts work to the benefit of influential and rich people.

Furthermore, on 16 December 2017, in an interview for a TVP news programme, “Wiadomości”¹⁸, the Premier reported that at the meeting with the President of the Republic of France he had compared Polish judges and Polish courts to courts of the Republic of Vichy collaborating with the Nazis, and at the same time claimed that removal of this strain from French judiciary took less than it is taking to decommunize Polish judiciary.

Finally, on 10 January 2018 at the meeting with European journalists in Brussels¹⁹, Mateusz Morawiecki handed leaflets in English describing the so-called “reform of the judicial system” and gave a speech in which once again, inter alia, emphasised the failure to decommunize the Polish judiciary and accused Polish judges of being politicised, operating on an alienated equivocal example of former President of the Regional Court in Gdańsk. He

¹⁵ <https://www.polskatimes.pl%2Fpo-zawiadamia-prokuratorze-ws-kampanii-billboardowej%2Ffar%2F12505118&usg=AOvVaw1aoBn8J1-4CaPByT1hanPn>, accessed on 3.03.2019,

¹⁶ The original version of the Law on the Supreme Court, under pressure of the public opinion (large street protest in more than 200 cities) vetoed by the President Andrzej Duda, stated that the office of all Supreme Court judges was to be terminated on the Law entering into force, the Minister of Justice could discretionary appoint temporary composition of the Supreme Court, until the justices of the Supreme Court were appointed by the new politicized National Council of the Judiciary.

¹⁷ <https://www.washingtonexaminer.com%2Fprime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary&usg=AOvVaw35lim7GpHtKddczltC6ix5>, accessed on 3.03.2019.

¹⁸ <https://oko.press%2Fporownujac-rezim-vichy-prl-morawiecki-obrazil-jednoczesnie-polakow-francuzow-porownanie-zreszta-niezbyt-trafne%2F&usg=AOvVawOM8VZl8FNAsVtilfVGG1k>, accessed on 3.03.2019.

¹⁹ https://www.tvn24.pl%2Fwiadomosci-z-kraju%2C3%2Fmorawiecki-tlumaczy-zagranicznym-dziennikarzom-zmiany-w-sadownictwie%2C808395.html&usg=AOvVaw0KHD7CTBMP9_6DiCmc-iZl, accessed on 3.03.2019.

also suggested that a judge was a paedophile, however, his opinion was based on a decontextualized piece of conversation with one of the judges of the Supreme Court which was unlawfully recorded by the secret police.

The Premier did not indicate the source of his revelations or statistical data which could confirm them. The allegation that 30 years after the change of the system, the Polish judiciary can be characterised as post communistic, with the average age of a Polish judge being 42 years of age, is *prima facie* absurd. In terms of the alleged intention to decommunize the judiciary, it is surprising that the leader of changes devastating the Polish justice system is current Parliament member, Stanisław Piotrowicz, the President of the Justice and Human Rights Parliamentary Committee. He is a former Communist prosecutor, a member of the Polish United Workers Party, responsible for prosecution of members of the oppositions, and a recipient of the Brown Cross of Merit for his loyalty to the Communist party²⁰.

A non-governmental body reported the Premier's comments to the Prosecution for potential contempt of national constitutional authorities, false accusations of judges and breach of diplomatic secrecy²¹. However, it could have not been expected that, controlled by the ruling party, the Prosecution would have conducted such proceedings efficiently.

Even now defamatory public comments made by the ruling party politicians and addressed to judges can be heard. In January 2019 it was revealed that during the LIBE Commission of the European Parliament visit 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 some other pass controversial and questionable judgments". Mr. Suski also claimed that some judges have been bribed with cars in return for certain judgments and that some of the judges – members of the (ex) National Council of the Judiciary – are so rich that they have bars of gold buried in their gardens. It does not need to be mentioned that Marek Suski did not reveal the source of this sort of information and that described revelations could not be confirmed neither by any media coverage nor information held by the prosecution, which thrives in sharing its successes in combating criminal activities amongst judges. The Member himself, later confronted by a journalist in respect of this comment, stated that by describing a person burying gold in a garden he did not mean a judge but a member of the NCJ who was a deputy²².

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

²⁰ <https://www.natemat.pl%2F84341%2C%2Fkoszarzenie-opozycjonisty-to-nie-jedyna-plama-na-zyciorysie-posla-piotrowicza-jako-prokuratur-uniewinnil-ksiedza-pedofila-z-tylaw&usg=AOvVaw3jcBlilAekdOhQf-9fT-Y9>, accessed on 3.03.2019.

²¹ <https://www.wiadomosci.wp.pl%2Fmorawiecki-popelnil-przestepstwo-kod-zawiadamia-prokurature-6224528194050177a&usg=AOvVaw0HSIRMYCMe1e2PkkVPu4PP>, accessed on 3.03.2019.

²² <https://www.wiadomosci.onet.pl%2Ftylko-w-onecie%2Fmarek-suski-i-zloto-zakopane-w-ogrodku-cimoszewicz-cwiakalski-budka-komentuja%2F0x1n6vr&usg=AOvVaw1y8V12pl7SneJ9UkpAty9G>, accessed on 3.03.2019.

Although the examples provided of black PR targeting judges do not seem sophisticated, nonetheless – in accordance with the rule that a lie repeated 100 times becomes the truth – an intense negative campaign paid off and resulted in social trust in judiciary deteriorating from above 40 to above 20 percent. Moreover, a wave of protests against the pseudo-reform of the justice system was far more modest in 2018 than the massive protests which took place in July 2017, during the first attempt at 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 impartiality of judges.

The key to seizing control over the judiciary by the ruling party lay in legislative changes leading to political subordination of the National Council of the Judiciary. This is the authority which decides on, inter alia, who becomes a judge, who will be promoted to a higher judicial office, and also sets out the Rules of Judicial Ethics and thus, has a direct influence over the initiation of the disciplinary proceedings against judges.

Its political subordination was achieved by shifting the power of appointment of 15 judges-members of the NCJ from the bodies of judiciary self-government to Parliament, where the ruling party enjoys the majority. In March 2018 new judges-members of the Council were appointed, notwithstanding the appointments breaching the constitutional tenure for a number of active NCJ members. The current composition of the Council influences the selection of candidates to judicial offices, candidates to senior judicial offices, drafting of the Rules of Judicial Ethics and can also initiate disciplinary proceedings against judges. This process of appointments to the Council does not only violate Article 187 of the Polish Constitution²³ but is also incompatible with the CCJE norms according to which not less than a half of all members of a judiciary council shall be composed of judges appointed by other judges.

From the moment the “new” Council was established, its main objective should remain, as prescribed by the Constitution, to safeguard the independence of courts and that impartiality of judges, but this authority has not taken even one step in this direction. On the contrary, its members publicly announced their intention to commence disciplinary proceedings against those judges who actively uphold constitutional legal order, 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 required for candidates to the Supreme Court offices and dropped the requirement of providing, for the purpose of assessing, case files of the cases determined by the candidates as well as preparing opinions on the candidates based on the case files provided. Under these circumstances it is perfectly reasonable to assume that the candidates were appointed on grounds other than merit. The author of this report has not even a shadow of doubt that such

²³ This provision of the Constitution clearly stipulates that Parliament selects 6 members of the National Council of the Judiciary including 4 Members of Lower Chamber of Parliament and 2 Senators (Members of upper Chamber of the Parliament). Should the intention of the legislative be for Parliament to select more members of the NCJ it would have been so provided in Constitution.

significantly politicized mode of appointment of the NCJ members has allowed the executive to gain political influence over who becomes a judge and analogously, which judge is to be promoted, both flagrantly contradicting accepted norms regulating the process of judicial appointments arising from Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union. Further, what is even worse, the National Council of the Judiciary, politicized in such a manner, selected candidates to the majority of the judicial offices in the Supreme Court including all judicial offices of both the Disciplinary Chamber and Extraordinary Claim and Public Affairs Chamber of the Supreme Court.

In recent times the National Council of the Judiciary, as has already been the case with the Constitutional Court, has taken steps which not just fail to realise its constitutional function of a body safeguarding the independence of courts and impartiality of judges, but also contradicts its constitutional objectives.

In particular, on 9 November 2018,²⁴ 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 a judicial office since he enforced the CJEU Order, of 19 October 2018, regarding adoption of interim measures and was returned to the office of the President of the Criminal Chamber of the Supreme Court having been previously forced to retire. He also cancelled the sessions scheduled by the newly appointed judge of this Chamber. It has to be noted that judge Stanisław Zabłocki is one of the greatest Polish legal authority figures, who in the 80s acted as an attorney for the representatives of the anti-Communist opposition and finalised the rehabilitation of Polish national hero Captain Witold Pilecki. The NCJ Resolution was objected by Associations of Judges²⁵ and by Resolutions of the Assemblies of Judges²⁶.

Further, on 12 December 2018, the National Council of the Judiciary adopted a Resolution²⁷ which stated that “a judge publicly displaying an infographic or a symbol which is unequivocally affiliated or is capable of being affiliated with a political party, a trade union or a social movement established by a trade union, a political party or other politically active organisation” constitutes “a behaviour capable of undermining trust in the independence and impartiality of a judge”. The objective of the 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 support to upholding the rule of law and independence of the judiciary in Poland. The design and colours of the caption, which by implication compares to the distinctive caption “Solidarność” originating from the 80s, was designed to advocate a social movement opposing violations of the rule of law in Poland. The wording of the Resolution adopted by a

²⁴<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.

²⁵ <http://themis-sedziowie.eu/aktualnosci/stanowisko-stowarzyszenia-sedziow-themis-z-dnia-09-11-2018-roku/>, accessed on 13.01.2019.

²⁶ Resolution No 3 of the Assembly of the Regional Court Judges of Krakow adopted on 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.

²⁷ 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.

body currently operating as the National Council of the Judiciary leads to a conclusion that the word “constitution” used by judges indicates their politicisation, whereas systematic breaches of the Constitution by the executive and legislative constitute a rightful privilege of those powers. Considering that 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 may result in commencement of disciplinary proceedings against judges.

In January 2019 the Deputy of Disciplinary Officer of Ordinary Court Judges Michał Lasota commenced disciplinary action in respect of Dorota Lutostańska, judge of the Regional Court in Olsztyn. Mr. Lasota summoned judge to submit written statement in the course of preliminary disciplinary proceedings in respect of situation when she was wearing T-shirt with a word “constitution” on the occasion of common picture taken by judges who were commemorating 100 years of regaining of independence by Poland²⁸.

A further controversial statement of the National Council of the Judiciary was published on 10 January 2019. The statement was produced in response to the Resolutions in which the Assemblies of Regional Courts and the Appeal Courts had expressed their concerns regarding the legal validity 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 determines the request for a preliminary ruling regarding the National Council of the Judiciary as requested by the Supreme Court²⁹ and the Supreme Administrative Court³⁰. The National Council of the Judiciary adopted a Resolution stating that in the absence of opinions on candidates provided by judicial self-regulatory bodies, thus, the Assemblies of Judges, the National Council of the Judiciary is not barred from issuing its own opinions about the candidates³¹.

The statements referred to along with the National Council of the Judiciary’s Resolution, adopted within the last 2 months, unequivocally indicate that this body, which condemned the Supreme Court judge for abiding by the CJEU Order, which silences judges protesting against breaches of the Constitution, or finally, which challenges the power of judicial self-regulatory bodies for participation in process of judicial promotions – is a hundred percent subordinated to the executive and implements its orders striving for political subordination of courts.

²⁸ <https://www.archiwumosiatynskiego.pl%2Fwpis-w-debacie%2Fzrecznik-dyscyplinary-sciga-sedzie-z-olsztyna-za-koszulke-konstytucja-pierwsza-taka-sprawa%2F&usg=AOvVaw2idExAfDILk3IFZXBPhr-o>, accessed on 3.03.2019.

²⁹ http://www.sn.pl%2Faktualnosci%2FSitePages%2FKomunikaty_o_sprawach.aspx%3FItemSID%3D236-271e0911-7542-42c1-ba34-d1e945caefb2%26ListName%3DKomunikaty_o_sprawach&usg=AOvVaw3_jvTTKezIAC3I3E8PXkgT, accessed on 2.03.2019.

³⁰ The case to be determined by the CJEU on 19 March 2019.

³¹ <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 courts and “soft” means of harassing judges.

For the last 3 years the “great reform” of the justice system has been exercising political control over courts. It has been carried out in a comprehensive way and also by means of “soft” harassment, it has increased administrative supervisory powers over courts enjoyed by the Minister of Justice.

Generally, restrictions have been placed on the powers of the Colleges of Courts (elected by the judges) and judicial self-regulatory bodies, which are the Assemblies of Judges of particular courts. These days, for instance, an appeal against variations of the scope of judicial duties shall not be lodged with the College of a particular court, but with National Council of the Judiciary, which politicised by election of its judges-members by the Parliament. The College has also lost the power of binding objection against a candidature to the post of Presiding Judge of the Court’s Division, and was deprived of the right to object to appointments of judges-visitors, a right now enjoyed by the Minister of Justice-Prosecutor General. Being at the politicians’ service, a judge-visitor can cause a lot of misery to a common judge if on instructions of politically appointed President of court, a biased inspection of a judge’s office is carried out.

Until recently, Article 86 § 6 of the Law on Ordinary Courts Organisation provided that if a President of a court objects to a judge’s additional employment in a form of educational activities, the judge had the right to appeal this decision before the College of the competent court. Currently, the Article quoted has been repealed and a judge is not entitled to appeal such refusal. Absence of the right to appeal a refusal to undertake an additional employment, determined by the arbitrary decision of a new and politically appointed President of court, can easily become an additional tool used to harass judges.

As mentioned in Chapter I of this report, the amendments to the Law on Ordinary Courts Organisation allowed the Minister of Justice to discretionary appoint the Presidents of Courts, with no involvement of the judicial self-regulatory bodies, and in the 6-month interim period allowed him to discretionary dismiss the then current Presidents. The Presidents significantly impact on a judge’s working conditions by, inter alia, granting an annual leave, allowing to participate in trainings, undertaking additional employment or finally, deciding on transfer between Divisions of court. The scope of a President’s powers accompanied by a direct dependence on the Minister of Justice (to whom they own the judicial office and by whose decision they can be dismissed on undefined grounds) create a President who is an instrument for applying pressure on politically inconvenient judges. This scenario already applies to a well-known judge who criticises the current “reform” of the judiciary, a judge of the Regional Court in Kraków, Waldemar Żurek. The judge was transferred to a different Division and allocated a different range of duties without any substantive reason and in the absence of any legally adopted Resolution of the College of Court. Although, in the past, an appeal to the College of the Appeal Court, having been nominated by judges, was provided for, currently, the politicized National Council of the Judiciary³² has been identified as a body

³² It ought to be added here that, in the case of judge Żurek, the new NCJ declared that no appeal from the decision of the President regarding transfer from one division to the other can be lodged. It was reasoned by

competent to hear an appeal. Additionally, on transfer, dealing with a specific case by an “inconvenient” judge might be hindered.

Moreover, considering that the Minister of Justice currently enjoys the power to discretionarily appoint, not after a contest, a Court Director who by managing the administrative personnel is in a position e.g. to replace a judge’s court recorder or assistant with someone unexperienced or to move a judge to a room shared with a number of other people, that position increases the odds for potential indirect harassment of a selected judge. A judge “thrown” into new and unfamiliar duties and deprived of decent working conditions is more likely to pass an erroneous judgment or prolong the proceedings which is in turn one step away from having disciplinary proceedings commenced.

To summarise, a significant increase in the administrative supervisory powers over courts attained by the Minister of Justice-Prosecutor General, at the expense of reducing judicial bodies’ powers, has resulted in the creation of instruments for an effective administrative harassment of selected judges facilitated by “soft” harassment and repression of inconvenient judges, thus violating the principle of judicial impartiality.

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

1. Inquisitorial model of procedures, that is, the special powers of the Minister of Justice.

The ultimate “icing on the cake” amongst instruments created by the “great reform” and employed to subordinate the judiciary to the political factor is the new mode of disciplinary proceedings against judges and other legal professionals, which confers to the Minister of Justice such significant powers that it is dangerously reaching a model of inquisitorial proceedings.

The Minister of Justice-Prosecutor General appoints the Disciplinary Officer of the Ordinary Courts Judges and his two Deputies³³. Further, the Officer appoints the Deputy Disciplinary Officers of the Appeal Courts and of the Regional Courts from six candidates nominated by the General Assemblies of Judges of those courts³⁴.

It is also worth noticing that in larger Regional Courts (more than 60 judicial posts) the Disciplinary Officer of the Ordinary Court is entitled to appoint a greater number of the Deputy Disciplinary Officers, given that this is required by the interest of the justice system. This arrangement suggests an intention to increase the number of disciplinary proceedings, which at the same time – not by accident – is feasible in larger courts, hence, the courts with the most significant opposition to unconstitutional changes and subordination of the judiciary to the political factor.

the change referred to the division of the same level, although he was transferred from the Appeal Division to first instance with a significantly different scope of responsibilities.

³³ Article 112 § 3 of the Law on Ordinary Courts Organisation (Journal of Laws 2001, heading 1070 as amended).

³⁴ Article 112 § 6 - § 13 of the Law on Ordinary Courts Organisation.

Analogously, the Minister of Justice discretionarily sets out the number of judges for each of the Disciplinary Courts at the Appeal Courts³⁵ as well as appoints by name all judges for these courts. Here the Minister's nominations are binding on judges regardless whether they consent to take up the office or not, with no right to appeal the Minister's decision³⁶. The Minister of Justice enjoys the authority to nominate a specific ad hoc Disciplinary Officer (that is, a Disciplinary Officer of the Minister of Justice) which disqualifies the competent Officer from the proceedings³⁷ and translates into a request to commence proceedings³⁸. Generally, the Minister of Justice is one of the entities having powers to request commencement of the disciplinary proceedings. Finally, if a case concerns disciplinary misconduct that satisfies the criteria of an intentional crime prosecuted by public complaint, the Disciplinary Officer of the Minister of Justice can be appointed from prosecutors recommended by the State Prosecutor. Should such circumstances occur, the Minister of Justice-Prosecutor General is entitled to instruct the Disciplinary Officer, and hence "manually steer" the proceedings in question. It is worrying that Article 231 k.k. (Criminal Code), long criticized for lack of clarity of the term "criteria of a crime" (a public official acting beyond his or her powers, negligence) provides the prosecution with potential flexibility in classifying a disciplinary delict or even a judicial activity³⁹ as an offence.

This is how a politician affiliated with the ruling party gains a direct influence on who accuses and who tries judges under the disciplinary proceedings. The power 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 duty of the Disciplinary Officer of the Minister of Justice expires when the decision refusing commencement of the disciplinary proceedings becomes final, or on discharge of the disciplinary proceedings or when the decision concluding the proceedings becomes final, nonetheless expiry of his duty under this mode does not bar the Minister of Justice from re-appointment of the Disciplinary Officer and reopening the case⁴⁰. This, under Article 112 b § 4 of the Law on the Ordinary Courts Organisation, means a request to reopen proceedings relating to the same matter and the same judge, who under this procedure can acquire a status of a perpetual suspect.

As if that was not enough the Minister of Justice-Prosecutor General enjoys the right to object the decision of the Disciplinary Officer in respect of refusal to commence the proceedings against a judge. Moreover, such objection binds the Officer and obliges him to

³⁵ Article 110 c of the Law on Ordinary Courts Organisation.

³⁶ Article 82 c of the Law on Ordinary Courts Organisation.

³⁷ Article 112b § 1 of the Law on Ordinary Courts Organisation.

³⁸ Article 112 b § 4 of the Law on Ordinary Courts Organisation.

³⁹ This way of thinking is not alien to some prosecutions which is indicated by those attempts to classify the decisions of active judges relating to allocation of cases (the case of the "Police" Chemical Works) or unprecedented disciplinary proceedings against judge Agnieszka Pilarczyk from Krakow, on the grounds of alleged overpayment of fees for expert witnesses-doctors, which constitutes a challengeable decision, incidental to pronouncement of a judgment. This last example is significant as a party to the proceedings, in respect of which an unfavourable decision was passed, was the current Minister of Justice-Prosecutor General, Zbigniew Ziobro.

⁴⁰ Article 112 b § 5 of the Law on Ordinary Courts Organisation.

commence the proceedings in accordance with the Minister's instructions⁴¹. The right to object is not qualified by any limitations as to the number of appeals or time bar (except for the fact that the Minister of Justice has a time limit of 30 days to appeal any decision, which is very long, anyway) and thus, the appeal can be renewed and once commenced the disciplinary proceedings can ultimately last forever.

The powers listed above authorise the Minister to take over full control of the course of the disciplinary proceedings, at the pre-litigation stage and to an extent which would allow to keep a judge in a stage of a perpetual allegation.

The disciplinary proceedings are formulated in a way authorising the Minister of Justice not only to initiate the disciplinary proceedings against a given judge but also to nominate the highest Disciplinary Officers, personally allocate the Disciplinary Officer of his choice to a given judge on a case-by-case basis, hence, having power to keep a judge in a state of perpetual accusation. Moreover, the Minister of Justice selects members of the Disciplinary Court of first instance, and thus establishes an inquisitorial model of proceedings. The fact that a person entitled to nominate a disciplinary officer and to select the composition of a first instance court, is an active politician of the executive power becomes the main argument proving the politicisation of the disciplinary proceedings against judges.

2. Special authorities at the central level, that is, politicisation of the criminal and disciplinary proceedings against judges.

In order to present a full picture of judges' special treatment during the disciplinary and criminal proceedings against them, it is necessary to discuss four special authorities which were established at the central level with an objective to put judges under "special supervision".

a) The task force of the Minister of Justice.

The most intriguing body with a special mission to deal with proceedings against judges was established on a governmental level by the Minister of Justice-Prosecutor General on 10 September 2018⁴². Acting with the Minister of Justice "Panel on actions taken by the Minister of Justice in proceedings against judges and judges' assessors" with an objective to "conduct analysis and present the Minister of Justice with recommendations" in respect of the disciplinary proceedings exclusively in respect of judges⁴³. What is significant, the Vice Minister of Justice, Łukasz Piebiak, chairs this Panel and is well known from his function as "a personnel director" for the judiciary. The Panel is also composed of, amongst others, the Disciplinary Officer of the Ordinary Courts' Judges appointed by the Minister of Justice and his two Deputies as well as the the Member of Commission on Disciplinary Responsibility of

⁴¹ Article 114 § 9 of the Law on Ordinary Courts Organisation.

⁴² <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.

⁴³ <https://bip.ms.gov.pl/pl/ministerstwo/dziennik-urzedowy-ministra-sprawiedliwosci/2018/download,3554,267.html>, accessed on 18.02.2019.

Judges established within the “new” National Council of the Judiciary. Considering that the Panel is composed of the Disciplinary Officers who decide on commencing disciplinary proceedings against judges and can take over any case dealt with the Deputy Disciplinary Officers of the Regional and Appeal Courts, who as the Panel’s members are also responsible for advising the Minister of Justice on steps which ought to be taken during the disciplinary proceedings, the arrangement should be regarded as direct influence of the political factor on the disciplinary proceedings against judges. It does contravene the principle of impartiality of the body conducting proceedings which can be concluded by a hefty punishment, including being struck off.

Absence of any specific indications of its responsibilities accompanied by the Panel’s composition suggest that the Panel’s actual goal is focused on selecting those judges who – on political grounds – should be harassed as well as establishing the type of harassment to be applied to a certain judge. The fact that the Prosecutor General is a member of the Panel indicates that not only actions under the disciplinary proceedings but also a criminal prosecution can be found in the armoury of recommended means.

It seems paradoxical that even in the 90s, i.e. the time when the amount of violent organised crime grew to its highest levels in Poland, it was never been recognised that it is worth establishing a permanent Panel, of the Ministry of Justice, to combat it.

What is interesting, according to the official statement published on the website of Ministry of Justice,⁴⁴ “The Panel deals with analysis concerned with Rules of Judicial Ethics. The aim is to elaborate – on the basis of existing regulations – a catalogue of good practices which should be followed by judges both in professional field and everyday life. The analysis can become a basis for amendments of legal acts and Rules of Judicial Ethics as well.” A situation in which the same persons decide what kinds of behaviour are allowed for judges and what are forbidden and at the same time accuse judges in the course of disciplinary proceedings is another inquisitorial feature of the new mode of disciplinary proceedings, which is characteristic for systems aiming at a monopoly of power.

Even the fact that such units, as the aforementioned special authority or, as discussed below, the Internal Affairs Department of the State Prosecution, both being subordinates of the Minister of Justice, were formed and considering a marginal number of disciplinary delicts as well as offences committed by judges. it is unambiguously demonstrated that the purpose is to harass of judges with a view to subordinating them to the political factor. The disciplinary proceedings initiated in this way may become a means of initiating and controlling the disciplinary proceedings against staff of the system of justice allowing for effective removal of judges who do not satisfy the government’s expectations.

b) The Internal Affairs Department of the State Prosecution.

The second central government’s body designed to deal with disciplinary proceedings against judges is the Internal Affairs Department of the State Prosecution, which was created to “conduct and supervise the disciplinary proceedings in cases of intentional crime

⁴⁴ <https://www.ms.gov.pl/%2Fpl%2Finformacje%2Fnews%2C11724%2Czesp%20doradczy-do-spraw-etyki-i-postepowan.html&usg=AOvVawZ2N42UOpqwgJ7lGpPDIYhc>, accessed on 18.02.2019.

prosecuted by public indictment committed by judges, prosecutors or court assessors or prosecutors' assessors". Therefore, this specialised Department is inter alia to run criminal prosecutions against judges. The composition of the Internal Affairs Department was selected by the Minister of Justice-Prosecutor General and the Department's top position within the prosecution's organisational structure demonstrates that the Minister enjoys not only direct supremacy and supervision over it, but also direct impact on its functions.

It has to be reminded that pursuant to the Law on Prosecution of 28 January 2016⁴⁵, the functions of the Minister of Justice and the Prosecutor General were merged⁴⁶, which means a return to the model originating from the times of the Communist regime. Legislation introducing the personal union of the offices of the Minister of Justice and the Prosecutor General was accompanied by a significant limitation of criteria required from a candidate to the office of the Prosecutor General, which facilitated appointment of an active politician to this post⁴⁷. It is significant that whilst the position of the Minister of Justice became a political one his powers simultaneously increased. In particular, currently the Minister of Justice has the authority to request operational and investigatory procedures which are directly connected with pending pre-litigation proceedings (which means surveillance, such as control over the contents of correspondence, discretionary use of phone tapping) as well as access to evidence obtained throughout those procedures. However, the Law on Prosecution is silent as to any conditions to be satisfied before those means are applied by the Prosecutor General, and hence the risk of abuse⁴⁸. The Minister of Justice is similarly authorised to issue orders, including those referring to specific procedural steps in each case (Article 7 § 2 and § 3 of the Act), the authority to revoke or alter the decision of a subordinate prosecutor (Article 8 § 2 of the Act⁴⁹), as well as the power to take over each case from the subordinate prosecutor of any level. In this way, the Minister not only becomes a prosecutor's supervisor but also a super-prosecutor equipped with strictly investigatory powers.

⁴⁵ <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000177/U/D20160177Lj.pdf>, accessed on 2.03.2019.

⁴⁶ The personal union between the offices of the Minister of Justice and the Prosecutor General was established on the Law on Prosecution entering into force on 4 March 2016. This merge of offices itself, accompanied by allocation of broad supervisory and investigatory competence to the Prosecutor General results in the same person, through subordinated prosecutors, becomes, on one hand an active party to any criminal proceedings and a body supervising courts on the other. This gave grounds to a constitutional complaint of the National Council of the Judiciary to the Constitutional Court regarding the scope of so called "administrative supervision" of the Minister of Justice. 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 President of the Supreme Court.

⁴⁷ Especially the Act of 2016 abandoned the requirement that a candidate to the post of the Prosecutor General should have at least 10 years of service as a prosecutor or an adjudicating criminal law judge. Consequently, the requirements regarding qualifications of the Prosecutor General are currently lower than in respect of a prosecutor of the lowest level or even an apprentice prosecutor.

⁴⁸ By the virtue of Article 57 s3 of the Law on Prosecution of 2016.

⁴⁹ The literature on this issue rightfully states that allowing the Prosecutor General such broad interference with ongoing proceedings give rise to a post of a "super-prosecutor" equipped with broad investigatory powers. Consequently, the powers of the current Minister of Justice-Prosecutor General, Zbigniew Ziobro, who is also a member of Polish Parliament, violates Article 103 s 2 of the Polish Constitution, which provides that a prosecutor cannot at the same time hold an office of a Parliament member.

Furthermore, having criminal proceedings initiated legitimises prosecutor to apply for waiving judicial immunity. In such case the competent organ is the disciplinary court of the first instance and the appeal court is the Disciplinary Chamber of the Supreme Court elected by the new, politicised National Council of the Judiciary. In order to waive judicial immunity sufficient is “justified suspicion of having committed a criminal offence”⁵⁰. Positive decision of a disciplinary court, accepting instigating criminal proceedings concerning indictable intentional offence in respect of a judge, legitimises a suspension of a judge’s service and hence, removing cases from a judge and reducing his remuneration by up to 50% (without statutory determination of the maximum suspension period)⁵¹. In this way, by taking control over politicized prosecution office and newly created disciplinary courts, the Minister of Justice gained potential for doing inconvenient judges out of cases.

The fact that the new body, the Internal Affairs Department of the State Prosecution, has been placed at the top level of the prosecution office structure, suggests the existence of a serious issue with corruption amongst judges and prosecutors in Poland which requires serious organisational measures. However, the theory stating that it was necessary to establish this type of specialized body is undermined by statistics. It turns out that during 2 years of it being in operation, having examined over 1100 complaints, requests and grievances, only 117 gave grounds to formal registration, with just 38 of the cases currently pending. Yet, there are only 7 claims against a specific individual, 5 of them in respect of prosecutors and 2 against judges⁵². Considering that there are around 10,000 active judges in Poland and over 6,000 prosecutors, such number of claims should be regarded as marginal and insignificant⁵³ and confirms that the creation of such body, similar to the special task force described before within the office of the Minister of Justice, lacks substantial reasoning. Therefore, the mere fact of creating them could not be regarded as anything else but an attempt at harassment of judges and prosecutors.

Experience shows that the new body’s personnel can go to some lengths to justify its existence, especially since the employer provides a “motivational” reward system. Therefore, numerous attempts at commencing criminal proceedings against judges, the legitimacy of which is questionable, is to be expected. Instigation of such actions will be easily facilitated by referring to the so-called offence of exceeding official authority or failure to perform official duties (Article 231 k.k. (Penal Code)) which is evaluative in nature and exposed to ever broadening interpretation, as will be elaborated on in this chapter under point 3. To secure conviction in this type of “forced” proceedings, a broad political control over the judiciary by those in power would be required and which, despite the utmost efforts, has not been yet materialised.

⁵⁰ Article 80 § 2 c of the Law on Ordinary Courts Organisation.

⁵¹ Article 129 § 2 of the Law on Ordinary Courts Organisation.

⁵² Data as of beginning of August 2018,

https://www.prawo.gazetaprawna.pl%2Fartykuly%2F1206379%2Cpatologie-wsrod-sedziow-i-prokuratorow.html&usg=AOvVaw1gvqMgiquGFrX4y7DDo5Z_, accessed on 3.03.2019 r.

⁵³ It shall be noticed that the creation of the Internal Affairs Department is not the only distinct feature of the new organisational shape of the Prosecution Office which lacks a required justification in the actual structure of crime. Analogously unusual is establishing institutions at the District Prosecution level (hence a very high level) which specialise in cases regarding medical malpractice, although, those institutions are often duplicated at the level of the Regional Prosecution Office.

c) The Disciplinary Officer of the Ordinary Courts' Judges, his Deputies and the Disciplinary Officer of the Minister of Justice.

At first sight, a three-tiered structure of the authorities responsible for pre-litigation disciplinary procedures against judges of the Ordinary Courts seems decentralised. However, on a closer examination of the scope of the Disciplinary Officers' powers it is revealed that the provisions provide for the disciplinary proceedings against a specific judge to be dealt with at a central level.

Namely, in principle, the Deputy Disciplinary Officers of the Regional Courts⁵⁴ are responsible for conducting disciplinary proceedings against judges of the District Courts. The Deputy Disciplinary Officers of the Appeal Courts⁵⁵ are responsible for conducting proceedings against judges of the Appeal Courts. Judges' self-regulatory bodies (Assemblies of judges of particular courts) influence appointments of both categories of Officers (that is, of the Appeal Courts and the Regional Courts).

However, an office of the Disciplinary Officer of the Ordinary Courts Judges, currently held by Piotr Schab, a judge of the Regional Court in Warsaw, was introduced at the central level along with the offices of two Deputy Disciplinary Officers of the Ordinary Courts Judges, currently Michał Lasota, the President of the District Court in Nowe Miasto Lubawskie and Przemysław Radzik, the President of the District Court in Krosno Odrzańskie⁵⁶. The Disciplinary Officer of the Ordinary Courts Judges and the two Deputies are discretionarily appointed by the Minister of Justice⁵⁷. Although, the Disciplinary Officer of the Ordinary Courts Judges and the two Deputies enjoy, in principle, the authority to conduct proceedings only against the Appeal Courts judges, the Presidents and Vice Presidents of the Appeal Courts and Regional Courts, nonetheless, by virtue of a special provision they have the power to take charge of the proceedings from Deputy Officers of the Regional Courts and the Appeal Courts⁵⁸. It can already be noticed that the Disciplinary Officer of the Ordinary Courts and his Deputies exhibit a tendency to take charge of particularly "disobedient" judges' cases. At the same time, the Officers at the central level, according to the rule "the end justifies the means" happen to breach provisions regulating jurisdiction, as will be discussed further.

Moreover, to conduct proceedings against particular judge the Minister of Justice can discretionary nominate, from among judges or from among the prosecutors (in case of intentional indictable offences), dedicated Disciplinary Officer of the Minister of Justice⁵⁹. Such disciplinary officer *ad hoc* has the authority to either commence the proceedings or take over the proceedings from Officers at any level.

⁵⁴ There are 45 Regional Courts in Poland and equal is amount of their Deputy Disciplinary Officers.

⁵⁵ There are 11 Appeal Courts in Poland and equal is amount of their Deputy Disciplinary Officers.

⁵⁶ Both Michał Lasota and Przemysław Radzik were appointed by Minister of Justice-General Prosecutor Public Zbigniew Ziobro for the positions of the Presidents of courts quite recently, in June 2018, which looks like a tool to buy both judges' loyalty to the political power, as well as the fact that they were seconded by Zbigniew Ziobro to the Regional Court in Warsaw (which is an upper level court) at the beginning of 2019.

⁵⁷ Article 112 § 3 of the Law on Ordinary Courts Organisation.

⁵⁸ Article 112 a § 1 a and § 3 of the Law on Ordinary Courts Organisation.

⁵⁹ Article 112 b of the Law on Ordinary Courts Organisation.

d) The Disciplinary Chamber of the Supreme Court.

What is also significant is that a court of second instance in the disciplinary proceedings against judges of the Ordinary Courts, which is identified as the Disciplinary Chamber of the Supreme Court and shares many features with a specialised court, non-existent in a catalogue of the judicial authorities provided by Article 175 of the Constitution. This authority reminds of a quasi-judicial body, like those established in times of war, revolution or under totalitarian regimes, with its distinctive composition appointed according to political reasoning and with their loyalty being additionally amplified by a “motivational” reward system. Such authorities operate by a special mode (usually restricting the right of the defence) and their powers usually refer to a limited category of people. This type of judicial authority is established to gain a hundred percent certainty that it will adjudicate in accordance with the political will of the “beacon idea of the nation”. The Disciplinary Chamber of the Supreme Court is clearly designed to ensure that it would punish or even eliminate from the profession disobedient judges and representatives of other judicial professions.

According to accepted targets the Disciplinary Chamber is totally independent and separate, apart from its name and location, and has nothing in common with the Supreme Court but only functions under its auspices. It has a separate President, whose status is so specific that in comparison with other Chambers’ Presidents, it matches in rank the office of the First President of the Supreme Court (and in some respects enjoying even more authority)⁶⁰, a separate budget⁶¹ and a separate main office.

It is worth emphasising that the President of the Disciplinary Chamber of the Supreme Court not only enjoys full autonomy in respect of the First President of the Supreme Court, but has also a direct, administrative influence on the operation of the first instance disciplinary courts. Namely, 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 to a relatively short, 3-year tenure, but can also dismiss them during the tenure on unspecified and discretionary grounds such as “a flagrant or persistent failure to satisfy official duties”, or „*when continuation of performing duties is incompatible with interest of administration of justice due to other reasons*”⁶². As can be concluded from the aforementioned discussion, the position of the Presidents of the Disciplinary Courts of Appeal Courts is so weak that it would not even be a challenge to dispose of them. The authority of the President of the Disciplinary Chamber of the Supreme Court reaches even further by having “the operations of the Disciplinary Court available for inspection”⁶³. The latter power, in practical terms, entitles a President of the Disciplinary Chamber to file a

⁶⁰ Article 20 of the Law on the Supreme Court; the importance of the President of the Disciplinary Chamber is proved by the fact that, inter alia, any doubts regarding the question of which Chamber of the Supreme Court will determine a specific case is generally settled by the First President of the Supreme Court but in the case of the Disciplinary Chamber it is the exclusive attribution of its President (Article 28 § 2 of the Law on the Supreme Court); moreover, the First President of the Supreme Court cannot delegate any of the Disciplinary Chamber judges to adjudicate in the other Chamber without the consent of the President of the Disciplinary Chamber (Article 35 § 3 s 4 of the Law on the Supreme Court).

⁶¹ Art. 7 § 4 of the Law on the Supreme Court.

⁶² Article 110 b § 1 and § 2 of the Law on the Ordinary Courts Organisation.

⁶³ Art. 112 c of the Law on the Ordinary Courts Organisation.

request to inspect, at any time, files of a case pending before the first instance court. This does not seem to be legitimated by any merits and could easily signal to a first instance court that a case is of a particular significance. This power, accompanied by direct influence of the President of the Disciplinary Chamber of the Supreme Court on who serves as the President of a first instance Disciplinary Court at the Appeal Court, is an indicative of a significant deterioration of the sovereignty and independence of first instance Disciplinary Courts. Finally, pursuant to Article 110 § 3 of the Law on Ordinary Courts Organisation, the President of the Disciplinary Chamber of the Supreme Court discretionarily appoints the first instance Disciplinary Court which is competent to hear a judge's case relating to any of the disciplinary delicts. These "flexible powers" of the first instance Disciplinary Courts raise concerns that the particular Disciplinary Court, to which judges are assessed as the most obedient, may become a body used for dealing with special issues. In the light of the arguments provided there can be no doubt that the powers of the President of the Disciplinary Chamber of the Supreme Court over the disciplinary courts structure are much broader than the powers of the First President of the Supreme Court over the structure of the ordinary courts.

What makes an assessment of the Disciplinary Chamber's independence and impartiality of its judges so negative is the fact that it is no longer composed of the "old" Supreme Court judges, but newly appointed individuals and according to a new mode of appointments. Especially since the mode of appointment to the offices of the Chamber is politicized pursuant to legislation, violating Article 187 of the Constitution, which transfers the authority to appoint 15 judges-members of the National Council of the Judiciary from the judges' self-regulating bodies to the Parliament, where almost an absolute majority belongs to the ruling party⁶⁴. Furthermore, the new National Council of the Judiciary, elected in an unconstitutional and politicized mode, flagrantly decreased the criteria required from candidates to the offices of the Supreme Court by waiving the requirement of presenting for an assessment files of cases heard by a candidate and an opinion based on the assessment of files. This contest, apart from the check of formal requirements (a very poor check⁶⁵), was limited to a few minutes' interview and proves that the contests are fictitious in nature. In these circumstances it seems perfectly reasonable to assume that candidates to the Disciplinary Chamber of the Supreme Court were appointed on criteria other than merit.

Consequently, the procedure described above cannot be assessed as a contest based on merit, five out of ten judges, and therefore half of the Disciplinary Chamber is composed of prosecutors who are not accustomed to impartiality and until recently have been subordinated to the Minister of Justice-Prosecutor General; thus, a politician whose official commands had a binding effect on them. The chamber is also composed of the Presidents of the Ordinary Courts who were appointed to their offices by the current Minister of Justice.

⁶⁴ Those are: nine judges nominated by Law and Justice, two Members of Parliament and two Senators being members of the Law and Justice and finally, a representative of the Minister of Justice – a member of the party in coalition with the Law and Justice, in total 14 votes in a Council of 25 members.

⁶⁵ The statement that an assessment of formal criteria was quite poor is substantiated by the fact that two candidates with unexpired disciplinary convictions went through the "sieve" of the contest procedure. The President refused to hand in the appointments after the fact of their disciplinary convictions were disclosed by the press.

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 63 candidates took part in the contests to the offices of the chamber, only 12 of them were appointed out of 16 vacant posts. Having rejected two candidates who had disciplinary convictions, the President was left with ten judges and therefore, even now 6 vacant posts to the disciplinary chamber remain. It cannot be dismissed that allowing the vacant posts to the Disciplinary Chamber to remain open was a deliberate action which would enable the Minister of Justice to make appointments from judges of the Ordinary Courts⁶⁶ for a defined term. If that happens the judges appointed by the Minister of Justice would be absolutely subordinated to the Minister of Justice due to the Minister of Justice's authority to dismiss them from their offices at any time.

Another characteristic feature of the Disciplinary Chamber is the fact that there is an unprofessional element of its composition – a lay judges⁶⁷ appointed by the Senate (with an absolute majority of the ruling party). Appointment of the unprofessional element to the composition of the Supreme Court, the highest judicial body, is a worldwide phenomenon and it is difficult to justify it by reasons other than sentiment towards a populist concept of “the People's Court”, which evokes the worst historical connotations. Distinctively, unlike the Code of Criminal Procedure in a mixed composition (professional and non-professional) lay judges always have the majority votes, under the new disciplinary proceedings the bench is composed of 2 adjudicating professional judges and one lay judge alternatively, 3 professional judges and 2 lay judges. Therefore, in all cases the professional judges enjoy the majority and the lay judges become the proverbial “square peg in a round hole”.

Although the Disciplinary Chamber's duties are in substance the simplest of all the Supreme Court Chambers, its members' remuneration is 40% higher than the other Chambers'⁶⁸. Moreover, as the Bureau of Research and Analysis of the Supreme Court rightly noticed in its report on the members' bill on the Supreme Court of 18 July 2017 (Sejm publication no 1727) every judge of this Chamber is responsible for far less cases than judges of the other Supreme Court Chambers⁶⁹. Such a high remuneration in a Chamber dealing with substantively simpler work and at the same time, less overburdened with cases could not be reasoned by arguments other than an attempt to buy its judges' loyalty to the political power. In these circumstances it is not surprising that an additional remuneration for the

⁶⁶ Provided under Article 40 § 1 of the Law on the Supreme Court, although judges nominated by the Minister of Justice can be delegated for a period of 2 years on application of the First President of the Supreme Court. The only formal requirement to be met by the delegated judge is 10 years of service as a judge.

⁶⁷ Article 62 § 2 of the Law on the Supreme Court (Journal of Laws 2018, heading 5).

⁶⁸ Article 48 § 7 of the Law on the Supreme Court.

⁶⁹ In this Opinion on page 21 it is stated 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 relating to other professions and 3 disciplinary cases for judges of the Supreme Court initiated by the Disciplinary Officer; altogether 196 cases. Assuming that the level of those kind of cases will remain unchanged after the proposed Law enters into force a significant disproportion between burdens on judges of the Disciplinary Chamber and the judges of the other Chambers will be noticeable. In 2016 cases received other than disciplinary claims exceeded 11,000, considering the total number of judges authorised by virtue of Article 91 to adjudicate in Public Law and Private Law Chambers would mean that statistically each of the judges of these Chambers would have to deal with 340 cases per year (11,000 : 32), whilst the judges of the Disciplinary Chamber would receive only 16 cases (196 : 12)”.

Disciplinary Chamber's judges is commonly called "Judas' silver" by the Ordinary Courts Judges.

The prevention from *ne peius* has been excepted from the proceeding in the Disciplinary Chamber thus, if a first instance court acquits from a disciplinary delict then the Disciplinary Chamber of the Supreme Court has the authority to overturn this decision and pass a conviction⁷⁰. There is no right to appeal to a different judicial body since it would be returned before the Disciplinary Chamber, although its composition would be different⁷¹. At the very least, this solution illustrates the deterioration of the constitutional principle of a two-tiered structure of courts (further discussed in section 4.d of this report). This means that every time when a judge's guilt and punishment is determined, regardless of the first instance court's decision, the determination falls with a politically appointed body, composed mainly of former prosecutors at the service of central government.

It is significant that the principle of random allocation of cases to judges, introduced in the Ordinary Courts, does not operate in the Supreme Court. It cannot be ruled out that this arrangement would permit the President of the Disciplinary Chamber, appointed under a politicized mode, to allocate certain cases to a deliberately chosen judge and to manipulate the Bench, similarly to the current practice of the Constitutional Court⁷². Implementing such a solution is symptomatic in view of the basic assumptions of 'the wide reform of the judiciary, which is assuring the transparency of case allocation by precluding function judges from deciding which case should be allocated to which judge. It seems evident that transparency ceases to be a priority in those cases over which the executive power wants to keep political control.

3. Indescribability of a category of punishable acts.

Instigation of disciplinary proceedings against judges will be more accessible since the Law on the Ordinary Courts Organisation fails to provide a definition of a disciplinary delict⁷³. Article 107 § 1 of the Law on the Ordinary Courts Organisation only reads "a judge takes disciplinary responsibility for misconduct in service including a gross violation of the provisions of law and for breach of the authority of the office of judge (disciplinary misconduct)". However, no further definition of the wording is provided. In the absence of a precise representation or even examples of the types of acts which would result in

⁷⁰ Article 121 § 3 of the Law on the Ordinary Courts Organisation.

⁷¹ Article 122 § 2 of the Law on the Ordinary Courts Organisation.

⁷² 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.

⁷³ Article 107 § 1 of the Law on the Ordinary Courts Organisation provides that "A judge takes disciplinary responsibility for misconduct in service including a gross violation of the provisions of law and for breach of the authority of the office of judge (disciplinary misconduct)", although the Law does not define the meaning of 'breach of the authority of the office of judge'.

disciplinary proceedings⁷⁴ thus, the classification of disciplinary delicts is evaluative in nature and left to judiciary and doctrinal discretion⁷⁵.

Significant interpretative discrepancies resulting from the evaluative nature of the criteria of an act prohibited by law can be illustrated by an example of offences contrary to the Misuse of Drugs Act relating to a considerable amount of narcotic drugs (which attracts a higher classification of offence than other types of illegal drugs). For a number of years, the Supreme Court regarded a considerable amount of drugs to mean an amount which could be used to intoxicate dozens of individuals. The Appeal Court in Krakow recognised that a considerable amount means several thousands of single doses of a psychoactive substance⁷⁶.

The described discrepancy occurred in the absence of any concerns regarding independence of those courts and impartiality of the judges in question. It is not difficult to imagine the scale of discretionary interpretation which may be practiced in the newly established Disciplinary Chamber of the Supreme Court, given that the Chamber was appointed by a politicized mode of appointments and half of its composition comprises prosecutors who until recently have been subordinated to the Minister of Justice-Prosecutor General. The Minister who, on numerous occasions, both in his comments as in his actions, has been implying that he is an advocate of political subordination of the justice system.

Under these circumstances it can be expected that the Disciplinary Chamber of the Supreme Court, through its decisions regarding selected and inconvenient for the party judges, is to set a very low-level threshold for meeting the criteria of a disciplinary delict. An abuse of such interpretation with a view of harassment of selected judges would be even more accessible due to the degree of the Disciplinary Officers' politization, which could facilitate a selective election of disciplinary proceedings to apply. In practical terms, it can become apparent that one type of conduct could in one instance be assessed as sufficient to enforce a disciplinary punishment, while in other instances it would not give sufficient grounds for the disciplinary proceedings to be raised⁷⁷.

Lack of closer definition of a disciplinary delict raises the significance of the Rules of Judicial Ethics in the process of interpretation of what is allowed for judges and what is forbidden. The core body of Rules of Judicial Ethics was established on the basis of

⁷⁴ This method was applied in Article 16 § 1 k.k.(Criminal Code), to provide a precise definition of the term preparation as a stage of committing an offence.

⁷⁵ The Rules of Judicial Ethics (Resolution of the National Council of the Judiciary no16/03 of 19 February 2013) is only supplementary in nature.

⁷⁶ To understand how serious in practice the problem was, it would be enough to mention that for the offence of producing illicit drugs and psychoactive substances in their basic form a penalty of from 1 month to 3 years of a custodial sentence can be imposed (Article 53 s1 of the Misuse of Drugs Act) and 3 to 15 years if classified as a substantial amount (Article 53 s2 of the Act).

⁷⁷ Signs of discrimination of representatives of some legal professionals are currently well manifested. Comparison illustrating this is provided by, for instance, the way in which professor Marcin Matczak, critical toward the pseudo-reform of the justice system, was treated. The Minister of Justice-Prosecutor General reopened the disciplinary proceedings against him, as a lawyer, for controversies taken out of context with an internet hater (apologised for). On the other hand the disciplinary actions against newly appointed lawyer Adam Tomczyński (well known for his vulgar and political Internet comments) or professor Jan Majchrowski appointed to the office of the President of the Disciplinary Chamber of the Supreme Court (with ongoing University disciplinary proceedings due to refusal to accept a student's course as a part of a private dispute with professor Sadurski) were dropped.

resolutions of the “old” National Council of the Judiciary⁷⁸, however, the problem is that the new, politicized Council can easily adopt new Rules, which is already happening (see the end of Chapter III). What is even worse, the Minister of Justice empowered Minister Piebiak’s Panel, which is absolutely politicized, to elaborate the Rules of Judicial Ethics (see subchapter V.2.a).

It ought to be noticed that in *the Minister of Justice and Equality v LM* (C-216/18), judgment of 25 July 2018 point 67, the Court of Justice of the European Union explicitly stated that the system of disciplinary measures applicable to judges shall comply with the requirement of independence and comprise rules defining conduct amounting to disciplinary offences.

In regard to the criminal proceedings initiated by a politically subordinated prosecution service, the Internal Affairs Department of the State Prosecution in particular made use of Article - a master key - 231 k.k. (Penal Code), widely criticised as breaching the principle of categorisation of acts prohibited by law. This provision penalises “exceeding authority and failure to perform duties of a public official” as an offence and facilitates initiation of criminal proceedings against judges on the grounds of an undefined scope of acts. At the same time, its broad interpretation can significantly distort the boundary between criminal and disciplinary liability. For instance, under this Article disciplinary action in respect of judge Agnieszka Pilarczyk has been initiated for alleged payment of excessive fees for preparing assessments by court medical experts⁷⁹. Also, action against judge Wojciech Łączewski was commenced for an alleged disclosure of operational officers’ personal details included in the statement of reasons attached to the judgment⁸⁰. As far as the author of this report is concerned, the most common application of Article 231 k.k. (Penal Code) in respect of judges is an attempt to burden judges with responsibility for allegedly wrongful allocations of cases to reporting judges in the period when the computerised system of random allocation of cases was not in force⁸¹. The most well-known example of this kind of proceedings is a case relating to motions to remand former members of the board of “Police” Chemical Works. However, according to the information available to the author of this report, there are many more examples of such cases run by the prosecution office.

It ought to be concluded that an undefined description of a conduct amounting to a misconduct as well as an offence of exceeding authority and failure to perform official duties accompanied by a political availability on the part of some prosecutors and the Disciplinary

⁷⁸ <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>, accessed on 18.02.2019 r.

⁷⁹ Notwithstanding that judge Pilarczyk has taken firm and efficient steps to reduce the cost of the experts’ reports and the fact that remuneration was based on a part of preliminary issues which in ordinary proceedings is subject to judicial review.

⁸⁰ The proceedings are carried on despite the fact that the case files accessible to judge Łączewski stated that the witnesses’ data was not subject to any confidentiality clause.

⁸¹ Additionally, not only is it impossible to imagine an attempt to associate this offence relating to allocation of the main category of cases, with a system of judges’ name list order in which they were judges replaced by the SLP system. Moreover, in practical terms it seems impossible to apply it to the method of allocation of a different category of cases which provides a strictly defined method of allocation with various courts and judges applying it differently.

Officers (especially those in the central government's offices), guarantee easy access to criminal prosecutions and disciplinary proceedings against judges.

It is peculiar that until now those proceedings, at least from a formal point of view, were conducted *in rem* and not against specific individuals. This should not be surprising, since the process of political subordination of Ordinary Courts' judges has not been fully achieved yet and the new system of disciplinary proceedings is still in its infancy (it has been specified on a legislative level nonetheless, it is implemented by the trial and error method, as further discussed in chapter VI.3). Those circumstances contributed to an ongoing difficulty in counting on achieving many convictions in doubtful cases. Nonetheless, it has to be noted that even the existence of such lengthy proceedings which evidently aim at pressing any charges, even fictional, against a judge may cause a freezing effect amongst judges⁸².

4. Restriction of procedural right of judges under the disciplinary proceedings.

The position of a judge under the disciplinary proceedings is further disadvantaged by a significant limitation of the right to defence which is manifested by, inter alia, the fact that a hearing can take place even when the absence of the accused or his defence agent was justified and unlawfully obtained evidence can be led or evidence obtained without judicial control, including evidence obtained by wiretapping. Due to the above, a judge's legal position is less favourable, even if a judge has been charged with e.g. a delay in producing a statement of reasons attached to the judgment, than a position of a person charged with a murder or an ordinary traffic offence.

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

Important objections, from the point of view of upholding procedural guarantees of individuals subject to disciplinary proceedings, are raised under Article 114 § 4 of the Law on the Ordinary Courts Organisation, which provides that the Disciplinary Officer shall serve the complaint on the accused immediately after the disciplinary charges have been formed and request a written statement and written evidence motions to be delivered within fourteen days from when the disciplinary charges are received by the accused. In case of failure to satisfy this time bar the written submissions lodged by the accused on expiry of the 14-day period may not be considered unless the accused can prove that the evidence has not been known to him before. On the grounds of the provision cited it can be concluded, that evidence may be disregarded as much due to failure to present the written statement as due to failure to disclose all the available evidence. Adverse inference drawn from refusal to take up the right to submit statement, in a prescribed and short time allowed, explicitly violates the privilege

⁸² The previously mentioned example of judge Pilarczyk is a perfect example here. Notwithstanding that the case is *in rem* and not *in personam* the description of the offence, which reads "exceeded power and failure to perform professional obligations by the presiding judge of the adjudicating bench in case reference...", unambiguously identifies the judge as remaining under suspicion. Regular summons of judge Pilarczyk's office personnel for examination does not allow the judge to forget about the Sword of Damocles hanging above her head. The question of how it is possible to keep proceedings in such an absurd case opened for nearly 2 years remains the prosecution's secret. One can only guess that the goal is not to determine the case but indeed to keep the proceedings alive for as long as possible and the judges in a state of distress.

against self-incrimination and right to refuse to provide explanations as interpreted by the Strasbourg Court under Article 6 of the ECHR. Such inference would be obviously faulty according to the right to prepare a defence⁸³.

Even assuming that the strict rules of no-consideration apply only to failure to observe the 14-day time bar in respect of evidence motions, nonetheless, introduction of this preclusion of evidence suggests departure from the principle of substantial truth in disciplinary proceedings. This departure from the principle in disciplinary proceedings against judges has been sparking controversy since, in 2016, for the party in power it was the main argument for abandoning the adversarial model of criminal prosecution. Thus, the Code of Criminal Procedure currently does not include provisions regulating preclusion of evidence. Introduction of the preclusion of evidence in disciplinary proceedings indicates a significant deterioration of the position of an accused judge even if compared with a position of any other individual accused of e.g. a minor offence, although a potential penalty of dishonourable discharge from the profession under the disciplinary procedure is definitely more severe than the most severe penalties prescribed for a minor offence.

It should be noticed that the time bar of 14 days is a very short period allowed to produce well-founded written submissions, especially since consideration ought to be given to the fact that at the early stage of the proceedings a judge is not familiar with the evidence in the case and disclosure becomes available only with consent of the Disciplinary Officer (Article 156 § 5 kpk (Code of Criminal Procedure) in respect of Article 128 Ordinary Courts Organisation. In these circumstances it may be difficult to establish which evidence can be relevant at later stages of the proceedings.

b) Use of unlawfully obtained evidence in disciplinary proceedings.

An unequivocally negative assessment is due for Article 115 c to the Law on Ordinary Courts Organisation, which introduced an option of relying on unlawfully obtained evidence and evidence obtained without the court's control, including evidence from wiretapping in proceedings against judges⁸⁴. Introduction of provisions of the Code of Criminal Procedure legitimising, with minor exceptions, the use of unlawfully obtained evidence and evidence from wiretapping was met with broadly spread and well-deserved criticism for violation of the Constitution and safeguards under the right to a fair trial. Application of those provisions alters the balance of power of the parties to disciplinary proceedings by legitimising an uneven advantage of the prosecution, excessively restricting procedural rights and the judge's rights as a citizen and, at the same time, being disproportionate to the gravity of the alleged 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 enough grounds to substantiate initiation of disciplinary proceedings? An affirmative answer would suggest a profound and severe interference with a judge's privacy, in breach of art. 8 of the European Convention of Human Rights.

⁸³ E.g. the ECHR judgment in *Saunders v the United Kingdom*, case no 19187/91 of 17 December 1996.

⁸⁴ Permitted by application of disciplinary proceedings under Articles 168b, 237 and 237a of the Criminal Procedure Code,

Since the majority of the disciplinary proceedings refer to acts which do not meet the criteria of an offence, it shall be concluded that their abuse under the authority of criminal procedures designed to detect, prosecute and penalise perpetrators of serious crimes is unfounded.

It is a valid claim that the application of operational control over judges may threaten the privilege of confidentiality of judicial deliberation and the rights of an individual since access to a case file ought to be granted only to strictly defined persons and the information contained within a file used only to assist in the determination of a case.

c) Limitation of the rights of defence in its substantive meaning.

From the point of view of safeguarding the right to form a defence, Article 113 § 2 of the Law on the Ordinary Courts Organisation does not seem objectionable since pursuant to this Article, on a reasoned request of the accused judge, who cannot participate in the disciplinary proceedings due to an illness, the President of the Disciplinary Court or the Disciplinary Court itself can appoint an attorney. However, this utterly righteous procedural right has been nullified by Article 113a of the Law on the Ordinary Courts Organisation providing that “procedures allowing for appointment of a public defender and the process of forming a defence do not obstruct the course of proceedings”. This is not compatible with the case law of the ECHR⁸⁵ and breaches the fundamental right to defend oneself. Consequently, the procedural right becomes an illusion. It cannot be ruled out that significant, in respect of the outcome of the case, procedural steps would be taken before a public defender is appointed, a defence formulated, involving at least file perusing, and a line of defence produced. Appointing an attorney *ex officio* does not guarantee the right of defence by itself.

A flagrant contravention of the right of the defence and the principle of equality of arms is manifested by Article 115a § 3 of the Law on the Ordinary Courts Organisation, which authorises the disciplinary court to continue the proceedings even when the accused judge’s absence and his attorney as well is justified, unless its continuation would adversely affect the object of the proceedings. This provision may preclude the accused from providing arguments supporting his defence in the situation of his absence caused by reasons beyond his control, such as severe illness. Nevertheless, should such circumstance occur, the proceedings can be continued even if the defence agent’s absence is similarly justified. The circumstances described indicate an inquisitorial nature of the disciplinary proceedings, as the court could only hear the prosecution’s case even if the absence of the accused was through no fault of his own. The procedure flagrantly violates not only the constitutional right of the defence but also the principle of equality of arms arising from Article 6 of the Convention on Human Rights and Fundamental Freedoms, which are equally applicable to the disciplinary proceedings⁸⁶.

A breach of the principle of equality of arms and the right to defence can be found in Article 113b of the Law on the Ordinary Courts Organisation, which by principle excludes

⁸⁵ Under the ECHR jurisprudence an accused shall be afforded enough time and an actual possibility of forming his defence (e.g. *The United Kingdom v France* or *Sadak and others v Turkey*).

⁸⁶ Judgment of the ECHR Grand Chamber of 23 June 2016 in *Baka v Hungary*, case no 20261/12, § 100-119.

application of the provision of the Code of Criminal Procedure⁸⁷ precluding from continuation of a hearing in the absence of the accused, 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 perspective of the principle of a two-tiered court structure (Article 176 section 1 of the Constitution) significant concerns are raised by Article 122 § 2 and Article 121 § 3 of the Law on the Ordinary Courts Organisation providing that “a decision of the second instance Disciplinary Court can be appealed to the same court with a different composition when the decision penalises the accused despite an earlier decision to acquit or to discontinue the proceedings passed by a court of first instance” and “in the appeal proceedings Article 454 of the Code of Criminal Proceedings does not apply”. In the light of the latter provision in criminal proceedings “the appeal court shall not be allowed to convict the accused who has been acquitted in the first instance proceedings, or with regard to whom the proceedings in the first instance has been discontinued or conditionally discontinued”.

The provisions quoted above read in conjunction indicate that in disciplinary proceedings allow for “amendment of a judgment of a first instance court by passing a judgment to the detriment of the accused and removal of the right to appeal to a higher instance court”⁸⁸. Thus, the rules of criminal procedure do not allow to convict a person previously acquitted by a court of first instance or if a court of first instance has discontinued the proceedings against a person since in this situation the Appeal court is only allowed to set the decision aside and to remit the case back to the court of first instance for re-consideration and deliver its recommendations. However, under the disciplinary proceedings the above is permitted and is compensated by introduction of so called “horizontal instance”.

In spite of this, an appeal against the decision of the same level of court occasionally appears in the Code of Criminal Proceedings but it applies to secondary and not substantive issues (under Article 254 § 3 of the Code of Criminal Proceedings). The doctrine provides that the rule of two-tiered court structure, inserted into Article 178 section 1 of the Constitution along 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 by the system of appeal to the same level court with a different bench, challenging the decision regarding a substantial issue of disciplinary liability, and thus an issue of constitutional rights and freedoms of an individual, satisfactorily meets the norms of human rights protection enshrined in the Constitution.

Moreover, an appeal to the same level of court with a different bench is only admissible if a court of second instance, having decided to discontinue the case or acquit the accused, imposed a disciplinary penalty. Thus, it can be concluded that if a second instance

⁸⁷ Article 117 § 2 of the Code of Criminal Procedure.

⁸⁸ A quotation of page 22 of 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 2017.

court finds the accused guilty, but a penalty has not been imposed, the right to appeal does not apply.

A further flagrant deterioration of judges' position under disciplinary proceedings arises from Article 121 § 4 of the Law on the Ordinary Courts Organisation. Namely, in an ordinary criminal prosecution the Appeal Court can hear an appeal from a "manifestly unjust decision" to the limits exceeding the appealed measures and the kind of allegations raised in the appeal but only if it could result in amendment to the benefit of the accused (Article 440 Criminal Procedure Code). However, under the disciplinary proceedings if the Appeal Court concurs that the decision passed is "manifestly unjust" then it is available for the court to amend the decision to the detriment of the accused, also *ex officio*, irrespective of the limits of the appealed measures and kind of allegations raised in the appeal.

e) 24-hour mode of revocation of judicial immunity

A further, new instrument of disciplinary proceedings, raising considerable concerns about safeguarding the right to a fair trial, is the 24-hour mode of revocation of judicial immunity under Article 80 § 2da of the Law on the Ordinary Courts Organisation. The procedure is applicable if a motion to grant consent to hold criminally liable or a motion to grant consent to remand refers to a detained judge, subsequently to the judge being caught in the act of committing a felony or a misdemeanour liable to a custodial sentence of at least 8 years, causing a road traffic accident whilst under the influence of alcohol or illegal drugs, or just offence of driving under the influence of alcohol or narcotics. In such an instance and for pragmatic reasons the need of the expedited mode of revocation of judicial immunity should not be negated although, it seems that fixing a 24-hour period to determine such matter was mainly motivated by populist reasoning and leads to an unnecessary limitation of procedural rights of the accused judge. Even more so, since the organisational structure of the disciplinary courts has not been adjusted to make such expedited decisions. The significance of a decision to revoke judicial immunity is even greater considering that it would imply a suspension of a judge's service and hence, removing cases from a judge and reducing his remuneration by up to 50% .⁸⁹

Concerns can also be raised in respect of the provisions regarding the obligation to observe the norms of procedural rights notwithstanding the disciplinary court, prior to passing a decision to revoke a judge's immunity, shall hear the positions of the Disciplinary Officer, the judge and a subject applying for a revocation of a judge's immunity but still despite the party's absence immunity can be revoked, which is also even if defence attorney is absent⁹⁰. From the exceptionally restricted 24-hour time bar for the decision to revoke immunity, it can be expected that decisions are made without having heard some of the parties and absence of the defence attorney is more likely to become a rule rather than an exception. In the event of a detainee under the influence of alcohol such a short time could mean that the detainee could be still unfit to take part in a hearing.

⁸⁹ Article 129 § 2 of the Law on Ordinary Courts Organisation.

⁹⁰ Article 80 § 2 e of the Law on the Ordinary Courts Organisation.

Finally, as the literature on this subject has amply described, it may be the case that observance of the 24-hour time bar could be unrealistic from an organisational point of view. Even more so since the provisions do not prescribe any form of an on-duty procedure for concluding the applications, “the fundamental difficulty lies in providing an answer to the question if the bench of the adjudicating court is composed of judges working in three different courts, located several dozens or hundreds kilometres away from the Appeal Court, would it be even realistic to observe the 24-hour time bar for a decision to be made? Especially since before merits of the case can be considered, some administrative-organisational tasks must be carried out, such as drawing the composition of the court, preparation of a hearing, allowing the parties a chance to read the files or deciding on rejecting a motion to pass the disclosure (Article 80 § 2f and 2g of the Law on Ordinary Courts). Further, at the hearing, the parties with the right to participate and who are present shall be heard, then the decision itself ought to be substantiated *ex officio* in writing. All those actions are expected to be carried out in a dramatically short timeframe. It is patently obvious that the judges involved need time to travel to court as well as time to read the evidence, which, *nota bene*, can be quite lengthy since Article 115c of the Law on Ordinary Courts clearly allows admissibility of evidence obtained from operational actions (such as wiretapping) in disciplinary procedures. In order to illustrate the scale of the difficulties it shall be added that if an unlucky judge has been drawn to attend the Appeal Court in Bialystok and the judge resides in e.g. Olsztyn then it is required of him to travel 230 km, which means about 4,5-hour journey on country roads, preferably at night”⁹¹.

In the light of the above and understanding that an application to revoke a judge’s immunity has to be heard, under Article 248 § 1 k.p.k (Code of Criminal Procedure), within a timeframe of up to 48-hours, and if exceeded requires the detainee to be released, it is incomprehensible why the legislative power did not allow the same 48-hour, or let’s say 36-hour period for determination of an application to revoke a judge’s immunity. This arrangement would not significantly prolong the proceedings and on the contrary, would make it possible to safeguard the procedural rights of the accused to a considerably greater extent and largely eliminate the detrimental impact of procedural difficulties on the proceedings.

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

A further violation of the right to a fair trial in disciplinary proceedings against judges can be found in pre-litigation disciplinary procedures (mentioned elsewhere in this report)

⁹¹ Małgorzata Tomkiewicz: “The Disciplinary Courts for Judges, 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. Here the author aptly indicated that concerns can be also raised by the provisions on the Disciplinary Court’s power competence to order revocation of immunity since the provisions suggest that with powers to hear disciplinary actions and in an emergency situations also other cases (Article 110 § 2 of the Law on the Ordinary Courts Organisation) an “obvious master key which opens the possibility of discretionary and unreasoned choice of court”.

which facilitates prolonging the status of a suspect for a judge, and in turn leads to a permanent insecurity over a judge's legal position.

Especially, the authority granted to the Minister of Justice by virtue of Article 112b of the Law on the Ordinary Courts Organisation, which legitimises nomination of arbitrary chosen prosecutor *ad hoc* to a case of a specific judge. Although the role of such dedicated 'Disciplinary Officer of the Minister of Justice' expires with a valid order refusing to commence or discontinue the disciplinary proceedings or when the decision concluding the disciplinary proceedings becomes legally binding nonetheless, an expiry by this mode does not preclude the Minister of Justice from re-appointment of the Disciplinary Officer *ad hoc* and in respect of the same case. Consequently, under Article 112b § 4b of the Law on the Ordinary Courts Organisation, it is admissible to lodge a fresh application to commence the disciplinary proceedings in respect of the same charges and the same judge. Thus, a situation of perpetual accusation can remain in place for a judge.

This measure leads to disregard shown to the decisions made at the pre-litigation stage of the disciplinary proceedings. It thus becomes apparent that discontinuation of the proceedings does not bar from re-opening the proceedings against the same judge at any time and with no further qualifications. The only restriction is delivered by abnormally long-time frames for a disciplinary delict conviction to expire, as further discussed.

It shall be noted that it is another measure which places a judge accused of a disciplinary delict in a less favourable position than an accused facing a criminal prosecution. By virtue of Article 327 of the Criminal Procedure Code, criminal proceedings in respect of the same offence may be reinstated at any time and without further qualification but only when the new proceedings do not refer to the same person. Whereas, discontinued proceedings with respect to the same person may be reinstated at any time pursuant to an order issued by a senior state prosecutor only when new or previously undisclosed circumstances or new evidence become available. And finally, under Article 328 of the Criminal Procedure Code, the Prosecutor-General may reverse a validly issued order to discontinue the proceedings with respect to a person if it is found to be ungrounded, although, should the reversal contribute to the detriment of the suspect, then the order can be reversed only within one year and could not be reversed if a previous court has upheld the order to discontinue the proceedings.

Moreover, under Article 114 § 4 of the Law on the Ordinary Courts Organisation, the Minister of Justice-Prosecutor General is authorised to object to the Disciplinary Officer's order refusing to commence the proceedings against a judge within 30 days from receiving the Officer's order. It should be underlined that the cited provision allows for a particularly long time for the Minister's objection to be lodged. It is over 4 times longer than the 7-day period allowed for an appeal against a decision to refuse to commence criminal proceedings. It is also over twice as long as the 14-day bar for an appeal against a criminal conviction. Such an objection is binding for the Disciplinary Officer and obliges him to initiate and carry out a procedure according to the Minister's guidelines. The right to object is not subject to quantity restrictions, making it possible to renew an objection repeatedly and disciplinary proceedings initiated against a judge can, once in practice, go on endlessly.

It is worth noticing that the circumstances described above are measures specific to the disciplinary proceedings against judges and other representatives of the legal profession,

which potentially could lead to the continuation of a judge's status of a person permanently accused, and still remain under full control of an active politician of the ruling power in the office of the Minister of Justice and simultaneously, the Prosecutor General.

All of the above demonstrates unfounded strengthening of the procedural position enjoyed by the Minister of Justice at the expense of potentially accused judges in disciplinary proceedings.

g) Extension of a limitation period.

A further deterioration of the legal position of judges and representatives of the legal profession facing disciplinary proceedings, in comparison with other general provisions of criminal law, arises from Article 108 § 1 and § 2 of the Law on the Ordinary Courts Organisation introducing periods of limitation of a conviction, which for offences and minor offences are substantially longer than those provided for by general provisions. Pursuant to the new legislation, the period of disciplinary limitation expires after 5 years from the time of committing the act; however, should the disciplinary proceedings be initiated prior to the expiry of this period, the period of disciplinary limitation expires upon 8 years from the time of committing the act. Consequently, if the disciplinary proceedings referred to a petty offence then, under general provisions, its limitation would expire upon 1 year from committing the offence and if during that time the proceedings are raised, upon 3 years from the time of committing the offence. However, the strict rules governing disciplinary proceedings lead to an extension of the limitation period to a period even 5 times longer. Similarly, in case of a minor offence the limitation period in disciplinary proceedings is evidently longer than the one pursuant to the general provisions⁹². It shall be noted that an extension of the limitation period described above would impact on the deterioration of the legal position of judges facing disciplinary proceedings since some of them are raised just due to failure to perform judicial duties, and if the proceedings relate to a criminal conduct, then they most often concern minor offences (e.g. road traffic offences). At the same time, under Article 108 § 4 of the Law on the Ordinary Courts Organisation, if a disciplinary misconduct meets the criteria of an offence, then the limitation period cannot occur earlier than the limitation period under the provisions of the Penal Code.

Finally, under Article 108 § 5 of the Law on the Ordinary Courts Organisation, disciplinary delicts, except for those constituting petty offences, attract a period of limitation which is suspended whilst the disciplinary proceedings are pending for a period from the time of submitting a request to impose a penalty until the proceedings are concluded by a judgment in force. This provision does not translate to the criminal proceedings. Thus, even a person charged with a serious offence and being at large can benefit from the passage of time⁹³.

⁹² For instance, in case of private accusation offences punitive records expire after a year and no longer than after 3 years from when the act was committed if the pursuer knows the perpetrator (Article. 101 § 2 k.k.(Criminal Code)).

⁹³ In criminal proceedings a status of a fugitive suspends the limitation period only at the stage of enforcement, and the maximum time allowed for an expiry of conviction can occur for a period of 10 years (Article 15 § 3 Executive Penal Code).

It may be concluded that the deterioration of legal position of a judge facing disciplinary proceedings with respect of extension of the limitation period for a disciplinary delict conviction, accompanied by the abovementioned power of the Minister to object refusal to commence the disciplinary proceedings, facilitates perpetuation of the state of permanent accusation applied to a judge. The measures illustrated not only lead to insecurity regarding the legal position of the accused but also violate the constitutional principle of equality before the law.

5. The typical conduct of the disciplinary proceedings in respect of a defiant judge.

Having regard to the scrutiny of the new model of disciplinary proceedings presented above, it would not be difficult to create a picture of potential means in which they would be used to initiate and continue disciplinary proceedings against selected judges.

Thus, as mentioned above, a special team (described in subchapter V.2.a, consisting of the Minister of Justice - Prosecutor General as well as Disciplinary Officer of the Ordinary Courts Judges and his deputies, amongst others) on behalf of the Minister of Justice will be responsible for selecting judges on which harassment shall be exercised and most likely the method of inflicting it.

Such case should, under the general provisions of law, thereafter, be dealt with by competent local Disciplinary Officers elected with participation judicial self-regulatory organs. Since it is open for the Disciplinary Officer of the Ordinary Court Judges and his Deputies as well as nominated by the Minister *ad hoc* Disciplinary Officer to take over a case of a specific judge still at the pre-litigation stage, which are also designed to be heard at the centralised level, thus under strict supervision of the Minister of Justice.

The only stage of the disciplinary proceedings against the Ordinary Court judges excluded from centralisation is the first instance court stage. However, it has to be borne in mind that all the first instance disciplinary court judges were discretionarily appointed by the Minister of Justice as well.

This transitional decentralisation, which poses a threat of losing control over a course of a certain proceedings by the Minister of Justice, would surely not increase the accused's change of a successful defence. It should be noted that the Disciplinary Chamber of the Supreme Court will enjoy the authority to single-handedly pass a conviction even if the accused had already been acquitted by a court of first instance. This is even more likely since more than a half of the Chamber is composed of former prosecutors lacking features of independence or even more, used to criminalisation of the conduct of the accused. Moreover, the composition of this Chamber can soon be enriched with judges of ordinary courts temporarily seconded to Supreme Court by the Minister of Justice and thus entirely dependent on him.

It seems obvious that the new model of disciplinary procedures was designed to achieve full political control over pre-litigation procedures (commencement of such procedure along with a possibility of almost indefinite continuation of it enables to grill a

judge in the media⁹⁴), as well as over the last stage of the proceedings, before the Disciplinary Chamber of the Supreme Court, which is decisive for the final outcome of the proceedings⁹⁵.

Notwithstanding the absence of specific disciplinary charges against a given judge, explanatory activities and thereafter disciplinary proceedings could be initiated by the well-exercised method, that is, consequently to “anonymous” reports or alternatively, after the court visiting judges, nominated by the Minister of Justice or Disciplinary Officers appointed by him, have “swept” through the case files and judges’ personal portfolios. The lack of a defined catalogue of disciplinary delicts used as grounds for initiation of the disciplinary proceedings can be found even by a delay in commencing professional service, which may easily occur considering the backlog of cases. Where disciplinary proceedings are pending, albeit brought on insignificant and insufficient grounds, the Minister of Justice, in his authority, can bind the Disciplinary Officer by an objection against the Officer’s order refusing to open the disciplinary proceedings, thus causing an indefinite perpetuation of the proceedings.

VI. The current criminal, disciplinary measures and those under administrative supervision.

1. A review of the previous disciplinary criminal proceedings against judges.

Notwithstanding the fact that the new mode of disciplinary proceedings against judges until recently have been in a *in statu nascendi* stage (due to the lack of a functioning Disciplinary Chamber of the Supreme Court), nonetheless a number of politically motivated disciplinary actions have been commenced against judges, with a high possibility of resulting from either already determined cases, for their political context, or resulting from the actions and public comments of judges safeguarding the independence of courts and impartiality of judges. A similar assessment, namely, presence of political motivation, should be made about a number of steps taken against judges by the prosecution subordinated to the Minister of Justice-Prosecutor General and thus, a politician strictly affiliated with the governing power.

The author of this report has no doubt that the objective of those actions is political subordination of the judiciary by causing “the freezing effect”⁹⁶ amongst judges, and in the long term, the removal of judges from their profession by the means of the strictest of disciplinary penalties.

⁹⁴ Publicity of a significant number of disciplinary charges, even the most absurd ones, can permanently ruin a judge’s good reputation and cannot be reversed even by a potential acquittal at the conclusion of a case.

⁹⁵ Prof. Laurent Pech and Patryk Wachowiec, in their accurate report on the current situation of the Polish judiciary in the light of existing ineffective action of EU authorities, did not hesitate to call the new mode of disciplinary proceedings in respect of judges as “kangaroo disciplinary proceedings”.
<https://www.verfassungsblog.de%2F1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii%2F&usg=AOvVaw2d21DVlYKdq4E8lhdfQLKG>, accessed on 24.01.2019.

⁹⁶ In this context see the Amnesty International report from December 2018,
https://www.amnesty.org.pl%2Fwp-content%2Fuploads%2F2019%2F02%2FPoland-briefing-GAC-Dec-2018.pdf&usg=AOvVaw23kMHbDDyemwa0IZ_1xkdV, accessed 4.03.2019.

It ought to be noticed that the catalogue of the further provided disciplinary and criminal measures taken against judges is certainly not exhaustive yet. However, it should not be surprising since each of the two judges, the most “appreciated” by the governing power, that is Waldemar Żurek and Igor Tuleya, are already facing so many parallel proceedings of different kinds (each of them more than 5) that they are getting confused in the proceedings. Similarly, judge Monika Frąckowiak faced 3 preliminary investigative disciplinary proceedings which gave birth to one disciplinary procedure concerning the way of performing judicial duties. It is worth drawing attention to another feature of the current mode of the disciplinary proceedings. Previously if a judge was charged with a few disciplinary acts, then it was common to join the disciplinary proceedings into one, which avoided repetition of the same steps, e.g. an interview of an accused judge. However, currently the proceedings are carried out separately, which causes an additional nuisance for judges due to multiplying number of procedural steps they have to participate in, and which obstructs the execution of their judicial duties. It is difficult to disregard a deliberate element of oppression resulting from such mode of proceedings.

The list of presumably unjustified disciplinary and criminal proceedings, which may invoke a so-called “freezing effect”, amongst judges include among others:

- 1) conducted by the Central Anti-Corruption Bureau, and taking more than a year and a half, audits of financial statements for member of Association of Judges “Themis”, judge Waldemar Żurek from the Regional Court in Kraków and a former spokesman of the National Council of the Judiciary⁹⁷ who been criticising various aspects of the pseudo-reform of justice system⁹⁸;
- 2) an unprecedented decision to commence criminal proceedings, officially carried out at the *in rem* stage but in reality aimed at the judge of the District Court for Kraków-Śródmieście in Kraków, Agnieszka Pilarczyk, who had acquitted 4 doctors accused of a medical error which allegedly resulted in death of Zbigniew Ziobro`s⁹⁹ father, a father of the Minister of Justice-Prosecutor General;
- 3) criminal proceedings against Wojciech Łączewski, a judge of the District Court in Warsaw, in respect of an alleged disclosure of confidential information regarding personal details of two police officers within the statement of reasons attached to a judgment, in

⁹⁷ The control and other measures against Judge Zurek were detailed in the Resolution No 2 of the Assembly of Judges of the Regional Court in Krakow 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.

⁹⁸ Proceedings in respect of judge Waldemar Żurek were described in the report of Amnesty International from March 2018, <https://www.amnesty.org%2Fdownload%2Fdocuments%2FEUR3780592018ENGLISH.PDF&usg=AOvVaw1Sgkl2mPPUyT6WeRZu693D>, accessed on 3.03.2019.

⁹⁹ The Assembly of Judges of the Regional Court in Kraków expressed its view in the Resolution No 3 of 26 February 2018, see link in the footnote no 95.

circumstances when the case files were not marked as containing any privileged information protected by law¹⁰⁰;

4) initiation of criminal proceedings against on superior judges of the District Court and the Regional Court in Szczecin who had assigned to the reporting judges requests to extend periods of remand in respect of individuals accused of acting to the detriment of “Police” Chemical Works¹⁰¹;

5) initiation of disciplinary proceedings against Dominik Czeszkiewicz, a judge of the District Court in Suwałki having acquitted activists of a non-governmental organisation protesting against an election campaign during the opening of a museum exhibition which had breached the election laws¹⁰²;

6) the District Prosecution taking witness statements from over 100 judges of the Regional Court and the Appeal Court in Kraków in case in respect of the degrading and inhumane treatment of Krzysztof Sobierajski¹⁰³, the former President of the Appeal Court in Kraków, which had occurred in the state prison in Rzeszów. The procedures employed by the prosecution, such as lack of grounds to take the judge’s statement, had been negatively assessed by the Resolution of the Representatives of judges of the judicial district of the Appeal Court in Kraków no 6 adopted on 12 October 2018¹⁰⁴,

7) explanatory activities in respect of a judge of the Regional Court in Poznań, Sławomir Jęksa, who had acquitted a self-government activist (connected with parliamentary opposition) accused of committing a minor offence¹⁰⁵;

8) the Disciplinary Officer initiating explanatory activities in respect of retired prosecutor Wojciech Sadrakuła for taking part in educational activities about the Constitution for children and young people¹⁰⁶;

9) the Deputy Disciplinary Officer initiating the explanatory activities in respect of a judge of the District Court in Łódź, Arkadiusz Krupa, who participated in educational

¹⁰⁰ https://www.wiadomosci.wp.pl%2Fskazal-mariusza-kaminskiego-teraz-jest-oskarzany-o-ujawnienie-tajnych-informacji-6242766436710017a&usg=AOvVaw3_P0vrX8c0uB3ciZdHBg3M, accessed on 3.03.2019.

¹⁰¹ 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 no 95.

¹⁰² The proceedings were described on the Association of Judges “Themis” website on: <http://themis-sedziowie.eu/wp-content/uploads/2018/05/Czeszkiewicz-dyscyplinarna-case..pdf>, accessed on 13.01.2019.

¹⁰³ In this case Resolution no 4 was adopted on 24 May 2018 by the Assembly of Judges of the Regional Court in Kraków <http://themis-sedziowie.eu/wp-content/uploads/2018/05/Resolutions-of-24-May-2018-ENG..pdf> (accessed on 13.01.2019), and then by Resolution no 1 by Assembly of the Appeal Court in Krakow of 28 May 2018.

¹⁰⁴ <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.

¹⁰⁵ <https://www.oko.press%2Fjest-dyscyplinarka-dla-sedziego-jeksy-ktory-uniewinnil-joanne-jaskowiak%2F&usg=AOvVaw3hGX5yyLbgtMB0Hp6bbXhs>, accessed on 3.03.2019.

¹⁰⁶ <https://www.wiadomosci.onet.pl%2Fkraj%2Fprokurator-uczyl-o-konstytucji-dyscyplinarka-prawnicy-reaguja-smiechem-i-donosami-na%2Fpfyrj87&usg=AOvVaw0yoYedMUj9kxSBEAN1NZSo>, accessed on 3.03.2019.

activities for young people during the Pol'and'Rock Festival and consequent an audit of his case files within the last 3 years¹⁰⁷;

10) the Deputy Disciplinary Officer initiating explanatory activities in respect of a judge of the District Court in Poznań, Monika Frąckowiak, in response to her comments in the media defending the impartiality of judges and her participation in educational activities about law for young people during the Pol'and'Rock Festival¹⁰⁸. During the investigatory proceedings the Deputy Disciplinary Officer has also ordered an audit of her case files for the last 3 years;

11) the Deputy Disciplinary Officers summoning Krystian Markiewicz and Bartłomiej Przymusiński, from the Association of Judges "Iustitia", for the purpose of providing statements in respect of their comments defending the impartiality of judges and participation in educational activities about law for young people during the Pol'and'Rock Festival¹⁰⁹;

12) the Disciplinary Officer ordering an audit of all case files determined within the last 3 years by Olimpia Barańska-Małuszek of the District Court in Gorzów Wielkopolski, a member of the Association of Judges "Iustitia", in response to her comments defending the impartiality of judges and participation in educational activities about law for young people during the Pol'and'Rock Festival¹¹⁰;

13) hearing as a witness judge Włodzimierz Brazewicz of the Appeal Court in Gdańsk in response to his role as a moderator in a public meeting with the presence of judge Igor Tuleya, dated 26 September 2018¹¹¹;

14) disciplinary measures taken against judge Jarosław Gwizdak, the former President of the District Court in Katowice, by which the Disciplinary Officer, failing to notify the judge about the ongoing disciplinary proceedings against him, requested judge Gwizdak to produce personal files and professional opinion in response to the judge's candidature in the recent local election to the post of a councillor and Mayor of Katowice¹¹²;

15) the Deputy Disciplinary Officers summoning judge Tuleya of the Regional Court in Warsaw and judge Ewa Maciejewska of the Regional Court in Łódź to provide witness statements regarding requests for preliminary rulings sent by them to the Court of Justice of

¹⁰⁷ <https://www.wiadomosci.wp.pl%2Fsedzia-arkadiusz-krupa-na-celowniku-rzecznika-dyscyplinarnego-za-festiwal-owski-6309785262475393a&usg=AOvVawOZNV25GNzbxCaZ6M4vVwHX>, accessed on 3.03.2019.

¹⁰⁸ <https://www.gloswielkopolski.pl%2Fpolandrock-2018-sedzia-monika-frackowiak-zdaniem-rzecznika-dyscyplinarnego-parodiowala-rozprawe-sadowa%2Far%2F13619158&usg=AOvVaw3IRde3zPfrPsQHSTFP7YxQ>, accessed on 3.03.2019.

¹⁰⁹ <https://www.rp.pl%2FSedziowie-i-sady%2F309209965-Dzisiaj-i-jutro-przesluchania-sedziow-w-KRS-przed-rzecznikiem-dyscyplinarnym.html&usg=AOvVaw3g2uJqedLrGvX9aO5-Yamf>, accessed on 4.03.2019.

¹¹⁰ <http://www.tokfm.pl%2FTokfm%2F7%2C130517%2C23919139%2Csedzia-olimpia-baranska-maluszek-w-praworzadnym-panstwie-nie.html&usg=AOvVaw3R5cMFxgnWPiEqJLnFml3j>, accessed on 4.03.2019.

¹¹¹ <https://www.wiadomosci.onet.pl%2Ftylko-w-onecie%2Fjak-przesluchuje-sedziow-z-ca-rzecznika-dyscypliny-pelnomocnik-wyrzucony-z-sali%2Fyq8endl&usg=AOvVaw2TrLWC1FSkvukFAUEz0B3z>, accessed on 4.03.2019.

¹¹² <http://www.polsatnews.pl%2Fwiadomosc%2F2018-12-21%2Fsedzia-startowal-w-wyborach-na-prezydenta-miasta-teraz-zajmuje-sie-nim-rzecznik-dyscyplinarny%2F&usg=AOvVaw0bN4BprNUqUjAq4TRlxTSl>, accessed on 4.03.2019.

the European Union; moreover, in regard to judge Ewa Maciejewska the Disciplinary Officer had ordered an audit of all case files determined by the judge in the period of the last 3 years; further, in response to the requests addressed to the CJEU for preliminary rulings judges Ewa Maciejewska, Igor Tuleya and Kamil Jarocki of the District Court in Gorzów Wielkopolski were obliged by the Disciplinary Officer to produce written statements, under Article 114 § 2 of the Law on the Ordinary Courts Organisation, thus, at the stage of investigatory procedure which takes place prior to initiation of the disciplinary proceedings,¹¹³

16) the Deputy Disciplinary Officer Michał Lasota summoning Dorota Lutostańska, judge of Regional Court in Olsztyn, to submit written statement in the course of explanatory activities in respect of situation when she was wearing t-shirt with a word “constitution” on the occasion of common picture taken by judges who were commemorating 100 years of regaining of independence by Poland¹¹⁴.

2. Political motivations 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 ungrounded activity of Disciplinary Officers) and, on the other hand, the objective of this harassment, it is worth to categorise the cases in which disciplinary actions or criminal prosecutions have been raised against judges.

Firstly, disciplinary proceedings have been raised against judges in response to public criticism of the pseudo-reform of the justice system. These types of measures were taken in respect of, amongst others, judge Waldemar Żurek, Monika Frąckowiak, Krystian Markiewicz, Bartłomiej Przymusiński and Olimpia Barańska-Małuszek. Even in default of a further scrutiny, so conducted disciplinary proceedings against judges – who contrary to the apparent reform of the justice system do not surrender to the attempted restrictions of independence of the judiciary – must be assessed as politically motivated. As an action of the same kind one shall assess disciplinary steps in respect of judge Lutostańska who showed her commitment to the rule of law by wearing t-shirt with a word “constitution”.

Another issue being of high interest to the Disciplinary Officers relates to judges` educational activities for children and young people in which the judges run mock court hearings or give lectures about the Constitution. In respect of those activities the Disciplinary Officers took actions against Arkadiusz Krupa, Krystian Markiewicz, Bartłomiej Przymusiński, Olimpia Barańska-Małuszek, Monika Frąckowiak as well as a retired prosecutor Wojciech Sadrakuła. Since educational activities for the society fully comply with the Rules of Judicial Ethics and are a common field of judicial associations` activities thus, measures against those activities cannot be labelled other than politically motivated. It seems that educating young people that courts shall be a separate entity, independent from political

¹¹³ <https://www.wiadomosci.onet.pl/%2Ftylko-w-onecie%2Fzrecznik-dyscypliny-nie-daruje-pytan-do-tsue-kolejny-sedzia-na-celowniku%2Fvwn2dnd&usg=AOvVawOTKxeGASs6UOBtUdKPHdJz>, accessed on 4.03.2019.

¹¹⁴ <https://www.oko.press/%2Fzrecznik-dyscyplinarny-sciga-sedzie-z-olsztyna-za-koszulke-konstytucja-pierwsza-taka-sprawa%2F&usg=AOvVaw27f5zqlCLAAku4QDUUp6g6bm>, accessed on 3.03.2019.

factors, does not comply with the interests of the executive. Judge Arkadiusz Krupa must have "fallen into disfavour" for being an author of satirical sketches in which he both exposes the shortcomings of a judicial profession and also critically illustrates the so-called "great reform" of the justice system; thus he can be classified as belonging also to the former group of judges liable to disciplinary proceedings. This accumulation of "negative" behaviour on the part of a judge invoked a particular "curiosity" of the Disciplinary Officer, who initially accused the judge of wearing an authentic judicial robe at a mock trial (although judicial robes are worn at mock court hearings in the National School of Judiciary and Public Prosecution in Kraków and object lessons for children) and then accused the same judge of putting on and wearing a t-shirt and denim shorts under a judicial robe. However, one has to be aware that the festival took place mid-summer during an exceptionally hot spell. It is worth adding that the case the simulation was taking place on location, inside a big tent and not in the premises of a public institution, where a strict dress-code must be followed.

In regard to the Internal Affairs Department of the State Prosecution¹¹⁵ summoning over 100 judges of the Regional Court and the Appeal Court in Kraków to be examined as witnesses, it was officially arranged to assess the inquiry of ill-treatment of the former President of the Appeal Court in Krakow whilst he was in prison. Considering that the prison in question is located 200 km away from Krakow and that any knowledge the Kraków judges could have come from the press publications, it can be stated that the sole purpose of those procedures was an attempt to harass members of the Associations of Judges having passed Resolutions criticising the degrading and inhumane treatment of the judge in prison. Therefore, the actions taken by the prosecution shall be regarded as an attempt to intimidate judges with a view of silencing self-regulatory judicial bodies.

Similarly, the recent measures taken by the Deputy Disciplinary Officer of the Ordinary Courts Judges, who on 16 January 2019 requested the President of the Regional Court in Poznań and the President of the Appeal Court in Kraków to provide certified copies of the Resolutions adopted by the Assemblies of those courts along with disclosure of the minutes of the meetings, the attendance list and names of authors of the Resolution and who distributed it by email¹¹⁶. It shall be added that the Resolutions criticized, inter alia, activities of the unconstitutionally appointed National Council of the Judiciary¹¹⁷. The Resolution of the Appeal Court in Kraków criticized the recent unfounded disciplinary and criminal proceedings against Ordinary Court judges as well¹¹⁸. The Disciplinary Officer claimed that the information was gathered as a part of an investigation into an alleged disciplinary delict, although it can be assumed that the authors of the Resolutions would be the potential accused. It is safe to conclude that according to the Disciplinary Officer the Assemblies of judges are not entitled to criticize unconstitutionally appointed bodies which facilitate political submission of courts to the political power.

¹¹⁵ This specialized body is described in subchapter V.2.b) of this report.

¹¹⁶ <https://oko.press/rzecznik-dyscyplinary-chce-hurtowo-scigac-sedziow/>, accessed on 24.01.2019.

¹¹⁷ <http://themis-sedziowie.eu/aktualnosci/uchwaly-zgromadzenia-ogolnego-sedziow-apealcji-poznanskiej-3-stycznia-2019-roku/> accessed on 24.01.2019.

¹¹⁸ <http://themis-sedziowie.eu/materials-in-english/resolution-of-the-assembly-of-the-representatives-of-the-krakow-appellate-judges-of-12-october-2018/> accessed on 24.01.2019.

Also, judge Jarosław Gwizdak, who competed in a local election as an independent candidate, during the time of the campaign was on an unpaid annual leave and did not breach any of the provisions of the Law on the Ordinary Courts Organisation. It seems that the disciplinary proceedings against him resulted from a high number of votes received in the election to the office of the Mayor of Katowice since by achieving the third place and receiving 11 percent of votes he became a competition to the position of the governing party's candidate.

Nonetheless, the majority of the disciplinary proceedings and criminal prosecutions are in relation to judges' judicial activity. In recent times the most spectacular steps taken for this activity concerned requests to provide written explanations ordered by the Disciplinary Officer of the Ordinary Court Judges, Michal Lasota. The requests were addressed to judges who referred questions for preliminary rulings to the CJEU, that is, judge Igor Tuleya, Ewa Maciejewska and Kamil Jarocki. The requests issued pursuant to Article 114 § 2 of the Law on the Ordinary Courts Organisation read that according to the Deputy Officer a referral for a preliminary ruling could constitute a "judicial excess". In a reply to the Amnesty International letter of 4 January 2019¹¹⁹ Piotr Schab, the Disciplinary Officer of the Ordinary Court Judges, stated that the judges listed are already under explanatory activities with a view of establishing whether "the reference for a preliminary ruling, which violates provisions of Article 267 TFEU (...), obstructed the court proceedings in the substantive cases in which the reference has been made". From the content of this comment it can be inferred that for some unknown reason the Disciplinary Officer usurps the right to assess the validity of a reference for a preliminary ruling, a prerogative belonging wholly to the powers of the Luxemburg Court. Moreover, it is difficult to guess the meaning of the statement, arising from the reference to the CJEU, "obstruction of the court proceedings" could have occurred since a reference for a preliminary ruling is a judicial right and sometimes even a judicial duty and is an ordinary element of proceedings, which additionally aims at assuring the right course of action, preventing a faulty ruling and the need to repeat the trial. It shall be noted that on application of the referring court the CJEU can determine the matter under the expedited procedure which is applied in cases where a temporary remand has been ordered. In the light of the above, the Officer's statement seems incomprehensible.

The author of this report has no doubts that by requesting the judges to produce a written explanation, under explanatory activities, which can subsequently trigger disciplinary proceedings, the Deputy Disciplinary Officer of the Ordinary Courts Judges strictly executes policies of the ruling political party, whilst being fully at the service of the Minister of Justice-Prosecutor General, who appointed him to the office. One has to bear in mind that on 5 October 2018 the Minister of Justice-Prosecutor General applied to the Constitutional Tribunal for a declaration of non-compliance of Article 267 TFEU with the Polish Constitution to the extent in which it affords the right to refer a question for a preliminary ruling relating to the system, form and organisation of the judicial power¹²⁰. The Minister's question addressed to the Constitutional Tribunal was an apparent attempt to discredit any

¹¹⁹ No RDSP 713-27/18

¹²⁰ https://ipo.trybunal.gov.pl/%2Fipo%2Fdok%3Fdok%3DF694069373%2FK_7_18_pg_2018_10_04_ADO.pdf&u sg=AQvVaw2XHGHtF3uBUmdOJO-iO8Ee, accessed on 4.03.2019.

future order of the CJEU to the extent in which it could adversely affect the pseudo-reform of the Polish justice system whose main objective is to subordinate the judiciary to the political factor. The disciplinary measures employed against judges who had referred questions for preliminary rulings are clearly politically driven and aim to invoke a “freezing effect” potentially deterring courts from further references for preliminary rulings contesting changes to the Polish justice system as incompatible with European Union law.

Similarly, other criminal and disciplinary proceedings against judges in response to the judgments passed by them are characterised by an unambiguously political context since they all relate to judges who had convicted individuals affiliated 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 General¹²¹.

Judge Wojciech Łączewski sentenced Mariusz Kamiński¹²², the former head of the Central Anti-Corruption Bureau, to 3 years of imprisonment without parole for an abuse of his authority. Mr. Kamiński was subsequently pardoned by President Andrzej Duda and is currently in the post of Minister-Manager of the Secret Service¹²³.

Criminal prosecution of the superior judges in Szczecin, who had assigned to reporting judges requests to extend periods of remand, was commenced after the court refused the prosecution’s motion to remand in respect of individuals accused of acting to the detriment of “Police” Chemical Works¹²⁴. Significantly, the prosecution received a report of an alleged mismanagement on the part of the former board intimated to the prosecution by the new board, affiliated with the ruling political party.

Finally, judge Igor Tuleya, additionally to a request for a preliminary ruling, acquitted, from most majority of charges, doctor Mirosław G., which was a prestigious and personal opponent 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. The judge also overruled the prosecution’s order to discontinue proceedings in relation to relocation of the Parliamentary vote to the Sala Kolumnowa (Pillar Chamber), after the report of the parliamentary opposition¹²⁵. Moreover, having examined the prosecution files, judge Tuleya reported to the prosecution an alleged offence of perjury committed by 230 Members of Parliament, the great majority of them being members of the Law and Justice party (amongst them persons as prominent as Jaroslav Kaczynski, the current Premier Mateusz Morawiecki, the former Premier Beata Szydło, the Minister of Internal Affairs Joachim Brudziński, the

¹²¹ 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 7.03.2019.

¹²² A Resolution to protect judge Łączewski was adopted by, inter alia, the Association of Judges Iustitia: <https://www.iustitia.pl%2F83-komunikaty-i-oswiadczenia%2F2453-uchwala-z-dnia-1-sierpnia-2018-r-w-sprawie-zapowiedzi-rzeczniaka-rzadu-o-usuniecie-sedziogo-wojciecha-laczewskiego-z-urzedu&usg=AOvVaw1t4dl-ppwRsSY45Qrovu-8>, accessed on 13.01.2019.

¹²³ <https://www.oko.press%2Fczy-sad-najwyzszy-zdazy-rozpatrzec-sprawie-bylego-szefa-cba-mariusza-kaminskiego%2F&usg=AOvVaw3QtY7ZX2DOLm6-FdAJUF3g>, accessed on 7.03.2019.

¹²⁴ <https://www.www.tvn24.pl%2Fpomorze%2C42%2Fszczecin-afeta-policka-sledztwo-w-sprawie-skladow-sedziow-umorzone%2C851321.html&usg=AOvVaw2z3HYDYHS3mCyBwxju1X6U>, accessed on 7.03.2019.

¹²⁵ https://www.tvn24.pl%2Fwiadomosci-z-kraju%2C3%2Fsedia-tuleya-wydal-decyzje-ws-obrad-16-grudnia-pelne-uzasadnienie%2C800305.html&usg=AOvVaw1rXzOUPQLDxuyJYFC_bARv, accessed on 7.03.2019.

Minister of Defence Mariusz Błaszczak, the Marshal of ‘Sejm’ Marek Kuchciński, the Minister of Justice-Prosecutor General Zbigniew Ziobro)¹²⁶.

Ungrounded disciplinary proceedings were raised against judges Dominik Czeszkiewicz and Sławomir Jęksa after they had acquitted persons protesting against the abuses of power by the current governing party.

This analysis of the grounds on which criminal and disciplinary proceedings against judges have been raised lead to a two-fold conclusion. Firstly, until recently it would have been unconceivable to even contemplate raising any type of procedures on any of the grounds presented above, even more so in case of criminal proceedings¹²⁷. The grounds for such proceedings would not have been stated as judicial educational activity or constructive criticism of changes to the justice system directly impacting working conditions within the judicial system, adjudication activities which are verifiable under the standard course of courts’ appeal proceedings.

Secondly, the conclusion seems undisputable that judges regarded by the governing power as nuisance are currently persecuted on political grounds in Poland.

3. The principle of “free appraisal of the procedure” attributed to the Disciplinary Officers.

After an assessment of the procedures described, employed to examine judges by the Deputy Disciplinary Officers, it is not difficult to notice that the procedures fail to satisfy high procedural norms; on the contrary, the Deputies seem to follow principle of “an unrestricted” if not discretionary evaluation of the rules of procedure.

Even the fact of summoning judges and examining them as witnesses in circumstances from which it can be clearly inferred that the proceedings are designed to “match” judges to disciplinary charges, is a process aiming at circumvention of the law. Proceedings thus described were experienced by, amongst others, judges Włodzimierz Brazewicz, Igor Tuleya and Ewa Maciejewska. However, under Article 307 § 2 of the Criminal Procedure Code applicable to disciplinary proceedings due to reference to Article 128 of the Law on the Ordinary Courts Organisation, at the stage of explanatory activities regulated by Article 114 of the Law on Ordinary Courts Organisation (which can lead up to the proper pre-trial disciplinary proceedings)¹²⁸, no actions requiring preparation of minutes

¹²⁶ Full text of judge Tuleya’s notification available at: <https://www.natemat.pl%2F260375%2Csledztwo-ws-sali-kolumnowej-igor-tuleya-twierdzi-ze-politycy-klamali&usg=AOvVaw1SVd50CCVJwK2Ap4mfDL98>, accessed on 13.01.2019.

¹²⁷ Very interesting analysis in respect of the scope of potential disciplinary responsibility of judges for judicial activity was prepared by P. Skuczyński: Direct application of Polish Constitution by the courts and disciplinary responsibility of judges. https://depot.ceon.pl/bitstream/handle/123456789/14574/Bezposrednie_stosowanie_Konstytucji_RP_przez_sady_a_odpowiedzalnosc_dyscyplinarna_sedziow.pdf?sequence=1&isAllowed=y, accessed on 4.03.2019.

• ¹²⁸ The Act on the System of Ordinary Courts of 27 July 2001, Journal of Laws of 2001, item 1070 stipulates as follows:

Article 114 § 1. The disciplinary commissioner shall take up explanatory activities at the request of the Minister of Justice, the president of the appellate court or the president of the regional court, the board of the appellate 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

are undertaken, thus no witness evidence is heard. Coercing someone, who can potentially be accused of committing a disciplinary delict, to give evidence and threatening with criminal liability for refusing to do so, constitutes a breach of the right of the defence (by bypassing the right to remain silent) and the principle of procedural loyalty.

Even the new, harsh disciplinary rules provide only for the possibility of calling upon a judge at the stage of preparatory inquiries to make an oral or written statement relating to the subject matter of the case (art. 114 § 2 of the Law on Ordinary Courts System) but making such a statement is the right, not the obligation of a judge. Therefore, the Disciplinary Officer breaches recently set rules.

Further, action of the Deputy Disciplinary Officer of the Ordinary Court judges, Michał Lasota who initiated the disciplinary proceedings by requesting from judges, who had referred questions for preliminary rulings to the CJEU and those being Igor Tuleya, Ewa Maciejewska and Kamil Jarocki, to produce written statements, under Article 114 § 2 of the Law on the Ordinary Courts Organisation amount to a violation of the provision regulating the court jurisdiction recently introduced by this Act, discussed in a further chapter of this report.

Another violation of principles provided for the proceedings was demonstrated by removing legal representatives of judges examined as witnesses, judges Włodzimierz Brazewicz and Igor Tuleya. A person can be represented by a legal representative who is not a party to the proceedings and can participate in the hearing by virtue of Article 87 § 2 k.p.k (Code of Criminal Procedure) “if the interests of the person so require”. However, under Article 87 § 2 k.p.k (Code of Criminal Procedure) a legal representative may be refused participation in the proceedings if “the interests of the person do not require it”. Such circumstance does not occur if a judge is examined as a witness but an intent of attributing a disciplinary liability to him is obvious. In these circumstances a role of a lawyer formally acting as a legal representative is close to a function of a defender and thus, it can be inferred from his presence that the judge may need to use the right of the defence. This situation materialised during the ongoing proceedings in respect of Igor Tuleya and Ewa Maciejewska, who were subsequently requested by the Deputy Disciplinary Officer to produce written statements in response to their references for preliminary rulings, pursuant to Article 114 § 2 of the Law on the Ordinary Courts Organisation, as a part of an explanatory activities which may directly lead to a disciplinary action.

The issue at hand becomes even more burdensome if the Disciplinary Officer examining a judge fails to caution him about the right, under Article 183 k.p.k (Code of Criminal Procedure), to decline answering questions if doing so would expose him to

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 clarification proceedings, the disciplinary commissioner shall initiate the disciplinary proceedings and prepare disciplinary charges in writing.

criminal liability. This was the case for Włodzimierz Brazewicz, after his legal representative was asked to leave the witness examination proceedings.

Moreover, the refusal to allow a legal representative to participate in the witness examination proceedings is challengeable under Article 302 § 2 k.p.k (Code of Criminal Procedure) and if an appeal is lodged the witness examination proceedings shall be suspended. In the examples of the witness examination proceedings provided above, the Disciplinary Officers did not suspend the proceedings and the appeals were never heard. And yet another issue, despite the fact that the Code of Criminal Procedure identifies an immediate senior prosecutor as a body competent to hear an appeal (Article 303 § 3 k.p.k.(Code of Criminal Procedure)), the Law on the Ordinary Courts Organisation remains silent on the issue of identification of a body competent to hear an appeal which, at the same time, cannot deprive a person potentially facing disciplinary liability, of the procedural rights.

The Disciplinary Officers, Michał Lasota and Przemysław Radzik, in the proceedings against judge Brazewicz conducted themselves in an exceptionally disloyal manner by the fact that on 6 November 2018, when the judge was being examined as a witness, they reassured the judge that he did not need a legal representative since no further disciplinary proceedings were to be carried out. As it later transpired, on 30 October 2018 one of those Officers had already prepared a letter addressed to judge Brazewicz requesting from him to produce written statement in relation to other alleged disciplinary delicts. This type of behaviour cannot be described as anything else but a deceitful attempt to extort information on account of the disciplinary proceedings accompanied by a violation of the privilege against self-incrimination¹²⁹.

The right to a fair trial was similarly breached by the Deputy Disciplinary Officer, who issued a request to the directors of the Appeal Court in Gdańsk to disclose information regarding whether between 2005 and 2007 judge Brazewicz was facing disciplinary proceedings. It shall be noted that even if the judge had committed a disciplinary delict within the period under enquiry, the disciplinary conviction would have expired by then. Therefore, the disciplinary conviction would need to be regarded as non-existent and no grounds could have validated a request to disclose this information.

In conclusion, it has to be stated that it is difficult to find grounds for initiation of the disciplinary proceedings against the judges listed above, further, the pseudo-disciplinary proceedings, often flagrantly violating the sphere of judicial impartiality, could in ordinary circumstances in some cases give grounds for raising the disciplinary proceedings against the Disciplinary Officers instead, under Article 231 § 1 k.k (Criminal Code).

The author's opinion about the matters is not an isolated one, since professor Katarzyna Dudka prepared a legal report, having examined the initial stage of the disciplinary proceedings against Monika Frąckowiak, in which she concluded that provisions applicable to the disciplinary proceedings thus, Article 10 § 1 and Article 17 § 1 s1 of the Code of Criminal Procedure allow for such proceedings to be raised but are qualified by existence of a reasonable suspicion that a disciplinary delict has been committed and allow for the proceedings to be carried out but limited to the extent of the offence notification. Further, the

¹²⁹ See report of Amnesty International from February 2019: <https://www.amnesty.org/download/Documents/EUR3798002019ENGLISH.PDF>, accessed on 4.03.2019.

author aptly states that on the grounds of a limited information contained within a disciplinary delict notification, the Disciplinary Officer does not enjoy the right to request more information regarding certainty of jurisprudence, timeliness of proceedings conducted, an average number of cases or potential challenges of a superior's instructions within the period of almost 3 years. In her opinion the author assessed this type of actions, which were also described by Ewa Siedlecka, the editor of a weekly newspaper "Polityka", as "sweeping" through the case files¹³⁰ meets the criteria of an offence under Article 231 § 1 k.k. (Criminal Code)¹³¹. So far, however, the Prosecution, subordinated to the Minister of Justice-Prosecutor General, being an instrument of the oppression of judges, is guaranteed a writ of untouchability.

It has to be noted that other politically-controlled entities such as the Central Anti-Corruption Bureau¹³² join in the oppressive actions against judges.

4. The sweet beginning of a bitter end.

It is appropriate here to refer to some of the theories formulated by the Disciplinary Officer of the Ordinary Court Judges, Piotr Schab, appointed to the office on 8 January 2019¹³³, in response to a publication on Onet¹³⁴ website regarding the issue of commencing ungrounded disciplinary proceedings against judges, and the one dated 4 January 2019¹³⁵ in response to Amnesty International calling the Officer to stop disciplinary proceedings against the judges who had referred questions for preliminary rulings to the CJEU.

A fundamental theory, repeated in both sources mentioned above, quotes a statement of the Disciplinary Officer of the Ordinary Courts, in which he argues that the authors have no right to accuse him of instigating disciplinary proceedings either against judges who had referred questions for preliminary rulings to the CJEU, or judge Jarosław Gwizdak. From a purely formal point of view, the Officer is right as to the fact that in the proceedings cited by him indeed until now no disciplinary charges have ever been pressed against the requested judges. It does not change the fact that a number of judges, including those to whom the Officer's letters were addressed, have been facing disciplinary proceedings raised by means of either examination of judges as witnesses or requests to produce written statements under the explanatory procedure (Article 114 § 2 of the Law on the Ordinary Courts Organisation) or finally, audit of the judges' case files and personal portfolios. This is contrary to the

¹³⁰ It is worth mentioning that the "sweeping" through the files was used in cases of judges Ewa Maciejewska, Włodzimierz Brazewicz and Olimpia Barańska-Małaszek.

¹³¹ <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.

¹³² Here, the never-ending audit of the former NCJ spokesperson Judge Waldemar Żurek's financial statements ought to be mentioned.

¹³³ No RDSP 713-1/19.

¹³⁴ Article by Magdalena Gałczyńska "The Year of Judgment for Courts, "the excesses" of the Disciplinary Officers. How and What for the Government intends to Punish Judges?" <https://www.wiadomosci.onet.pl/%2Ftylko-w-onecie%2Fsadownictwo-jak-rzad-zamierza-karac-sedziow%2Fvkq07dd&usg=AOvVaw3SgyaJQe52vxFIP6Eo020T>, accessed on 13.01.2019.

¹³⁵ No RDSP 713-27/18.

Officer¹³⁶ claiming that the terms used in the summons, such as “a potential judicial excess” or “obstruction of the court proceedings” unambiguously indicate that the ongoing proceedings may still lead to disciplinary charges being pressed against the judges. Moreover, under Article 114 § 3 of the Law on the Ordinary Courts Organisation¹³⁷ the explanatory procedure is designed to establish whether any grounds for commencing disciplinary proceedings exist. Therefore, a claim that none of the summoned judges has any reason to be concerned is just pulling the wool over their eyes.

It shall be noticed that there are few reasons why the majority of politically motivated criminal and disciplinary actions against judges is still at an initial phase thus, either at the investigatory stage or *in rem* and not yet at the *in personam* stage.

Firstly, an option of commencing politically motivated disciplinary proceedings against judges appeared only very recently. The Disciplinary Officer of the Ordinary Courts Judges and his Deputies were only appointed in June 2018. Furthermore, the justices of the Disciplinary Chamber of the Supreme Court were appointed on 20 September 2018, and for those institutions to start operating some organisational actions were needed. Consequently, the very first proceedings before the Disciplinary Chamber took place not earlier than on 5 December 2018. Thus, the new mode of disciplinary proceedings against judges has just recently achieved the capacity to operate.

Secondly, an obstruction in achieving full capacity of the politically motivated disciplinary proceedings against judges may be contributing to their almost artificial nature. In circumstances when some media are still independent and scrutinise the Disciplinary Officers` every move it is difficult to proceed with proceedings so obviously ungrounded or even ridiculing the Officers, which bears the risk of the new model of the disciplinary proceedings being totally discredited in the eyes of the public. It seems that a similar mechanism operates within the politically motivated criminal proceedings with a scope of interest still focused on judges. No judge has been charged in any of the following cases, the one when judge Agnieszka Pilarczyk was accused of an allegedly excessive remuneration paid to the experts and the other regarding the judges on duty in Szczecin transferring to the linesmen judge applications to remand in “Police” Chemical Works case. Both proceedings are in the *in rem* stage although, in judge Pilarczyk’s case, the description of the act to which the proceedings relate unambiguously indicates that she is the only potential suspect and accompanied with an absurd theory of the prosecutor who claims that the appealed decision in respect of the amount of the remuneration paid to the experts can be still validly pursued. The fact that the proceedings in such a simple case as judge Pilarczyk’s case is taking nearly 2 years and the proceedings against “Police” Chemical Works being first deserted and currently pending having been re-opened illustrated that no one even considers pressing any

¹³⁶ A quotation from Adam Schab’s, the Disciplinary Officer, letter to Amnesty International of 4.01.2019 (No RDSP 713-27/18) “the entirely erroneous statement, page 1 of your letter of 20 December last year, is reflected in a false conclusion complementing it – namely, that examination of judges as witnesses was designed to “allegedly obtain information” and it actually aimed at “pressing charges”. Considering that it obviously contradicts facts a question can be raised as to the objective of such a radical theory rejecting independence of Polish state authority.

¹³⁷ Article 114 § 3 of the Law on the Ordinary Courts Organisation “having conducted investigatory proceedings there are grounds for instituting disciplinary proceedings, the Disciplinary Officer institutes disciplinary proceedings and provides the judge concerned with written charges”.

charges: it has more to do with their long lasting perpetuation in order to produce the “freezing effect” on judges. In circumstances of an ongoing process of political subordination of the judiciary, still being far from a “successful” finale, indicting such cases would not promise favourable for the prosecution outcomes.

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

The third and certainly the most important factor that can slow down the disciplinary and criminal proceedings against judges relates to the ongoing proceedings against Poland in the CJEU. Taking into account a very broad social support for Polish membership in the European Union, entering into an open conflict with the EU institutions and in particular CJEU, during the year in which parliamentary elections are held (to take place in October – November 2019) could prove too risky for the ruling party.

5. Centralisation of disciplinary proceedings against selected judges.

Another feature specific to the proceedings at a pre-litigation stage under the new mode of disciplinary proceedings is the tendency of the Disciplinary Officers and his two Deputies to centralise the proceedings against particularly “disobedient” judges by taking over cases relating to them. At the same time the Officers, at the level of central government, pursuant to the principle “the end justifies the means”, happen to breach jurisdiction provisions, as discussed below.

In general, the Disciplinary Officer of the Ordinary Courts Judges and his two Deputies are identified as having jurisdiction to hear cases for the Appeal Courts judges, as well as Presidents and Vice-Presidents of the Regional and the Appeal Courts¹³⁸. Under Article 112 a § 1 a and § 3 of the Law on the Ordinary Court Organisation, the Disciplinary Officer of the Ordinary Courts Judges and his two Deputies have the authority to take over cases from the Deputy Disciplinary Officers operating at the Regional Court or the Appeal Court level, although the provisions cited include some significant restrictions. Namely, it can be inferred from their wording that the Disciplinary Officer of the Ordinary Courts Judges and his Deputies are only entitled to take over a “case conducted by the Deputy Disciplinary Officer of the Regional Court” or the Appeal Court. The wording of the provisions in question indicates that the Disciplinary Officer of the Ordinary Courts Judges and his Deputies are authorised to take over, from the Deputies Disciplinary Officer of the Regional Court or the Appeal Court, only cases in which a “local” Officer has already undertaken some disciplinary proceedings. However, none of the provisions of the Law on the Ordinary Court Organisation does authorise the Disciplinary Officer for the Ordinary Courts and his Deputies to open the first disciplinary proceedings against judges of District or Regional Courts.

Under current practice, in “sensitive” cases the Disciplinary Officer of the Ordinary Courts is excessively eager to take up this right. A distinctive example of such is provided by the case of judge Waldemar Żurek who, contrary to the provisions (in absence of required

¹³⁸ Article 112 § 6 of the Law on the Ordinary Courts Organisation.

opinion of the College of the Court), was transferred to a different department by the new President Dagmara Pawełczyk-Woicka. Furthermore, on receiving this order he was informed about the right to appeal it to the National Council of the Judiciary. Having exercised the right, but prior to receiving the decision of the National Council of the Judiciary, the judge had in writing refused to commence his service in the new department until his appeal was determined. This appeared to suffice for the new President to intimate to the Disciplinary Officer of the Appeal Court that judge Waldemar Żurek has committed a disciplinary delict. Not before long the Disciplinary Officer for the Ordinary Courts exercised his authority under the cited provisions to take over the case. The process was justified by the fact that the Disciplinary Officer of the Appeal Court in Kraków participated in the meeting of the Assembly of Judges of the Kraków Appeal Court Circuit of 12 October 2018 which adopted, inter alia, Resolution no 3 criticizing the President of the Regional Court in Krakow for opening disciplinary proceedings against judge Żurek¹³⁹. An argument supporting a position that it was used only as an excuse to transfer the case to the central government level, originating from the political power's lack of "trust" in Tomasz Szymański¹⁴⁰, the Deputy Disciplinary Officer of the Appeal Court in Kraków, is emphasised by the fact that not only did the Krakow Officer not vote in the Resolution relating to judge Żurek but also deposited an electronic voting machine for the duration of voting as recorded in the minutes of the meeting¹⁴¹.

The circumstances of judge Monika Frąckowiak's case were different in that the competent Deputy Disciplinary Officer of the Regional Court refused to open the proceedings. Nonetheless, to secure the future of the proceedings the case was transferred to the Deputy Disciplinary Officer for the Ordinary Courts.

The intention to centralise the most politically sensitive disciplinary proceedings against judges is demonstrated by the mode of their initiation against all three judges of the Ordinary Courts who have referred questions for preliminary rulings to the CJEU, namely, Igor Tuleya, Ewa Maciejewska and Kamil Jarocki. Hence, the disciplinary proceedings against those judges where the requests to produce written statements, under Article 114 § 2 of the Law on the Ordinary Courts Organisation, were not issued by a competent local Deputy Disciplinary Officers but directly by the Disciplinary Officers of the Ordinary Courts Judges. It can be concluded from the above that the Disciplinary Officers of the Ordinary Courts Judges opened the disciplinary proceedings against the judges without due powers and contrary to the rules on jurisdiction.

Owing to the fact that the preliminary ruling questions referred by the judges pose a challenge to various aspects of the so-called "reform of the justice system" at a political level,

¹³⁹ <http://themis-sedziowie.eu/aktualnosci/uchwaly-zgromadzenia-przedstawicieli-sedziow-apelacji-krakowskiej-z-dnia-12-pazdziernika-2018-roku/>, accessed on 13.01.2019.

¹⁴⁰ It certainly refers to the fact that Tomasz Szymanski, the Krakow Deputy Disciplinary Officer has previously rejected the request to open the disciplinary proceedings against judge Waldemar Zurek the request being based on the fact that judge Zurek has read the statement of the College of the National Council of the Judiciary outside the Supreme Court in Warsaw, which constitutes his political engagement.

¹⁴¹ <https://www.krakow.sa.gov.pl/dzialalnosc/Lists/InformacjeRzeczniczadsKarnych/DispForm.aspx?ID=65>, accessed on 13.01.2019.

it must have been declared essential to concentrate the disciplinary proceedings in the hands of the most trusted and politically compliant people, who being in the office in Warsaw constantly work with the representatives of the Minister of Justice, like those of the special forces described in sub-chapter V.2.a. Those individuals do not hesitate to abuse their powers since they trust the protective umbrella of the Minister of Justice. This leads to the conclusion that the Disciplinary Officer for the Judges of the Ordinary Courts and his Deputies, relying partially on the “ius caducum” right, can proceed with a case against any, in practice not accidentally chosen, judge sitting at any of the Ordinary Courts. It demonstrates an exceptional “flexibility” of the provisions on the Disciplinary Officers’ powers and their interpretation of the provisions which results in the guarantees provided by the said provisions being lost. Each judge has to consider the possibility that disciplinary proceedings against him may be dealt with by the central government level and at different, discretionary chosen stage.

6. Oppressive measures taken under the administrative mode, including the “domino effect”.

Interesting seem the motives behind the measures taken by the Disciplinary Officer, the procedure of opening disciplinary proceedings against judge Włodzimierz Brazewicz, where he firstly examined as a witness and then his personal files were “swept” through. It is bordering on the absurd to try to reason that judge Brazewicz engaged in a political activity by attending an open meeting along with some 450 participants including several local politicians. It seems in this instance that the rationale behind the disciplinary proceedings was exclusively the fact that judge Igor Tuleya, intensely targeted by the executive, was one of the main speaker at the meeting chaired by judge Brazewicz. That is how the Disciplinary Officer sends a message to other judges to “stay away from Tuleya”.

This is not an isolated example of “successive” or even the “domino effect” based oppression of judges undertaken in order to indirectly impact on judges with the widest involvement in upholding the rule of law. Similar situations relate to judge Waldemar Żurek, the former spokesperson of the National Council of the Judiciary, although it shall be noted that they have not been taken under a disciplinary or criminal mode, but under the mode of administrative supervision of the court Presidents appointed by the Minister of Justice-Prosecutor General. Here, Rafał Dzyr, the President of the Administrative Court in Kraków, dismissed judge Paweł Rygiel, a judge of the Appeal Court in Kraków, from the post of a visiting judge before his tenure expired, after the judge found no defects in the audited files of cases dealt with by judge Żurek, the audit instructed by the President Rafał Dzyr to whom an anonymous report had been sent to this effect. It is worth mentioning that no complaint regarding execution of his duties of a visiting judge was raised against the judge of the Appeal Court, Paweł Rygiel.

A much wider scale was achieved by the actions taken against judges in Kraków by Dagmara Pawełczyk-Woicka, the President of the Regional Court in Kraków, and Zbigniew Ziobro, the Minister of Justice-Prosecutor General, in response to judge Waldemar Żurek’s dismissal from the office of the spokesperson of this court. Here, three judges of the Regional Court in Kraków, that is, judges Agnieszka Włodyga, Janusz Kawałek and Joanna

Melnyczuk, who having assessed Waldemar Żurek's dismissal from his office of the spokesman of the Regional Court as procedurally faulty, in protest resigned from their memberships in the College of the Regional Court in Kraków, and were subsequently dismissed from the offices of the Presiding Judges of Divisions. Another judge, who for the reasons mentioned above resigned from the College of the 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 ought to be emphasised that all judges mentioned, dismissed from their offices in response to their support for judge Żurek, were highly regarded superior judges against whom no complaints regarding their work had ever been made.¹⁴²

Finally, President Dagmara Pawełczyk-Woicka 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 demonstrated by failure to meet the obligation to obtain, by the prescribed mode, a Resolution of the College assessing the validity of changes to the judge's responsibilities. The oppressive nature of this relocation can be vouched for by the fact that on relocation the judge was allocated tens of stagnant cases which had been piling for months. Furthermore, on delivering the decision to transfer, the judge was informed by the President about his right to appeal the decision to the National Council of the Judiciary. Judge Żurek for a short time postponed his service in the new department, having exercised the right to appeal and whilst the decision to transfer was still to become final. Consequently, the President with no delay reported an alleged disciplinary delict (of not fulfilling judicial duties) despite that the judge was not authorised to begin his service without the decision to transfer becoming final¹⁴³.

Attention must be drawn to the fact that the Ministry of Justice has been recently introducing a number of changes to the organisation of the judicial system by which e.g. large divisions of courts of first instance have been merged. Thus, some divisions are doomed to cease to exist and their current directors will lose their offices. Such operations are executed notwithstanding the current practice proving that divisions with more than 15 judges are dysfunctional. It can be argued that the actual objective behind at least some of the organisational changes is the intention to dismiss judges advocating the rule of law, or those who in the past displeased current authorities with their rulings. Such statement is supported

¹⁴² At the assemblies and meetings, Krakow judges expressed concerns regarding the personnel changes conducted by President Dagmara Pawełczyk-Woicka, 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),

Resolution no 5 of the Assembly of Judges of the Regional Court in Krakow 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.

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.

¹⁴³ The Assembly of Judges of the Court of Appeal in Kraków position of 12 October 2018, Resolution no 3

<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.

by the fact that one of the first judges dismissed from the office as described above is Bartłomiej Przymusiński who is the spokesperson of the biggest Polish Association of Judges Iustitia¹⁴⁴.

VII. European standards of the disciplinary proceedings against judges.

The doctrine presented in the chapter's heading has recently become profoundly true and not just as a doctrine or system but also a pragmatic issue. It was facilitated by a series of questions referred by the Ordinary Courts (Warsaw, Lodz and Gorzow Wielkopolski) for preliminary rulings to the Court of Justice of the European Union. The questions were triggered by the changes to the Polish model of disciplinary proceedings against judges and directly challenge the potential abuse of the disciplinary proceedings which can be used (or rather misused) to enforce political control over court judgments, which is in breach of European Union law.

European law academics speculated - especially in regard to the referrals for preliminary rulings issued by the Regional Courts in Warsaw, Gorzow Wielkopolski - whether the cases involved an element of European Union law as consequently, the Court could have declared the actions inadmissible. Paradoxically, the actions taken by the Deputy Disciplinary Officer of the Ordinary Courts Judges against those judges, in response to their referral for preliminary rulings, on the one hand unintentionally confirmed the arguments supporting the preliminary questions stating that the new mode of the disciplinary proceedings became so politicized that it can be employed to harass judges, and on the other hand, allowed them to attain an element of European law.

Should Poland fail to comply with its obligations arising from European Union law regarding the independence of the judiciary, the European Court can oblige it as a State to cease the infringement without delay. Should the Polish government fail to comply with the judgment the European Court, at the request of the Commission, a continuous or periodic penalty payment order can be imposed. Therefore, as presented above, the Court's judgment may lead to significant financial consequences for our country and owing to its authority can influence Poland's general position in the European Community.

Pursuant to the so-called "great reform" the Court of Justice of the European Union has already investigated compliance of the Polish justice system with the European norms. The criteria of the potential assessment of the Polish justice system were already formulated (presumably not an exhaustive list) in point 62-67 of the judgment of 25 July 2018 in case *Minister of Justice and Equality v LM*. The Court judgment in this case reiterated the requirement of regulating the system of disciplinary measures against judges in order to prevent a risk of them being used as a system of political control of the content of judicial decisions¹⁴⁵. In the judgment in question the Court stressed the importance of the requirement

¹⁴⁴ <https://www.wiadomosci.onet.pl/%2Ftylko-w-onecie%2Fministerstwo-tnie-wydzialy-w-sadach-funkcje-traci-rzecznik-iustitii%2F62clvj4&usg=AOvVaw1bRir2IEsbzmak5aPJgRO5>, accessed on 7.03.2019.

¹⁴⁵ § 67 judgment in *the Minister of Justice and Equality v LM*, C-216/18 PPU, of 25 July 2018, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=8931122E8B0795EED54962D8DBF52569?text>

of a system of rules which defines conducts amounting to disciplinary offence, undoubtedly also the right of the defence and which lays down the possibility of bringing legal procedures of the effective judicial control of the first instance disciplinary bodies' decisions. It shall be concluded from the above discussion that the issues surrounding the new model of disciplinary proceedings in Poland raise many concerns in respect of safeguarding the right to a fair trial. Considering that the criteria listed above are formulated on the grounds of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, originating from Article 6 of ECHR, there could be no arguments against using the broad case law of the Strasbourg Court in assessing the particulars of the new mode of disciplinary proceedings¹⁴⁶.

Many of the ECHR's judgments concur that the guidelines for a fair trial in civil cases are also applicable to disciplinary proceedings against judges, provided that the national law does provide a court litigation for those proceedings (ECHR judgment of 5 February 2009 in *Olujić v Croatia*, case 22330/05, § 34-43). The norms under Article 6 of the ECHR apply not just to proceedings which could result in a dismissal of a judge from the office. They find its respective application when more lenient disciplinary penalties can be imposed (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 judgments cited, it is undisputable that judges facing disciplinary proceedings shall also attain the right to a fair trial, the right to a court hearing and safeguards regarding equality of arms under Article 6 (1) of the ECHR.

As previously discussed, in the light of cited ECHR case law disciplinary proceedings against judges attract the same right to a fair trial under Article 6 of the ECHR as civil cases do. The scope of the rights is in many aspects limited if compared to the rights in criminal cases since it does not provide for the right to remain silent and associated privilege against self-incrimination, the right of the defence, the presumption of innocence or inadmissibility of unlawfully obtained evidence. Therefore, it seems valid to inquire whether it would be competent for the Court of Justice of the European Union to investigate the system of disciplinary proceedings against judges in the context of these norms, or at least some of them, applicable to criminal proceedings. The author of this report concludes that such a question deserves an affirmative answer. Under Article 52.3 of the Charter of Fundamental Rights of the European Union, the norm of protection afforded by European Union law shall be at least as high as the norms provided under the European Convention on Human Rights and Fundamental Freedoms, although there are no bars for the norms to exceed the Union norms. The fact that an extended 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 the disciplinary proceedings against judges, is the right of the defence and thus, the right to a fair trial in criminal but not civil proceedings.

In the context of the European norms of the disciplinary proceedings against judges, Opinion no 3 of the Consultative Council of European Judges (CCJE), dated 19 November

[=&docid=204384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2903684](#), accessed on 7.03.2019.

¹⁴⁶ Under Article 53.3 of the Charter of Fundamental Rights of the European Union "to the extent of the right of the Charter corresponding with the rights afforded by the European Convention for the Protection of Human Rights and Fundamental Freedoms, in their respective fields of application, as recognised by the Charter".

2002¹⁴⁷, operating under the auspices of the European Council, discusses, inter alia, disciplinary proceedings against judges. The Opinion provides recommendations for statutory regulations in respect of the conduct amounting to an offence which can attract a disciplinary penalty, the scope of the disciplinary penalties (which shall be proportional to the gravity of the offence) as much as the procedure regarding the disciplinary proceedings. Thereafter, the recommendation refers to an appointment of a disciplinary officer for judges responsible for verification of grounds for commencing disciplinary proceedings. The disciplinary proceedings shall be concluded by a decision of an independent body complying with the right of the defence, its members being appointed by an independent authority composed mainly of judges selected by professional peers. Finally, in accordance with the CCJE's recommendations, there ought to be an appeal procedure from a first instance body to the court. The conclusion drawn from the content of subchapter V of this report and recommendations cited is that the new model of disciplinary proceedings introduced in Poland leads to significant concerns regarding lack of definition of a disciplinary delict, safeguarding the right of the defence for the accused judges and a politicized mode of appointments to the disciplinary bodies, that is, both the Disciplinary Officers and their Deputies.

As stated above, the preliminary ruling referrals made to the CJEU by judges Ewa Maciejewska, Igor Tuleya and Kamil Jarocki will give the Luxemburg Court an opportunity to express its view on the new disciplinary proceedings in Poland in the light of the European Union law.

VIII. Conclusions.

An overly optimistic simplification of matters is presented by the media, who state that the sole aim of the so-called “great reform of the justice system” lies in a one-off change of judicial personnel with a view to replace the key judicial office holders by those subordinated to the Minister of Justice. The authors of the “reform of the justice system” were far more ambitious. It is more about such deterioration of the independence of the judiciary which would enable the political power, on the one hand, to influence decisions on who is to become a judge, who is to be promoted (the objective of changes to the appointments of judges-members of the National Council of the Judiciary) on the other hand, to interfere with court proceedings in specific cases.

Considering the above described broad spectrum of powers of the Minister of Justice-Prosecutor General encompassing as much the administrative supervision over courts as means of interfering with the process of disciplinary action and political control over criminal proceedings in respect of judges, it shall be declared that the political power represented by the Minister of Justice, due to the recent legislative changes, has become significantly better equipped in instruments to harass judges, which facilitates exercising pressure on judges, and a foreseen deprivation of the right to adjudicate or even dismissal from judicial office.

¹⁴⁷<http://rm.coe.int/opinia-nr-3-rady-konsultacyjnej-sedziow-europejskich-ccje-do-wiadomosc/168078bbe5>, accessed on 8.01.2019.

The Minister of Justice, pursuant to the authority, extended by the “great reform”, to oversee administration of courts, will also gain the power to exercise, through the Minister-appointed Presidents of Courts as well as the Directors of Courts, “soft” harassment of selected judges e.g. by transfers to different court divisions, causing other inconveniences in performance of judicial functions¹⁴⁸ or by an overload of cases allocated to a judge so that disciplinary proceedings for negligence at work could be justified.

The main tool of harassing judges will be the disciplinary proceedings in which the Minister of Justice with his broad powers will be like a “pistol” to a judge’s head with the Minister’s finger on the trigger. Having regard to the detailed measures described above of the new model of disciplinary proceedings against judges, a non-exaggerated conclusion can be drawn that the status of the accused judge is less favourable than the accused in criminal proceedings heard by this judge, with a much restricted right of the defence¹⁴⁹. This widespread deterioration of procedural rights under disciplinary proceedings, including, inter alia, their politicization and centralisation, restriction of the right to the defence, introduction of non-admissibility of evidence, extension of limitation period for convictions in disciplinary delicts, breach of two-instance court system, which is accompanied by the abovementioned means of perpetuating the status of a suspect, leads to uncertainty as to the legal status of the accused judge and violates not only the constitutional principle of equality before the law and prevention from discrimination (Article 32 of the Constitution) but predominantly infringes the principle of impartiality of judges (Article 178 para 1 of the Constitution). Wide scope of competences of Minister of Justice in respect of disciplinary proceedings covering on the one hand his direct impact on appointment of Disciplinary Officers and Judges of disciplinary courts, and on the other hand, broad range of his procedural rights justifies conclusion that we face an inquisitorial model of the proceedings. .

Considering that the Minister of Justice is also the Prosecutor General with broad investigatory powers and equipped with means of direct control over his servant prosecutors, it can be assumed that in order to further discredit defiant judges, ancillary criminal proceedings could be opened, probably most often under provisions of a multipurpose tool of art. 231 of Criminal Code.

Politically motivated intrusions via disciplinary, criminal or administrative measures will certainly be applied more in respect of judges who deal with sensitive cases, e.g. a party to the proceedings being a politician (or someone from their surroundings) or a state-owned enterprise or a private company financially connected with a politician or the governing party or an action relating to the property of the State Treasury. “Special supervision” may similarly apply to disciplinary proceedings for a selected group of professionals, e.g. judges,

¹⁴⁸ Such actions can consist of worsening of working conditions of selected judges by depriving them of support of experienced office workers, limiting use of vacation time, as well as forms of additional occupation or education.

¹⁴⁹ Prof. Laurent Pech and Patryk Wachowiec, in their accurate report on the current situation of the Polish judiciary in the light of existing ineffective action of EU authorities, did not hesitate to call the new mode of disciplinary proceedings in respect of judges as “kangaroo disciplinary proceedings”.
<https://www.verfassungsblog.de%2F1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii%2F&usg=AOvVaw2d21DVlYKdq4E8lhdfQLKG>, accessed on 24.01.2019.

doctors¹⁵⁰ or finally, high -profile media cases with the prospect of producing political capital. The problem is that it is difficult to predict which case has the above-mentioned potential. That said, every judge can feel threatened. We can also assume that the Minister of Justice will still remain interested in judges objecting to violations of the Constitution and politization of the judiciary and especially activists of judicial organisations and judges engaged in legal education for children and young people.

Having regard to the fact that by the means here described, politicians gained direct influence over who is to be a judge and which judge is to be promoted as well as which judge should face disciplinary proceedings, as well as who is going to proceed with pre-trial and court proceedings. For this reason, it ought to be accepted that we are dealing with a carefully planned “production line” which potentially promotes only subordinated judges and inconveniencing work which in some extreme instances could result in dismissal of those judges who do not bend down under pressure.

As described in part VI of this report, recent measures such as e.g. unfounded transfer of a judge to a different division, “sweeping” through case files and personal files, summons for interviews or to produce written statements as a part of an investigatory procedure, unequivocally indicate that the Minister of Justice intends to use those means to the fullest and that he intends to interfere with proceedings (no other interpretation is available for the situation in which judge Ewa Maciejewska was called before the Disciplinary Officer and her files “swept” through just because she had referred a question for a preliminary ruling to the CJEU, and the disciplinary proceedings against Igor Tuleya were opened on the same grounds).

What is even worse, due to limitations placed on authority of the judicial organisations accompanied by politization of the National Council of the Judiciary, intimidated judges cannot count on an institutionalised support apart from independent media, judicial associations or non-governmental organisations. Unfortunately, members of the judicial associations who are most actively advocating independence of the judiciary need to consider that disciplinary proceedings under the false pretence of their politicization can be opened against them.

Attention must also be drawn to the consequences of the “great reform” of the justice system for an ordinary citizen. A question can be asked: if the described means of harassment are to be applied to a reasonably low number of judges dealing with particularly sensitive cases or those safeguarding judicial independence, can we refer the entire judicial system as “rotten”, thus, detrimental to the norms of protection of right and freedoms of the people? Unfortunately, to a question thus formulated, only an affirmative answer can be given due to the “freezing effect” on judges, achieved by some soft and harsh means of intimidation. A judge’s discretion in an adjudication process should not be constrained by external factors irrelevant to the case. Every case shall be adjudicated entirely on merits and applicable provisions of law, according to a judge’s knowledge, experience and conscience. Judicial impartiality ends at a point where provisions which ought to safeguard judicial impartiality are formulated so that before a judgment is passed a judge has to weigh which outcome

¹⁵⁰ Indicated by the establishment of bodies dealing with criminal proceedings in cases of medical errors, created on unsubstantiated merits, within the District Prosecutor Offices.

would be more beneficial to their own professional career path. A situation is even worse if, in fear of potential repercussions, a judge starts to hesitate whether to pass a righteous judgment. The effect of squashing institutional safeguards for judicial impartiality is that the people will lose confidence that judges can adjudicate entirely on merits. A vision of a state in which judges are either appointed by the political power, or are subject to surveillance and intimidation conducted in violation of the right of defence by means of disciplinary and criminal proceedings, constitutes a real threat to the rights and freedoms of citizens in Poland.

Moreover, the measures described on in this report result in the Polish judiciary ceasing to meet the criterion of independence, freedom from external pressure, and the Minister of Justice representing a political factor. A general evaluation of the Polish justice system, subsequent to implementation of the changes earlier discussed, does not satisfy the criteria of Article 47 and 48 of the Charter of Fundamental Rights and Freedoms as well as Article 6 ECHR, does not guarantee the right to a fair trial before an independent and impartial tribunal. The assessment is certainly substantiated by the decisions of the Courts in Strasbourg and Luxembourg. Should the strict position of the Polish government remain unaltered, the consequences of those judgment would mean that our country would be ordered to pay financial penalties and the State Treasury liable to compensation. Assuming that the position of the Polish government is not varied by the penalties then, the future holds a potential for Polesis as, on the long run, it would not be possible for Poland to remain a member of the European Union in circumstances of an ongoing and systematic violation of the fundamental values on which the European Community is build, making the Polish legal system unable to guarantee the level of protection of civil rights and liberties comparable to other EU countries.

It would probably come as a surprise for someone less versed that such degree of political control over the disciplinary proceedings with only soft, administrative measures of harassment being imposed on judges, that politically motivated disciplinary procedures against judges until now have not produced any spectacular results. Especially the proceedings against any of the “defiant” judges have not been concluded by a spectacularly harsh penalty, such as transfer to a different office or dishonourable discharge from the judicial office. It is partially because the applicable provisions have been implemented relatively recently and the new institutions responsible for disciplinary proceedings freshly established and have not had time to “gain speed”.

Nonetheless, the author of this report is of an opinion that the key factor halting the dynamics of criminal and disciplinary proceedings against judges is provided by the ongoing proceedings against Poland before the CJEU, on application of the European Commission, as well as the preliminary ruling referred to by the Polish courts. In a situation where 75% of society supports Poland’s membership of the European Union, entering into an open conflict with the institutions of the European Union, and the CJEU in particular, during a year of parliamentary elections would be too risky for the ruling power. Similarly, an escalation of ungrounded and ostensibly political disciplinary proceedings against judges, especially if concluded by dishonourable discharge from the judicial office, could fuel the existing conflict.

Therefore, it seems that until the Parliamentary elections, that is, October or November 2019, the defiant judges will face mainly “soft” disciplinary actions, similar to the

current ones, however, probably more numerous, in a form of summons to be examined as witnesses, requests to provide written statements under the investigatory procedure or, finally, “sweeping” through the files of adjudicated cases, or alternatively personal portfolios. It can be proportionally compared with the Middle Ages practice of “showing the tools of torture” before a torturer begins. Considering the ongoing position of a definite majority of judicial organisations, doubts arise in respect of whether application of the current disciplinary measures, even if accompanied by means of administrative harassment, would suffice to take political control over the judiciary this year.

These speculations do not mean that the new mode of disciplinary proceedings against judges, created with such significant effort and amount of funds, which – from the legislative and organizational point of view - has already achieved full operational capacity, would not be fully implemented should “more convenient circumstances” arise. Experience proves that if one buys an axe and spends time sharpening it diligently, it is not done to just hang it on a wall. Even if that was to happen temporarily the axe will be reached for at the first opportunity.

About the author:

Dariusz Mazur is a criminal court judge who currently holds the position of Chief of the Third Criminal Division of Regional Court in Cracow. He is also the spokesman of the Association of Judges "Themis" (the second largest association of judges in Poland) . He specialises in international co-operation in criminal matters. As a lecturer on these matters he works with the Polish National School of Judiciary and Public Prosecutors, and with the European Judicial Training Network (EJTN). In 2016 he was honoured with the title of European Judge of the Year 2015, which was granted by the Polish Section of the International Commission of Jurists (ICJ) for the statement of grounds for the decision concerning the refusal of extradition of Roman Polański to the USA.

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

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