

# Description of the Situation of the Judiciary in Poland

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The following is a presentation given by Judge Bogdan Jędrys at the event ‘Retsstaten under pres’ (the *rechtsstaat* under pressure), arranged by the legal policy think tank Forsete and the union of Danish jurists and economists Djøf, held at the Danish Parliament on 6 December 2021.

The presentation concerns the situation of the judiciary in Poland vis-à-vis the ongoing rule of law crisis in the country. Considering its thematic relevance for this special issue, as well as its ongoing relevancy to the international legal community, the Editorial Board of Retskraft has decided to publish it in full here.

## Structure of my talk

- I. Political background that exists behind the current situation of the Polish judiciary.
- II. Systemic backslide of the independent judiciary in Poland.
- III. Landmark cases of Polish judges persecuted by the Polish current government.
- IV. Update on developments in Poland.

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## I. Political background that exists behind the current situation of the Polish judiciary

The nationalist-populist coalition of political parties led by Law and Justice won fully democratic elections in Poland in 2015.

At that time, a part of Polish society assessed the judiciary as having been ineffective, and judges as inaccessible and devoid of empathy.

Therefore, newly elected Politicians clamour for the reform of the judiciary. On top of that, they claim that this reform should be framed by politicians rather than experts, law professors, judges or members of the society itself. The rationale behind that is that politicians, as elected representatives of society, know better the real wishes of the people around the organisation of the judiciary.

The reform is widely advertised in the pro-governmental media as aimed at improving the efficiency of the judiciary and breaking up an inaccessible judiciary caste.

In reality, however, politicians in order to get more power, are trying to subordinate judges, undermining the rule of law and weakening the authority of independent judges in society.

In the nutshell, Law and Justice, according to sociological research and survey results, has decided to draw political capital from the denial of an independent judiciary and the rule of law.

## II. Systemic backslide of the independent judiciary in Poland

Let's take look at this issue in the chronological order

1. In November 2015, the new Parliament amended the Law on the Constitutional Tribunal. In December, the Parliament introduced changes to the Tribunal's procedure - for example by requiring it to hear the majority of cases at full bench and decide by a two-thirds majority, as opposed to a simple majority. The amendment also gave Poland's President and the Minister of Justice the right to open disciplinary proceedings against Tribunal judges.

2. In December 2016, the Parliament adopted a package of new laws on the Constitutional Tribunal, including a new procedure for the election of the President of the Tribunal, authorizing the President of Poland to appoint an ‘Acting President’, a term not recognized by the Polish Constitution. Also in December 2016, the President of Poland chose to appoint Julia Przyłębska to the post of the President of the Constitutional Tribunal. It worth to mention that Julia Przyłębska has been an ordinary judge who previously had dealt with social insurance cases on first instance level and who has had no jurisprudence and scientific achievements in the field of constitutional law but who does not deny her close social relations with the leader of the ruling party – the Law and Justice political party. Subsequently, the Tribunal was packed with two other people, former members of the Law and Justice party and Members of Parliament. The first one is widely known as the person who keeps on posting homophobic texts online. The second one, used to be a communist prosecutor who accused members of the anti-communist opposition in the 1980s.
3. In March 2016, changes were brought to the Law on the Public Prosecutor's Office which strengthened the competencies of the Minister of Justice. Under the amended law, the function of the Minister of Justice was merged with the Prosecutor General. He can give written instructions to all the public prosecutors concerning the content of any individual case they are dealing with.
4. In August 2017, an amendment to the Law on the System of Common Court entered into force. The law empowered the Minister of Justice to dismiss and appoint presidents and vice-presidents of courts, without requiring that a justification be provided (this was applicable during the first six months since the law came into force). In the period between 12 August 2017 and 12 February 2018, over 70 presidents and 70 vice-presidents of courts had been dismissed under the six-month transitional regime and the same number of new ones were appointed via fax messages from Minister of Justice (we call them ‘faxed presidents’). This law also created a new position of Disciplinary Prosecutor/Commissionaire for Common Courts. The post holder and his two deputies are directly appointed by the Minister of Justice for a four-year term. The Disciplinary

Prosecutor also chooses disciplinary prosecutors at the regional and appeal courts. The Disciplinary Prosecutor investigates possible offences of judges pursuant to the request of the Minister of Justice, president of an appeal or district court, college of an appeal or district court, National Council of Judiciary or on his own initiative. The Disciplinary Prosecutor for Common Courts was appointed by the Minister of Justice in June 2018.

5. In December 2017, amendment of the Law on the Supreme Court entered into force in April and July 2018, changing the retirement age of the Supreme Court judges. By lowering the retirement age for Supreme Court judges from 70 to 65 years, it aimed at - among other things - the forced retirement of 27 Supreme Court judges. The law also established two new chambers: the Disciplinary Chamber and the Extraordinary Chamber. The Disciplinary Chamber's members were to be elected by the National Council of the Judiciary and its 'lay judges' by members of the Senate.
6. In September 2018, the President of Poland appointed 10 new judges of the Disciplinary Chamber and in February 2019, the President of Poland appointed the heads of the two new chambers. Both new Chambers are widely regarded as unconstitutional since they are not envisaged in the Polish Constitution.
7. In January 2018, an amendment to the Law on the National Council for the Judiciary entered into force. The law gave Parliament the power to appoint the 15 judges that comprise the NCJ. The Polish Constitution, however, expressly limits the number of the members of the NCJ appointed by Parliament to six. On 5 March 2018, Parliament appointed the new NCJ members, 8 of whom are the new presidents or vice-presidents of courts appointed by the Minister of Justice since August 2017. The amendment of the Law on NCJ prematurely terminated the tenure of the previous NCJ members.
8. On 17 September 2018 the Board of the European Network of Councils for the Judiciary the Polish National Council of the Judiciary suspended the Polish NCJ on the grounds that it does not meet the requirements of the ENCJ in the area of independence from the legislature and the executive and thus does not ensure independence for the Polish courts and

judges and subsequently excluded Poland from the membership in the Network on the meeting in Vilnius, in 2021.

### III. Landmark cases of Polish judges persecuted by the Polish current government

After having talked about the law let's move on to case study.

#### Case 1: Fake patriotism

On the 2 July 2021 three former prosecutors appointed by the politicized National Council of the Judiciary and the President of the Republic of Poland to the disputed Disciplinary Chamber of Supreme Court, have made a decision to waive the immunity and suspend the President of the Labour and the Social Security Chamber of the Supreme Court. The formal reasoning behind this decision is the content of the case which the President decided 40 years ago that is before political transformation.

However, it seems obvious that the real goal is to eliminate the President from his duty in order to take over his cases and allocate them to newly appointed quasi judges.

It is worth mentioning here that the suspended President heads the Chamber of the Supreme Court which referred many questions to the Court of Justice of the European Union regarding particularly the observance of the rule of law in Poland. After the President having been suspended it will be easy to withdraw these questions and disregard the Court of Justice of the European Union decisions.

At the same time, as I mentioned above, the former communist prosecutor is promoted to the one of the highest positions in judiciary - judge in the Constitutional Tribunal - for his service to the Law and Justice Party. During the appointment procedure President of the State Duda claims him to be a real patriot.

My take on this case: *Consequently more and more Law and Justice party politicians emphasize patriotism as a main feature of the judge-to-be. However they mistakenly perceive patriotism as a service to the political party tinted with nationalist slogans with no regard to civil rights and the rule of law.*

### Case 2: ‘Le juge est la bouche de la loi’

On the 14 September 2021, the President of the Regional Court in Warsaw, the Disciplinary Prosecutor for Common Courts at the same time, ordered an immediate interruption of the judicial duties of the member of IUSTITIA judge of the Regional Court in Warsaw and file the request for instigation disciplinary proceedings against the judge.

The reasoning behind this decision is that the judge refused to adjudicate in a panel with a person appointed to the position of a judge with the participation of the neo-NCJ.

The judge who was suspended in the written statements justifying his position referred to a number of legal arguments and court rulings, in particular, he pointed out:

- that the Court of Justice of the European Union in its judgments C-824/18 and C-791/19 argued that that the present National Council of the Judiciary is not an independent body capable of initiating the nomination procedure for judicial position;
- moreover, the European Court of Human Rights in Strasbourg in the case of *Reczkowicz v. Poland* (application no. 43447/19) argued that in the context of the procedure of the nomination of judges, the National Council of the Judiciary did not provide sufficient guarantees of independence against the legislative and executive authorities.

My take on this case: *Politically affiliated Disciplinary Prosecutor imposes false take on judge as to be just a Montesquieu 'la bouche de la loi', with disregard to the widespread case law of European Courts on 'judicial speech' (see ECtHR cases: Baka v. Hungary [GC], § 165, Wille, § 64, Kudeshkina, § 94 or Di Giovanni and Poyraz).*

### Case 3: ‘The punishing arm of the party’

Now, I will try to present to you rationale which lays behind the intervention of American Bar Association in Igor Tuleya’s case:

Judge Igor Tuleya is a judge in the criminal division of the Regional Court in Warsaw. He has been publicly critical of the Law and Justice government’s reforms to the judiciary and has made numerous public statements calling for adherence to the rule of law and preservation of judicial independence.

In December 2017, Judge Tuleya adjudicated a complaint concerning discontinuation of an investigation by the prosecutor's office in a high-profile, politically sensitive case involving the lawfulness of a vote convened by the Speaker of the lower house of Parliament, who was a member of the Law and Justice party. Judge Tuleya allowed media representatives to attend the December 2017 hearing, where, in delivering the justifications for his ruling, he referred to evidence from the preparatory proceedings, including witness testimony.

The prosecutor present at the hearing did not object to the media presence at that time or to Judge Tuleya's reference to the evidence presented in his public decision.

However, in 2018, the deputy disciplinary officer for common court judges launched an investigation into Judge Tuleya's decision to allow journalists access to the proceedings. It was one of seven investigations opened by the deputy disciplinary officer involving Judge Tuleya in 2018 alone. At the same time, he was being repeatedly named and publicly criticized for his decision by PiS party members.

In February 2020, the National Prosecutor's Office sought permission to lift Judge Tuleya's judicial immunity from criminal prosecution in relation to the December 2017 proceedings. The Prosecutor's office alleged that Judge Tuleya failed to fulfill his duties and overstepped his authority by allowing the media to record the December 2017 session. The Disciplinary Chamber considered the request, in a closed hearing, on June 9, 2020 and refused to lift Judge Tuleya's immunity. The Disciplinary Chamber found that Judge Tuleya's decision to permit media recordings 'in no way' constituted overstepping the judge's authority as judicial discretion to admit media to such proceedings is explicitly authorized under statutory law. The Prosecutor's office appealed the June ruling.

On November 18, 2020, the Disciplinary Chamber overturned its first instance decision and granted the prosecutor's motion to waive Judge Tuleya's immunity. It also suspended him from professional duties for an indefinite period and reduced his pay for the duration of the suspension. There is no further appeal within the Polish court system and it appears that Judge Tuleya may now face criminal charges for exercising his judicial discretion during a proceeding in his courtroom.

The decision against Judge Tuleya poses a severe threat to the independence of the judiciary in Poland and undermines his individual rights. An independent judiciary is a core element of a democratic system of government that adheres to the rule of law. A key component of an independent judiciary is the immunity of judges from prosecution for judicial decisions. The National Prosecutor's quest to criminally charge Judge Tuleya – and the Disciplinary Chamber's revocation of his immunity – for a judicial decision made within the scope of his judicial discretion, goes against international and European standards on judicial independence. The numerous disciplinary inquiries and the Disciplinary Chamber's November 18 ruling also signal an escalation in the government's efforts to curb Polish judges' engagement in the public discourse surrounding the reforms and violate Judge Tuleya's freedom of speech. Furthermore, the proceedings before the Disciplinary Chamber concerning lifting Judge Tuleya's immunity do not meet international standards on the right to a fair hearing. The independence and impartiality of the Disciplinary Chamber has been called into question by the European Commission, and due to concerns about its impartiality and independence, the Court of Justice of the European Union suspended the Chamber's disciplinary jurisdiction on April 8, 2020.

Commentary by American Bar Association: *After having monitored the disciplinary proceedings against Judge Igor Tuleya the ABA Center for Human Rights highlights: since regaining power in 2015, the Law and Justice Party (PiS) has passed numerous pieces of legislation affecting Poland's judicial system. These reforms impact the scope of disciplinary liability of judges, the structure of and appointments within the judicial disciplinary system, and the applicable disciplinary procedures. The reforms have faced widespread criticism from international organizations and the European Union as they generally increase opportunities for overt political influence over the judiciary. Unfortunately, these concerns have been borne out in the instant case.*

My short take on this particular case: *Crucial in this case is that the judge has been held accountable for judicial decision rendered during the due legal process which undermines the foundation of an independent judiciary.*



## Krakow rebellion

Several weeks ago, 11 judges from the District Court in Krakow stated that they would not adjudicate in panels composed of judges with the opinion of the current National Council of the Judiciary. In the justification, Krakow judges argued *inter alia*:

- that the Court of Justice of the European Union in its judgments C-824/18 and C-791/19 argued that that the present National Council of the Judiciary is not an independent body capable of initiating the nomination procedure for judicial position;
- moreover, the European Court of Human Rights in Strasbourg in the case of *Reczkowicz v. Poland* (application no. 43447/19) argued that in the context of the procedure of the nomination of judges, the National Council of the Judiciary did not provide sufficient guarantees of independence against the legislative and executive authorities.

Three judges have already refused to adjudicate in such panels. The President of the Regional Court in Kraków reacted by transferring these third judges to other divisions and filing a motion to institute disciplinary proceedings against these judges due to the refusal to perform the duties of a judge. This retaliatory action will, of course, lead to excessive length in cases heard by these judges so far.

More and more judges from all over Poland declare their support for Krakow judges.

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To sum this point up, politically motivated disciplinary cases against judges in Poland concern the following actions of judges:

- public statements about harmful changes in the justice system,
- issuing a ruling based on the application of European law,
- implementation of the CJEU judgment of 19 November 2019 (questioning the status of newly appointed judges).

## IV. Update on developments in Poland

Several weeks ago, The Constitutional Tribunal headed by mentioned above Julia Przyłębska handed down decision as follows;

Article 6 of the Convention ... as far as it includes the Constitutional Tribunal in its definition of a court, is not compatible with the Polish Constitution...

Please do allow me to quote article 6 of the Convention European Convention on Human Rights:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

This provision of the Convention is one of the greatest achievements of European legal culture, with the above mentioned decision this achievement was dismantled by a person with basic legal education.

In the end, I would like to tell a short anecdote that illustrates the determination of Polish independent judges.

During one of the demonstrations in Krakow, I had a chat with one of the suspended judges. He told me: You know Bogdan, I am surprised that she have suspended me from my duties, she knows that I run marathons, these real marathons over 40 kilometres and I gave up only once when I broke my leg while running ...

I explained that when he was mentioning the person who suspended him, he referred to the current president of Krakow Regional Court. One of the most trusted people of the Minister of Justice Ziobro, who was a basic level judge having been promoted by Minister Ziobro to this position and appointed as a member of the now excluded from European Network, Polish National Council for the Judiciary, and a big gun in the Polish School of Judiciary and Prosecution.

I would like to finish this short article with the significant words by President Ursula von der Leyen, who made herself clear:

Justice systems across the European Union must be independent and fair.  
The rights of EU citizens must be guaranteed in the same way, wherever they  
live in the European Union.

Judge Bogdan Jędryś  
Krakow Regional Court  
IUSTITIA