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Current situation of the Polish judiciary.

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I. Introduction.

On 25 October 2015, a parliamentary election was held in Poland from which the then opposition party Law and Justice (in Polish: *Prawo i Sprawiedliwość, or PiS; further referred as "L&J"*), led by Jarosław Kaczyński, emerged as the winner. The party had campaigned intensely using the slogan of "Good Change", which it said it was going to bring to Poland. The "Good Change" policy was to involve reforms and improvement in a number of areas of public life which had until then been neglected, and to make it possible for Poland "*to rise from its knees*" in international relations, including with the EU. According to Jarosław Kaczyński, the parties that had ruled in Poland until then had been elements of an alleged post-communist pact which had prevented that kind of thorough reform. He is also an author of a theory known in Poland as "impssibilism" according to which no serious reform of Polish society and institutions is possible due to the system of checks and balances and due to "*the vested interests of liberal elites and foreigners intent on exploiting the country*". The type and number of legislative actions taken so far certainly suggest that the justice system is one of the key targets for the present government.

In the Polish voting system a large portion of the votes for the political groups that do not reach the parliamentary threshold in effect accrues to the party which wins most votes, and thus the approximately 38% of the vote gave the party an absolute majority in Parliament. Although L&J only has a small majority of seats, the efficiency of the party's whips has turned the lower house of the Sejm (the Polish Parliament) into a highly efficient voting machine held firmly in the hands of the ruling party. Keeping in mind the fact that the party that won the election has created a single-party government, and the fact that the office of President of Poland was taken in August 2015 by Andrzej Duda, the Law-and-Justice-backed candidate, it is easy to realise that the ruling party is actually wielding complete legislative and executive power.[1] We note at this point that the political situation in Poland differs from that in Hungary under Viktor Orban in one important respect: with only a slim majority in Parliament (234 of the total number of 460 seats in the lower house) and being unable to form a coalition, L&J is far from holding the qualified majority that would allow it to change the Constitution.[2] The present Constitution states that Poland is a democratic state ruled by law,

[1] During his first year in office, the President of Poland neither vetoed nor referred for constitutional review any of the bills proposed by L&J.

[2] According to Article 235.4 of the Polish Constitution, *"A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies..."*

and its political system is strictly based on the tripartite separation of powers, with an independent judiciary and an extensive catalogue of civil rights and freedoms. Lacking the majority needed to change the Constitution, L&J decided to further changes to the system by way of adopting legislative acts, caring not at all for their compliance with the Constitution. Consequently, the Constitutional Tribunal thus has to become the first natural chief enemy, so to say, of the ruling party, as it stands in the party's way to unbridled autocracy.

II. General overview of legal changes undermining independence of the judiciary.

II.1 Hostile takeover of the Constitutional Tribunal (CT).

In December 2016, the ruling party took political control over the CT which was achieved in violation of law. Before that, three judges were correctly elected by previous Parliament, but not sworn by Polish President Duda while 3 others elected by new Parliament were not admitted to the bench by CT President Rzepliński (so called judges-doublers). In March and August 2016 the CT found so called remedial statutes adopted by new Parliament unconstitutional, but the government refused to publish rulings in the Official Journal of Law.

Polish Constitutional Tribunal was subordinated to executive power after illegal and even unconstitutional hostile takeover. What does it mean in practice? One of Polish aphorists said: "Even illegality can be codified". That is happening in Poland currently, which means that:

1) the very small Law and Justice (L&J) majority of seats in Parliament is able to adopt any law, even unconstitutional,
2) it is even worse, the CT was turned from the effective guardian of the Constitution into one of the most active instruments of destruction of the rule of law in Poland in the hands of governing party, which supresses independence of the judiciary.

Examples:

- the request of January 2017 by the General Prosecutor Zbigniew Ziobro to examine the constitutionality of the 2010 Sejm Resolution on the selection of the 3 "old" CT judges – still pending case, applied to justify not admitting to the bench three "old" judges,
- the request of April 2017 by the General Prosecutor to examine the constitutionality of the Act on National Council of the Judiciary (NCJ) from 2011 in its part concerning selection of the 15 judges – members of the Council and their terms of office – resolved in favor of the L&J, afterwards applied to supporting termination of terms of office of the members of "old" NCJ,
- Judgment of 25 March 2019 which legalized the NCJ:
  - NCJ don't have to be independent as it's not a court (paradoxically the CT accepted that the NCJ shall safeguard judicial independence, it nevertheless concluded that NCJ do not have to be independent itself),
  - judges-members of NCJ can be appointed by the parliament as the Constitution says that its 15 members must only be chosen "among judges" but not "by judges" – such interpretation undermines the very nature of NCJ and makes nominating proceedings politically controlled as well as ignores a provision of the Constitution that allows the Parliament to elect only 6 members of the NCJ (Art. 187 (1)),
  - right to appeal against negative opinions of the NCJ concerning candidates to the Supreme Court (SC) to the Supreme Administrative Court is unconstitutional, because KRS is not an administrative body and its proceedings are not "administrative cases".

II.2 Political subordination of the Prosecutors Office (PO).

a) In April 2016 the governing camp took political control over the public prosecutor office which was achieved by combining functions of the Minister of Justice and Public

Prosecutor General. This solution has been accompanied by a significant increase of his investigative powers. Currently, the Public Prosecutor General has, in particular, the power to:

- to issue binding commands, including with regard to the content of particular procedural steps in individual cases,
- to overrule or change a decision of a subordinate prosecutor,
- to take over the cases conducted by subordinate prosecutors,
- the General Prosecutor – Minister of Justice in an arbitral way arbitral appoints the superior prosecutors (instead of competition procedure applied before), accompanied by exchange of the top prosecutors under pretext of reorganization,

the result is an image of the Public Prosecutor's Office as potentially entirely disposed towards the ruling camp.

b) Extending the powers of the Public Prosecutor General accompanied by solutions as:

- a significant amount of freedom in collecting and using operational materials which result from the telephone tapping (substantive reduction of court's scrutiny),
- the wide admissibility of evidence collected in illegal way, which arouses deep concern from the point of view of protecting freedom and civil rights.

c) Creation of Internal Affairs Department of the State Prosecution Service at the very top of Public Prosecution Office, which aim is to '*conduct and supervise preparatory proceedings in cases of intentional crimes prosecuted by public indictment, committed by judges, prosecutors, trainee judges or trainee prosecutors*'.

During more than 2 years of its operation, having examined over 1100 complaints and files, there are only 7 proceedings against a specific individual, 5 of which apply to prosecutors and 2 to judges. Given that Poland has approximately 10,000 active judges and over 6,000 prosecutors, such a number of proceedings should be considered as insignificant. Establishment of such a body, lacks substantive justification. Therefore, it could not be regarded as anything but an attempt to harass judges and prosecutors.

II.3 The collapse of a new National Council of the Judiciary (NCJ) as an organ protecting judicial independence.

The National Council of the Judiciary is a collective body responsible for protecting the independence of judges and courts in Poland. It consists of 25 members: 15 judges, 4 members of lower house of Parliament and 2 Senate members chosen by the lower chamber of Parliament and the Senate, the President of the Supreme Court, the President of the Supreme Administrative Court, the Minister of Justice and a representative of the President.

The Council has rights guaranteed by the Constitution, which include, the right to choose candidates for judges as well as candidates for higher judicial positions and present them to the President for approval, the right to set out the rules of professional ethics for judges, the right to express opinions with regard to legal acts concerning judiciary and to challenge them to the Constitutional Court, the right to commence disciplinary proceedings against judges.

Unfortunately, in March 2018, this body was taken over by the ruling party by changing the mode of election of the judges-members of the Council. Before that, the judges-members were elected by the judges' self-government bodies from among the judges, now they are elected from among judges by the Parliament in which "Law and Justice" has an absolute majority. Currently Law and Justice controls 14 votes in the 25-member Council, which adopts resolutions with absolute majority of votes.

NCJ, similarly like the CT was turned from the effective guardian of judicial independence into one of the most active instruments of destruction of the rule of law in Poland, which supresses independence of the judiciary. Examples:

- as a rule the new NCJ rejects the judges who apply for promotion who are the best evaluated and recommended by judges inspectors and assemblies of local courts; instead the new NCJ promotes judges with poor professional achievements, who guarantee loyalty to newly nominated presidents of court. In one of it's opinions concerning such a loyal candidate for promotion the new NCJ stipulated: *"the fact that the candidate has the high rate of judgements overturned by the second instance court proves his independent way of thinking*". I would add: way of thinking independent from professional knowledge and logical thinking.

  The paradox is that personal policy of the neo NCJ is so controversial that some of its resolutions concerning assessment of judges who applied for promotion have been recently overturned by the newly created Chamber of Extraordinary Complaint and Internal Affairs of the SC,

- Competence of establishing the Rules of Judicial Ethics became very dangerous in the hands of the current, politicised NCJ. In December 2018, the new NCJ passed a resolution, according to which it is going to prevent judges from wearing T-shirts with a distinctive, three-coloured word 'Constitution', worn by many judges as a declaration of their support for upholding the rule of law and independence of the judiciary. This enables disciplinary responsibility of judges wearing such t-shirts;

- on 9 November 2018, the NCJ published a statement declaring that the President of the Criminal Chamber of the SC, Stanisław Zabłocki, is 'unworthy' of his judicial office, as he enforced the Order of the CJEU of 19 Oct. 2018 on the adoption of the interim measures and, having been previously forced to retire prematurely, returned to the office of the President of the Criminal Chamber of the SC and cancelled the sessions scheduled by the newly appointed judge of this Chamber,

- long list of public statements of particular members of current NCJ:

  - on 3 July 2018 Jarosław Dudzicz, a judge-member of neo NCJ on TT: *"I don't think that ECJ has competencies to rule that judges retired by the new law will be in fact – active judges"*,

  - on 6 August 2018 Maciej Mitera - the spokesperson of the neo NCJ stated, contrary to the ruling of the Supreme Court, that the NCJ is not the addressee of suspension of application of the Act on Supreme Court

  - on 27 August 2018 Maciej Nawacki, another judge-member neo NCJ, during tv interview, commenting preliminary reference of Polish Supreme Court to CJEU stated as follows: "*If someone is breaking the law, not obeying the law in a drastic way, breaking Polish constitutional order, such person shall be subjected to disciplinary liability*". Threating judges of SC for referring preliminary request constitutes another interesting example of creative approach of a member of neo-NCJ to the task of protection of judicial independence,

  - on 12 February 2019, Nawacki on TT: "*ECJ considers already non-existing law, which did not make any legal effect, for the money of EU taxpayer. I have to say – the council of historians of law*",

  - on 2 March 2019, Dudzicz, on TT: *"ECJ has no competences to assess the lawfulness of PL constitutional bodies, moreover, it has no right to assess their concordance with constitution"*.

  - on 12 March 2019, Dudzicz (TT): "*There are many myths around EU law, one of them is absolute priority of ECJ, as if it was super-court in one European super-country*",

II.4 Changes in law on the organization of ordinary courts.

The amendment of the Law on the Organization of Ordinary Courts of August 2017 gave the MoJ-General Prosecutor exclusive power to appoint Presidents of all levels of common courts (without any control of judicial self-governing bodies). The new law also authorised him to dismiss, in an arbitrary manner, all presidents and vice-presidents of ordinary courts within 6 months from the moment of entering into force, which enabled exchange of about 160 presidents and vice-presidents of courts. The presidents have a significant influence on a judge's working conditions (by granting annual leave, allowing the judge to take part in training or additional paid work, making decisions on the transfer of a judge between divisions of the court). Such powers of the presidents, combined with their direct dependence on the MoJ (to whom they owe the judicial office and by whom they can be dismissed on undefined grounds) mean that they can become instruments for applying pressure on politically inconvenient judges.

Moreover, the new law extended the scope of direct or indirect Minister's administrative supervision over the courts achieved at the expense of limitation of competences of the judicial self-government. For instance, an appeal against changes in the scope of a judge's duties cannot be filed with the Council of the given court, but needs to be filed with the politicized neo NCJ. The Council has also lost the power of a binding objection to the appointment of a given candidate to the post of president of the court's division and has been deprived of the right to object to appointments of judge-visitors, a right that has recently been transferred to the MoJ– Prosecutor General.

Furthermore, given that the MoJ currently has the power to appoint court directors at his own discretion and not through contests, the possibilities of indirectly harassing individual judges become even greater. By managing the administrative personnel, the court director, is able, e.g. to deprive the judge of a good court recorder or assistant, assigning him an inexperienced person instead, or to move a judge to an office which he will share with several people.

A judge 'thrown' into new and unfamiliar duties by the president of the court and subsequently deprived of decent working conditions by the court director, is more likely to pass an erroneous judgment or prolong the proceedings, which is, in turn, only a step away from initiating disciplinary proceedings against him (judge Waldemar Żurek).

This changes furnished the Minister of Justice – Prosecutor General with various 'soft' forms of harassment and repression of inconvenient judges.

II.5 New chambers of the Supreme Court.

The new Act on Supreme Court created two entirely new Chambers which all members were chosen by the new politicized NCJ (the only one requirement to become a member is 10 years of experience in any legal profession, so the candidate do not have to be a judge):

- Disciplinary Chamber,
- Chamber of Extraordinary Complaints and Public Affairs.

Taking into account that the Disciplinary Chamber of the SC has its own President (independent from the First President of the Supreme Court), own budget, office, spokesperson, rules of procedure it becomes obvious that it is a separate, specialized court, just acting under the auspices of the SC. Creation of specialized court, not included in Polish Constitution, is admissible only in times of war[3]. That is why the Disciplinary Chamber of the SC is not a court "provided by law" in the meaning of art. 6(1), as well as art. 47 of ChFR[4].

The Disciplinary Chamber of the Supreme Court stands for:

[3] See art. 175 of Polish Constitution.

[4] See ECtHR judgment of 12 March 2019 in *Guðmundur Andri Ástráðsson v Iceland* (application 26374/18).

- the second instance court for disciplinary cases of judges of the ordinary courts and members of other legal professions (prosecutors, attorneys and notaries),
- the first instance disciplinary court for disciplinary cases of the judges of the SC,
- the second instance court for disciplinary cases of the judges of the SC,
- the second instance court recognizing appeals from resolutions of the NCJ.

Creation of Chamber of the Extraordinary Complaint and Internal Affairs gives the executive power control over legal scrutiny of elections and referendums, over energetic and telecommunication sectors, which causes direct endangerment for preserving democracy and the rule of law in Poland.

II.6 National School of Judiciary and Public Prosecutors [Krajowa Szkoła Sądownictwa i Prokuratury - KSSiP].

Legal training in the School is supervised by Minister of Justice – General Prosecutor, who:

- appoints The Director of the KSSiP– without a contest, following a non-binding opinion of a politicized NCJ and a Prosecution Council subordinated to the Prosecutor General (Art 12 of the Act on the KSSiP),
- appoints and dismisses all members of the Programme Council of the KSSiP (no more than 13), whereby he personally or indirectly (through the public prosecution office) nominates 6 candidates to be members of the Council (Art. 6),
- the contest for articling students is organized by a commission appointed in whole (directly or indirectly) by the Minister of Justice (Art. 20),
- the lecturers of the KSSiP – receive an opinion of the Programme Council, although the Minister of Justice may object, which effectively blocks the ability of the person to whom this applies to hold a post of lecturer (Art. 53b). On the basis of the Act on the amendment to the Act on the KSSiP – verification of the current lecturers was done,
- judge examinations are organized by a 10-person examination committee, all nominated by the Minister (personally -8, indirectly - 2). Furthermore, an "observer" from the Ministry participates in the work of the Commission (Art. 32).

III. <u>The black PR campaign against judges.</u>

III.1 The defamation „billboard campaign" against the judiciary.

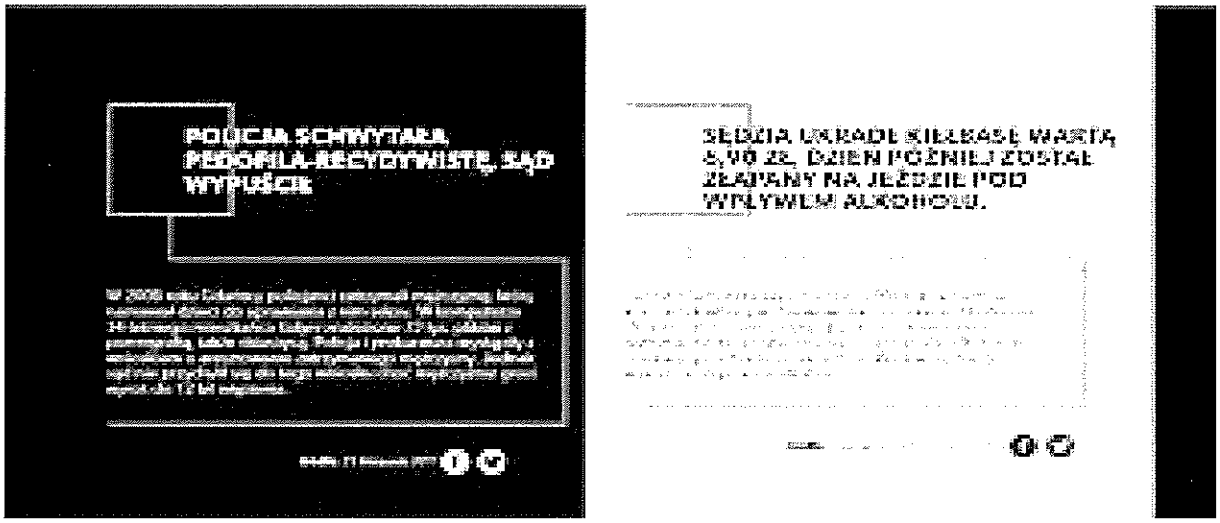
On 8-th of September 2017 the great billboard/TV/press/Internet negative campaign addressed against Polish judges began. The cost of the campaign was more than 2 mln EURO. It was conducted by Polish National Foundation financed by 17 biggest Polish state owned companies controlled by managers who are nominees of the governing party. In spite of the fact that the statutory objective of the Foundation is to promote Poland abroad, the aim of this media campaign was to depreciate authority of the judiciary inside Poland.

The government said it was designed to promote the great reform of the system of administration of justice. In fact it was the black PR action run by the ruling party showing Polish judiciary in distorting mirror by describing, in a very tendentious way, situations of disciplinary proceedings in respect of some judges and real or alleged court mistakes. While some of described situations are true, the others are manipulated or even fake.

One of the "true" examples concerns the judge who stole trousers from the shop. The situation by itself has happened, however, the website doesn't mention that the judge, at the moment of theft, has been retired for many years and he was mentally ill.

For the purposes of the campaign judges are described as a "privileged caste". In terms of colors the campaign is designed in black and white. The judges are situated on the black side and depicted as classic examples of lack of competence, corruption and indolence.

Example of the billboard from the campaign at the highway.


Internet part of a billboard campaign.

III.2 Activity of a Prime Minister Mateusz Morawiecki.

Numerous speeches (Dec. 2017 – interview for Washington Examiner, Dec. 2017 - meeting with President Macron, Jan. 2018 – interview for European journalists, April 2019 statement for Le Figaro, April 2019 – interview at the New York University) including two main thesis:

- Polish judiciary is a part of post-communist pact – complete absurd, as the average Polish judge is 42, so 30 years ago (change of a political system) was 12,

- Polish judges are corrupted - equally ridiculous – according to the data submitted by the Supreme Court in the period between 2007 and 2017 only one judge was disciplinary sentenced for taking a bribe – the judge was removed from the profession.

May 2018 – interview for "Polish newspaper" – PM suggests that among judges of Kraków Regional Court there is an "organized crime group".

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

IV. Distinctive features of The new mode of disciplinary proceedings in respect of judges.

Creation of the SC Disciplinary Chamber is accompanied by introduction of the entirely new mode of disciplinary proceedings with main features as follows:

- judges of the first instance disciplinary courts are elected by Minister of Justice (the General Prosecutor and the member of the political party currently in power as well),
- MoJ appoints the Main Disciplinary Commissioner for Judges and his 2 deputies,
- the Main Disciplinary Commissioner for Judges appoints local disciplinary commissioners at the regional and appellate courts from among 6 candidates elected by assemblies of courts,
- MoJ can appoint a disciplinary commissioner for a particular judge. He can be appointed not only from among judges, but also from among public prosecutors, to whom the minister gives personal instructions,
- the MoJ is also empowered to object a decision of a disciplinary commissioner on a refusal to initiate disciplinary proceedings. Such objection is binding for commissioner who is also bound by Minister's instructions in respect of the further steps in the disciplinary proceedings; in this way a particular judge can become a perpetual suspect,
- it is permissible to carry out a hearing in disciplinary proceedings in justified absence of a judge or her/his counsel, which undermines the right to defence,
- the new law explicitly allows to apply evidence obtained without judicial control and in violation of laws, including evidence obtained as a result of operational control of telephone conversations,
- the new law provides for possibility to repeal a judge's immunity under the accelerated and simplified 24-hours mode of procedure,
- the new law eliminates application of the prohibition of *reformatio in peius* within appellate disciplinary proceedings. Contrary to classical criminal proceedings, this means that a person acquitted by the first instance disciplinary court can be found guilty by the Disciplinary Chamber of the SC without the possibility of the remedy in a the normal course of the proceedings (only right to "horizontal appeal" to another bench),
- extension of the limitation periods in respect of judges committing petty offences,

The solutions described above result in introduction of an inquisitional model of disciplinary proceedings against judges and representatives of other legal professions, which politicized these proceedings as well as restricted procedural rights of the defendants.

V. Review of the disciplinary & criminal proceedings taken up to date.

1) Disciplinary activities **in response to public criticism of the pseudo-reform of the justice system** by the judges (for media activity of judges Żurek, Frąckowiak, Markiewicz, Przymusiński and Barańska-Małuszek). Judge Lutostańska, who demonstrated her commitment to the rule of law by wearing a T-shirt bearing the word 'constitution'. The explanatory proceedings with respect to Judge Zabłudowska because of the acceptance of the 'Equality Prize' awarded to people acting in support of human rights.

2) **educational activities of judges for children and youths**, involving simulations of court hearings or giving lectures on the Constitution (judges Krupa, Markiewicz, Przymusiński, Barańska-Małuszek, Frąckowiak, a retired prosecutor Wojciech Sadrakuła).

3) **intimidating judges in order to silence the self-governing judicial bodies**:

- the summoning of over 100 judges of the Regional Court and Appeal Court in Kraków by the Internal Affairs Department of the State Prosecution Service to be examined as witnesses was officially arranged in connection with the investigation on the ill-treatment of the former President of the Appeal Court in Kraków while he was in prison,

- the Deputy Main Disciplinary Commissioner 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 passed by the assemblies of those courts together with the disclosure of the minutes of the meetings, as well as the attendance list and the names of the authors of the resolutions and information who distributed it by email. The resolutions of these courts criticized, among other things, the activities of the neo NCJ, and the unfounded disciplinary and criminal proceedings against ordinary court judges.

4) **defense of the 'good name' of the newly-established disciplinary authorities** - the explanatory proceedings initiated with respect to Judge Sławomir Jęksa and Judge Alina Czubieniak, who criticized the steps taken with respect to them by the Deputy Main Disciplinary Commissioner and the Disciplinary Chamber of the SC. How else is an accused to defend himself if his written statement sent to the disciplinary authority in response to that authority's summons (which was not publicized and did not include arrogant and slanderous content) constitutes grounds for initiating further explanatory proceedings with respect to him? What is more previously the "local" disciplinary officer at the Appellate Court in Poznań refused to commence disciplinary proceedings in respect.

5) **the largest number of disciplinary proceedings and criminal prosecutions has been taken up with respect to the purely judicial activity of judges**:

- summons addressed to judges, who referred requests for preliminary rulings to the CJEU, ordered by the Deputy Main Disciplinary Commissioner, to provide written explanations, namely Judges Igor Tuleya, Ewa Maciejewska and Kamil Jarocki. The deputy commissioner believes that the request for preliminary rulings could have constituted a 'judicial excess' as resulting in overly long proceedings.

It should be borne in mind that in Oct. 2018 the MoJ applied to the CT for the declaration of non-compliance of Art 267 TFEU with the Polish Constitution to the extent to which it affords the right to refer preliminary requests concerning the organization of the judicial authority. The disciplinary measures are clearly politically driven and aim to invoke a 'freezing effect' deterring courts from submitting further requests for preliminary rulings contesting changes to the Polish justice system.

- criminal proceedings in respect of judge Agnieszka Pilarczyk, who acquitted doctors accused of a medical error, allegedly leading to the death of the father of the current MoJ,

- criminal proceedings relating to judge Wojciech Łączewski who sentenced Mariusz Kamiński, the former head of the Central Anti-Corruption Bureau to 3 years custodial penalty for the abuse of his authority, after which Mariusz Kamiński was pardoned by President Andrzej Duda and currently holds the post of a Minister – Coordinator of the Secret Service,

- criminal prosecution initiated with respect to the superior judges in Szczecin, who had assigned requests to apply preliminary custody, after the court refused the prosecution's motion to take the accused into custody for acting to the detriment of the 'Police' chemical works. Significantly a report of alleged mismanagement on the part of the former board, was submitted to the prosecution service by the new management board, affiliated with L&J party.

- groundless disciplinary proceedings initiated against Dominik Czeszkiewicz and Sławomir Jęksa who acquitted people protesting against the abuse of power by "Law and Justice".

VI. Review of typical categories of „sensitive cases".

Politically motivated interventions with the use of disciplinary or criminal proceedings or administrative measures will be applied to judges handling sensitive cases, such as a case in which a party is a politician (or someone from the political environment) or a state-owned enterprise or a private company financially connected with a politician or the ruling party or an action related to State Treasury property. Judges who refer preliminary requests to CJEU, or those, who refuse to accept Prosecutor's motions to apply preliminary custody (Police case, judge Czubieniak's case) or who decide in favor of foreigners[5]. Judge Czubieniak's 'fault' was to decide in favor of the Constitution and EU law. 'Special supervision' may be applied in cases widely presented in the media where it is easy to gain political capital.

The problem is that it is difficult to predict which case has such potential. Every judge can feel threatened. Judges protesting against a breach of the constitution and the politicization of the judiciary, especially activists of judicial organizations and judges involved in legal education for children and young people, will also continue to be of interest to the MoJ.

VII. Measures applied in respect of defiant judges.

VII.1 "Soft" measures:

- unjustified transfer of judges between divisions (judge Żurek - ex spokesman of NCJ), – administrative measure applied by president of court,
- deteriorating of working conditions by depriving judge of proper administrative service (judge Żurek), namely the experienced court clerk and assistant of a judge – administrative measure applied by directors and presidents of courts,
- objecting motions for additional professional activity of judges (according to the Act on the organization of ordinary courts – administrative measure applied by the Presidents of courts – applied by the President of the court in Katowice (on the other hand the newly nominated President of Regional Court in Włocławek let President of District Court in Włocławek for paid seasonal work of collecting the grapes in France, which can be assessed as a kind of work undermining judicial dignity),
- liquidation of division of a court in order to deprive particular judge of function (judge Przymusiński – spokesman of "Iustitia"), which lead to creation of overly big and

[5] In his famous speech of September 2018 Jarosław Kaczyński revealed that one of the reasons of great reform of the judiciary is the ojkofobia (hate to homeland) among judges, which concerned judges who decided in favor of German citizens in estate cases concerning grounds in former Prussia.

completely dysfunctional division which is bigger than some entire regional courts – administrative measure within the competence of MoJ,

- 'trawling' through their case files and personal files – applied by inspecting judges or disciplinary officers (in respect of judges Frąckowiak, Maciejewska, Brazewicz),
- summoning judges to questioning within disciplinary proceedings (judges Markiewicz, Przymusiński, Brazewicz) or criminal proceedings (more than 100 judges-members of Kraków court judges),
- summoning to submit written statements in explanatory proceedings (the most common form so far, applied in respect of judge Tuleya, Maciejewska, Jarocki),

Formally explanatory proceedings is not a proper disciplinary proceedings (which starts at the moment of presenting judge with charges in writing), but rather a kind of collecting of information, which helps to decide if proper disciplinary proceedings shall be commenced.

> *Article 114. § 1. The disciplinary commissioner shall take up explanatory activities (...)* ***after initially establishing the circumstances that are necessary to conclude that there are signs of a disciplinary offence*** *(...).*
>
> *§ 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 (...).*
>
> *§ 3.* ***If grounds arise for instituting disciplinary proceedings after conducting the explanatory proceedings, the disciplinary commissioner shall initiate the disciplinary proceedings and prepare disciplinary charges in writing.***

The Main Disciplinary Commissioner, in January 2019, answered the Amnesty International that the independent media disseminate false information about "pending disciplinary proceedings" in respect of particular judges in the situation in which the disciplinary officer initiated only explanatory proceedings. From the formal point of view he was right, however, in the state-owned media it is disseminated by highlighting the name of a judge and the type of alleged offence, which is a kind of stigmatization, not to mention that explanatory activities have a potential of instigating proper disciplinary proceedings.

Terms in the summons such as '*potential judicial excess*' or '*breach of the appropriate course of proceedings*' unambiguously indicate that the activities being taken up may still be heading towards disciplinary against the judges. Therefore, the assertion that none of the summoned judges has any cause for concern is a case of simple pulling the wool over their eyes.

VII.2 Hard measures:

- commencing disciplinary proceedings (judges Frąckowiak, Jęksa, Głowacka),
- commencing criminal proceedings, formally not at the stage "in personam", but "in rem" (in respect of judge Agnieszka Pilarczyk, or judge Wojciech Łączewski) – in spite of the fact that it is formally at the "in rem" stage the description of alleged offences unequivocally indicates the judges concerned. The proceedings are excessively prolonged without conclusions which stigmatizes judges.

VIII. Irregularities in application of law by the newly appointed disciplinary bodies.

VIII.1 Centralization of the disciplinary proceedings.

The Main Disciplinary Commissioner and his two deputies have the tendency to centralize proceedings by taking charge of cases of particularly 'disobedient' judges, in this way breaching the provisions on jurisdiction.

In principle, the Main Disciplinary Commissioner and his two deputies have the jurisdiction to hear cases of appeal court judges, as well as presidents and vice-presidents of the regional and the appeal courts. According to the Act on the Organization of Ordinary Courts[6], the Main Disciplinary Commissioner and his deputies also have the authority to take over cases from the deputy disciplinary commissioners operating at the regional court or the appeal court, however, they can take over only the pending cases, previously commenced by local disciplinary commissioners. They often commence such kinds of proceedings on their own (e.g. in respect of Igor Tuleya, Ewa Maciejewska, Kamil Jarocki).

VIII.2 'Trawling' through the case files and personal files of judges without prior information about the disciplinary delict.

The new central Disciplinary Commissioners established a common practice of 'trawling' through the case files and personal files in respect of defiant judges, which is done without any factual basis, which means - without prior information about the disciplinary delict.

Applicable provisions of the Criminal Procedures Code, enable the initiation of such proceedings only if there is a reasonable suspicion that a disciplinary delict has been committed and such proceedings may only be conducted to the extent that arises from the notice of this offence.

It is an obvious breach of the legality principle, done in accordance with the rule: "give me a man, than I will find a paragraph against him", well grounded in authoritarian or totalitarian regimes.

VIII.3 Circumventing of the right to remain silent by forcing judges to testify.

The mere fact that judges were summoned and questioned as witnesses in circumstances where it is obvious that the proceedings are designed to 'match' judges to disciplinary charges in the future, is a process that is intended to circumvent the law. **Coercing someone, who can potentially be accused of committing a disciplinary delict, to give testimony under the sanction of criminal liability for refusing to do so, constitutes a breach of the right of defence** (by circumventing the right to remain silent) and the principle of procedural loyalty (applied in respect of judges Włodzimierz Brazewicz, Igor Tuleya and Ewa Maciejewska).

Another act which is in breach of the principles of proceedings was the **removal of the legal representatives of the judges** who were being examined as witnesses, which was experienced by Judges Włodzimierz Brazewicz and Igor Tuleya. This problem becomes even more burdensome if the disciplinary commissioner questioning a judge as a witness **fails to caution him about the content of Article 183 CPC on his right to decline answering questions if doing so were to expose him to criminal liability**.

While handling the proceedings against Judge Brazewicz, Disciplinary Commissioners behaved exceptionally disloyally. When the judge was being examined as a witness on 6 Nov. 2018, they assured him that his legal representative is not necessary because no further disciplinary proceedings would be conducted against him. Later turned out that the commissioner had already prepared a letter to Judge Brazewicz, dated 30 Oct. 2018 ordering him to submit a written statement in connection with other alleged disciplinary delicts. It was

[6] Article 112 a § 1 a and § 3

a deceitful attempt to extort information for the purposes of disciplinary proceedings, combined with a breach of the principle of prohibiting the forcing of self-incrimination.

VIII.4 Forcing suspected judge to remain silent.

Judge Sławomir Jęksa was summoned by local Disciplinary Commissioner to submit a written statement in the course of explanatory proceedings. In his written statement he fiercely criticized instigating disciplinary action in respect of him for purely jurisdictional activity. He did not use abusive or slanderous descriptions with respect to the disciplinary authorities. When local disciplinary commissioner – Judge Mariola Głowacka refused to commence disciplinary proceedings in respect of judge Jęksa than one of "central" disciplinary officers accused him of disciplinary offence of insulting local disciplinary commissioner. No doubt that action taken with respect to Judge Jęksa grossly breached his right to a defence. How else is an accused to defend himself if his written statement sent to the disciplinary authority in response to that authority's summons (which was not publicized and did not include arrogant and slanderous content) constitutes grounds for initiating further disciplinary proceedings with respect to him.

VIII.5 The "domino" effect.

The concept behind this idea is to generate the 'chilling effect' by instigating disciplinary, or administrative action in respect of persons only accidentally involved in particular events, or those who showed solidarity with persecuted judges.

Coming back to the case of Judge Jęksa. When local disciplinary commissioner – judge Mariola Głowacka not only did not feel offended by written statement of judge Jęksa but also refused to commence disciplinary proceedings in respect of judge him than one of "central" disciplinary officers accused her of disciplinary offence of failing to perform commissioner's duties properly. It constitutes a massive breach of the autonomy of local disciplinary commissioner. Her negative decision on commencing disciplinary action could be reversed by simple taking over the case by central disciplinary commissioner, which was done.

Instigating disciplinary action in respect of her means sending a clear signal to other commissioners "you have to persecute the others if you want to avoid being persecuted".

Interesting factor is a reason of instigating of disciplinary activity in respect of judge Brazewicz. The attempt to justify the assertion that Judge Brazewicz was involved in political activity through the attendance of several local politicians at an open meeting attended by approximately 450 people is a kind of absurd. It seems that the real reason for the disciplinary proceedings was the fact that Judge Igor Tuleya, intensely targeted by the executive, was one of the main speakers at the meeting moderated by Judge Brazewicz. That is how the disciplinary commissioner sends a clear message to other judges to 'stay away from Tuleya'.

Another action based on domino-effect was carried out by Dagmara Pawełczyk-Woicka, the President of the Regional Court in Kraków, and Zbigniew Ziobro, the Minister of Justice – Prosecutor General, in connection with Judge Waldemar Żurek's dismissal from the position of the spokesperson of the Regional Court in Kraków. Here, three judges of the Regional Court in Kraków (Agnieszka Włodyga, Janusz Kawałek, Joanna Melnyczuk), were dismissed from their functions of presiding judges of divisions after they resigned from membership of the Council of the Regional Court in Kraków in protest of the dismissal of the spokesperson of the Regional Court, Judge Waldemar Żurek, which they considered was conducted in the wrong procedure. In turn, another person who resigned from the Council for the reasons mentioned above, District Court Judge Ewa Ługowska, was dismissed from the office of the President of the District Court in Wieliczka by the MoJ. All these judges, who were dismissed from their offices because of their support for Judge Żurek, were highly regarded superior judges against whom no complaints regarding their work had ever been raised.

VIII.6 Ignoring the Constitution and rules of European Law (Czubieniak's case)

Judge Czubieniak, acting as a second instance court released from the custody a 19-year-old man, who was detained by the police on the suspicion of committing sexual activities (involving touching the body of a 9-year-old victim). She did it because, although the suspect is mentally retarded and cannot read or write, he was interrogated by the police and the first instance court without the defense council, which the judge assessed as a massive breach of his right to defense. When pointing out the inconsistency of the provisions of the Polish criminal procedure with international standards (Directive of 22 Oct 2013 on the right of access to a lawyer in criminal proceedings (2013/48/EU), Directive of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings (2016/1919/EU)) the judge inferred the obligation to provide a court appointed defense counsel to a person who is particularly sensitive, even from the initial activities in the preparatory proceedings from provisions that apply at the stage of court proceedings.

When the local media described a case using the catchy slogan "judge released a pedophile", the current MoJ took an interest in the matter, followed by the local disciplinary commissioner at the Appeal Court. He accused the judge of committing a disciplinary delict involving the 'obvious and gross breach of the law'. Next, the Disciplinary Court at the Appeal Court acquitted the judge of the charges. Than the MoJ and the disciplinary commissioner appealed to the Disciplinary Chamber of the SC. The Disciplinary Chamber took advantage of the lack of the *ne peius* principle and overturned the acquittal, convicting the judge to the penalty of a warning. The judges of the Disciplinary Chamber ignored the Directives mentioned above as well as consistent line of judgments of the ECHR (e.g. *Salduz v. Turkey*). They **sent out a clear signal that they either disregard or are unfamiliar with the international standards on the assurance of the effective right to a defense as early as at the stage of preparatory proceedings**.

In this context, the circumstance that a former notary public, a former legal counsel and a lay judge comprised the adjudicating panel of the Disciplinary Chamber becomes particularly significant, whereby none of these people had previously had any adjudicating experience, nor had they had anything to do with the criminal procedure. Such a panel assessed negatively a judge with 35 years of professional experience.

VIII.7 Indescribability of types of punishable acts.

The initiation of disciplinary proceedings against judges will be even easier as the Act on the Organization of Ordinary Courts does not give a definition of a disciplinary delict (tort). This Act only reads '*a judge is subject to disciplinary liability for misconduct in service including for a gross breach of the provisions of the law and for a breach of the dignity of the office of judge (disciplinary misconduct)*'[7]. Given the lack of precise representation or even examples of the types of conduct that can result in disciplinary proceedings, the classification of disciplinary delicts is left to the discretion of the judiciary, doctrine, neo NCJ and special ministerial task force.

The Act on the NCJ empowered this body with competence of establishing the Rules of Judicial Ethics. This competence became very dangerous in the hands of the current, highly politicised NCJ. On 12 Dec. 2018, the new NCJ passed a Resolution, according to which '*the public use of infographics or symbols by a judge which are unequivocally affiliated to or may be identified with a political party, a trade union or a social movement established by a trade union, a political party or other politically active organizations*' constitutes '*behaviour that can undermine confidence in the independence and impartiality of a judge*'. The objective of this Resolution, as directly admitted by a member of the NCJ, was to prevent judges from

[7] Article 107 § 1.

wearing T-shirts with a distinctive, three-coloured word 'constitution', worn by many as a declaration of their support for upholding the rule of law and independence of the judiciary.

Worse still, the MoJ empowered special task force including his deputy Łukasz Piebiak and central disciplinary commissioners, to develop the Rules of Judicial Ethics. It was done without any legal grounds, purely by announcing this on the official website of the MoJ.

IX. Conclusion.

To sum up: the new mode of disciplinary proceedings combined with full control of the MoJ over the Prosecutors' Office (including Bureau of Internal Affairs) and his excessive administrative control over the judiciary constitute a real "chilling effect generator". Such scope of competences in the hands of the active politician of the ruling camp has great potential of intimidation of judges. Judges are exposed to constant attacks, including black PR campaign in public media. The only protection they can expect comes from activity of judicial associations, independent media, activity of some NGOs, activity of EU institutions (CJEU, European Commission).

The new disciplinary regime allows for judges to be subject to disciplinary proceedings for the content of their judicial decisions.

The existence of a chilling effect linked to disciplinary proceedings was confirmed by a survey conducted by the daily 'Rzeczpospolita'[8], in which more than 10% of the total judicial population took part. Approximately 97% of those responding confirmed their concerns.

The changes to the disciplinary procedures for judges introduced by the new Laws on the Supreme Court and on the Organization of the Ordinary Courts, combined with the reforms to the National Council of Judiciary, allow a ruling political party to exert very considerable influence over which judges are investigated and why; over who conducts the investigation and initiates disciplinary proceedings; over how they do so; and over who ultimately decides on the outcome.

The disciplinary systems for judges of the Supreme Court and ordinary court judges differ, but both provide for the excessive involvement of the executive in a multitude of ways, that both undermine the independence (and the appearance of independence) of the judiciary as a whole and violate the right of judges subject to disciplinary proceedings to a fair trial. The effect of these reforms is not just to jeopardise the rule of law in Poland, but also the consistent application of EU law in the country and the integrity of the EU legal order as a whole.

The procedures introduced by the current Polish government in relation to the disciplining of judges and the appointment and dismissal of ordinary court judges set out in this opinion violate the external independence of the judiciary and are in breach of EU law in so far as they:

a. jeopardize the attainment of the EU's objective of the respect for the rule of law (Article 4 TEU, in conjunction with Articles 2 & 3 TEU.); and

b. compromise the fairness of judicial proceedings, thereby denying remedies sufficient to ensure effective respect for EU law in Poland (Article 19 TEU, in conjunction with Article 47 CFR);

The changes to the disciplinary procedures in both the Supreme Court and ordinary courts also

c. violate the right to a fair trial under Article 47, CFR

[8] In October 2018

X. Sources of information on the current situation of the Polish judiciary:

1) The general report: **So called "Good change" in the Polish system of the administration of justice,** updated for 6 October 2017 – description of 2 years of legal changes showing constant process of devastation of independence of the judiciary, prepared by members of Themis, https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Sanders/Dokumente/Good_change_-_7_October_2017_-_word.pdf

2) The general report **Where the law ends The collapse of the rule of law in Poland – and what to do** prepared by the Stefan Batory Foundation with European Stability Initiative, http://themis-sedziowie.eu/materials-in-english/where-the-law-ends-the-collapse-of-the-rule-of-law-in-poland-and-what-to-do/

3) Report of Association of Judges "Themis" (a kind of in depth analysis of the system of political subordination of polish judiciary): **Judges under special supervision, namely 'The Great Reform' of the Polish justice system.** http://www.themis-sedziowie.eu%2Fwp-content%2Fuploads%2F2019%2F04%2FJudges_under_special_supevision_second-publication.pdf&usg=AOvVaw08S0Xa1kMH-pBbKbpikcgT

4) Report of The Justice Defence Committee (competent review of politically motivated disciplinary proceedings in respect of judges and prosecutors in Poland): **A country that punishes. Pressure and repression of Polish judges and prosecutors.** http://citizensobservatory.pl/wp-content/uploads/2019/03/Raport-KOS_eng.pdf

5) Short report: **New mode of disciplinary proceedings in respect of judges and members of other legal professions in Poland,** showing creation of freezing effect among judges by legislative changes granting politicians control over disciplinary proceedings, prepared by Themis, http://themis-sedziowie.eu/materials-in-english/new-mode-of-disciplinary-proceedings-in-respect-of-judges-and-members-of-other-legal-professions-in-poland/

6) Report: **Disciplinary case of judge Czeszkiewicz,** an example of instigating politically motivated, groundless disciplinary proceedings in respect of judge, prepared by Themis, http://themis-sedziowie.eu/materials-in-english/disciplinary-case-of-judge-czeszkiewicz/

7) **Resolution of the Assembly of Representatives of Judges of the Regional Court in Kraków of 26 February 2018,** describing politically motivated persecution of judge Waldemar Żurek, 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/

8) Themis's Report: **Alarming revolution within the Polish Supreme Court,** describing legislative changes in the SC aiming at taking political control over the highest judicial authority in Poland,, http://themis-sedziowie.eu/materials-in-english/alarming-revolution-within-the-polish-supreme-court/

9) **The position of the Association of Judges „Themis" on the Supreme Court request for a CJEU preliminary ruling of 2 August 2018** http://themis-sedziowie.eu/materials-in-english/the-position-of-the-association-of-judges-themis-on-the-supreme-court-request-for-a-cjeu-preliminary-ruling-of-2-august-2018/

10) Classical report "**How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding**" Wojciech Sadurski professor of Universities in Warsaw, Sydney & Firenze, http://ssrn.com/abstract=3103491.

11) **Survey on Judicial Independence** conducted by "Rzeczpospolita" daily, http://themis-sedziowie.eu/materials-in-english/survey-on-judicial-independence-october-282018/.

12) Amnesty International report: **Poland: update on the "reform" of the judiciary** https://www.amnesty.lu%2Fuploads%2Fmedia%2FPOLAND_UPDATE_ON_THE_REFORM_OF_THE_JUDICIARY.PDF&usg=AOvVaw2Kni8yE0EtRnVwmSmVr7fj

13) Report of US NGO Human Rights First: **Justice Purged. Poland Politicizes its Judiciary** https://www.humanrightsfirst.org%2Fsites%2Fdefault%2Ffiles%2FPoland-Justice-Purged.pdf&usg=AOvVaw2-aGuRi0pwf50M-SC_ZhXI