



POLAND: BRIEFING ON THE RULE OF LAW AND INDEPENDENCE OF THE JUDICIARY IN POLAND IN 2020-2021

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CONTENTS

1. INTRODUCTION	7
2. DEVELOPMENT CONCERNING RULE OF LAW AND HUMAN RIGHTS IN POLAND IN 2020	8
2.1 LEGAL DEVELOPMENTS IN 2020: THE “MUZZLE LAW”	8
2.2 SIGNIFICANT LEGAL DEVELOPMENTS UNDERMINING THE INDEPENDENCE OF THE JUDICIARY	9
2.2.1 THREE ILLUSTRATIVE CASES OF INTERFERENCE WITH JUDICIAL INDEPENDENCE IN POLAND: WAIVING THE IMMUNITY OF JUDGES AND REMOVING THEM FROM OFFICE	9
2.2.2 THE CONSTITUTIONAL TRIBUNAL RULING ON ABORTION	11
2.3 IMPORTANT LEGAL DECISIONS AND JUDGMENTS	12
2.3.1 THE CJEU ORDERS THE SUSPENSION OF ACTIVITIES OF THE DISCIPLINARY CHAMBER OF THE SUPREME COURT	12
2.3.2 RESOLUTION BY A PANEL OF THREE CHAMBERS OF THE SUPREME COURT	12
3. NEW DEVELOPMENTS CONCERNING RULE OF LAW AND HUMAN RIGHTS IN POLAND IN 2021	14
3.1 LEGAL DEVELOPMENTS	14
3.1.1 THE NEW AMENDMENTS TO THE LAW ON THE SUPREME COURT	14
3.1.2 BAN ON PARTICIPATING IN THE ASSEMBLIES INTRODUCED BY THE ORDINANCE	14
3.1.3 TRANSFERS OF PROSECUTORS DURING THE PANDEMIC	15
3.1.4 EUROPEAN COMMISSION REFERS POLAND TO THE CJEU WITH ANOTHER REQUEST FOR INTERIM MEASURES TO PROTECT THE INDEPENDENCE OF JUDGES	15
3.2 ISSUES OF CONCERN	16
3.2.1 THE CASE OF THE HUMAN RIGHTS COMMISSIONER– CONSTITUTIONAL TRIBUNAL JUDGMENT AND ITS CONSEQUENCES	16
3.2.2 TWO MOTIONS TO THE CONSTITUTIONAL TRIBUNAL TO EXAMINE THE SUPREMACY OF THE CONSTITUTION OVER EU LAW	16
3.2.3 REGIONAL COURT OF KATOWICE QUESTIONING THE LEGALITY OF JUDGES APPOINTED BY THE NCJ.	17
4. SUMMARY OF POLISH CASES CONCERNING JUDICIARY BEFORE ECTHR AND CJEU	18
4.1 CASES BEFORE THE ECTHR	18
4.1.1 XERO FLOR SP. Z O.O. V POLAND (NO. 4907/18) - CONCERNING THE IRREGULARITIES OF THE APPOINTMENT OF THE CONSTITUTIONAL TRIBUNAL'S JUDGES, THE SO-CALLED “DOUBLE JUDGES”	18
4.1.2 ADVANCE PHARMA V POLAND (1469/2074) - CONCERNING THE APPOINTMENT OF JUDGES TO THE CIVIL CHAMBER OF THE SUPREME COURT BY THE NCJ IN ITS CURRENT FORM	19

4.1.3 RECZKOWICZ AND OTHERS V. POLAND (NOS. 43447/19, 49868/19 AND 57511/19) - CONCERNING THE APPOINTMENT OF JUDGES TO TWO NEW CHAMBERS OF THE SUPREME COURT: DISCIPLINARY CHAMBER OF THE SUPREME COURT AND THE EXTRAORDINARY CONTROL AND PUBLIC AFFAIRS CHAMBER	20
4.1.4 SOBCZYNSKA AND OTHERS V POLAND (NOS. 62765/14, 62769/14, 62772/14 AND 11708/18) - CONCERNING THE ADMISSIBILITY OF JUDICIAL REVIEW OF THE APPOINTMENT OF A JUDGE BY THE PRESIDENT.	20
4.2 CASES BEFORE THE CJEU	20
4.2.1 WALDEMAR ŻUREK (C-487/19) AND MONIKA FRĄCKOWIAK (C-508/19)	20
5. CONCLUSIONS AND RECOMMENDATIONS	23

EXECUTIVE SUMMARY

Since late 2015, the Polish government has adopted and implemented a set of legislative and policy measures that have undermined the independence of the judiciary. These include politicizing judicial appointments, giving the Minister of Justice exclusive power to dismiss and appoint Presidents and Vice-Presidents of Courts, and forcing Supreme Court judges to retire. The government has also used disciplinary proceedings as a ploy to target judges who have spoken out against the government led reforms and placing some of them at risk of losing their jobs.¹

In 2020 and in the first quarter of 2021, the Polish government continued to introduce legal and policy changes that undermined the independence and integrity of the judiciary and prosecutors.

Parliament adopted a new law in January 2020 imposing severe restrictions on judges' rights to freedom of expression and association.² The law prohibits judges from questioning the credentials of judges appointed by the President. The state's Deputy Disciplinary Commissioner sought to initiate disciplinary proceedings in August against 1,278 judges who had asked the OSCE to monitor the presidential election.

International scrutiny also continued. A number of cases against Poland regarding attacks on the judiciary were pending before the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). In September 2020, the European Parliament (EP) adopted a resolution expressing concerns regarding the independence of the judiciary and threats to human rights in Poland³.

In September 2020, the ECtHR formally requested a response from the government in the case of judge Igor Tuleya who challenges disciplinary proceedings against him as violations of his rights to private life and freedom of expression. The Disciplinary Prosecutor initiated the proceedings against Igor Tuleya in 2018. Judge Tuleya had, among other things, submitted a request for a preliminary ruling from the CJEU on whether the new national legislation that undermined the independence of the judiciary was compatible with EU law⁴.

In April 2020, the CJEU issued an order for interim measures requiring the government to immediately suspend its new system of disciplinary proceedings against judges. The authorities, however, continued to refuse to implement fully this interim measure. Although as of 2020 the Disciplinary Chamber of Supreme Court (DC) no longer examined disciplinary cases of judges, it continued to adjudicate in the cases concerning removing immunities of judges. The Deputy Minister of Justice stated that by examining the legality of the Disciplinary Chamber under the EU law, the CJEU had violated Poland's sovereignty by intervening in its domestic affairs.

Poland failed to respect interim measures issued by the CJEU in April 2020 which ordered the government to suspend the powers of the Disciplinary Chamber of the Supreme Court pending a decision on the case regarding it. The Polish government has also failed to satisfy the European Commission that the law adopted in February 2020 (also known as "the muzzle law") is compatible with EU law. In March 2021, this led the Commission, to refer Poland to the CJEU to request an order for interim measures pending a final judgment in the case.⁵

Against this background, Amnesty International calls on EU Member States to respond to this serious situation and to urge the government of the Republic of Poland to:

¹ <https://www.amnesty.org/en/latest/news/2020/01/poland-judges-and-lawyers-from-across-europe-protest-judicial-takeover-in-warsaw/>

² Op. Cit.

³ https://www.europarl.europa.eu/doceo/document/TA-9-2020-0225_EN.html

⁴ <https://www.amnesty.org/en/countries/europe-and-central-asia/poland/report-poland/>

⁵ <https://www.amnesty.eu/news/eu-request-to-the-portuguese-presidency-to-take-action-on-the-deteriorating-situation-in-poland/>

- Comply with the CJEU's order of 8 April 2020 to suspend the activities of the Disciplinary Chamber of the Supreme Court
- Amend the law on the National Council of the Judiciary (NCJ), so that members of the Council who are judges are elected by other judges, not by representatives of the executive and/or legislative branch and have the legally required number of judges supporting them.
- Revise the system of disciplinary responsibility which currently concentrates power over disciplinary proceedings in the hands of the Minister of Justice and repeal the provisions extending disciplinary responsibility for judges introduced by the “Muzzle Law”.
- Stop the unjustified secondment of prosecutors to remote prosecution units and the initiation of retaliatory disciplinary and criminal proceedings against judges and prosecutors who oppose the subordination of the judiciary and prosecution services to the executive.
- Implement the ECHR ruling in the case Xero Flor Sp. Z. o.o. v Poland, as soon as it becomes final, with the aim of bringing the procedure before the Constitutional Tribunal in line with article 6 ECHR.

1. INTRODUCTION

This briefing provides an update on the state of judicial independence in Poland for the period 2020 - 2021. It summarizes the developments in the proceedings against Poland that are currently pending at the Court of Justice of the EU, particularly those in relation to the Supreme Court (SC) and the National Council of the Judiciary (NCJ). It also provides information on the proliferation of disciplinary proceedings against judges and prosecutors who have publicly criticised the government's efforts to undermine the independent functioning of the judiciary in Poland. The so-called reform of the judiciary in Poland has in fact been used as a pretext by the government to undermine the independence and integrity of the judiciary. Judicial independence is an essential requirement of the right to a fair trial, which is of crucial importance to guarantee and ensure the enjoyment of other human rights.

2. DEVELOPMENT CONCERNING RULE OF LAW AND HUMAN RIGHTS IN POLAND IN 2020

2.1 LEGAL DEVELOPMENTS IN 2020: THE “MUZZLE LAW”

At the beginning of 2020 a new bill was introduced – so called “muzzle law”⁶ – which prohibits judges from:

- criticizing the new organisation of the justice system;
- questioning the legality of the newly elected judges of Constitutional Tribunal (CT), National Council of Judiciary and Supreme Court;
- applying EU law by submitting questions for a preliminary ruling to the CJEU.

The 2020 “muzzle law” extended and aggravated the disciplinary responsibility of judges. It introduced tools to interfere with the judicial independence and judges' rights to freedom of expression and association by:

- Extending the disciplinary liability of judges to "actions questioning the existence of a judge's official status, the effectiveness of a judge's appointment or the legitimacy of a constitutional body of the Republic of Poland" and "actions or omissions likely to prevent or significantly impede the functioning of a judicial body".
- Requiring judges and prosecutors to disclose their membership in foundations or associations. This is a *prima facie* interference with the rights to freedom of association and privacy.
- Imposing sanctions on judges and prosecutors for conducts such as performing activities considered to be of a political nature, obstructing the functioning of the judiciary, as well as questioning the existence of a judge's official status or the effectiveness of his or her appointment. Such conducts are sanctioned by transfer to another official position and dismissal from office.

The “muzzle law is a one of the main reasons for the referral of Poland to CJEU by the European Commission on 31 March 2021.⁷

⁶ Act of 20 December 2019 amending the Act - Law on the System of Common Courts, the Act on the Supreme Court and certain other acts, <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000190>

⁷ <https://wyborcza.pl/7,173236,26943196,european-commission-sues-poland-for-undermining-judicial-independence.html>

2.2 SIGNIFICANT LEGAL DEVELOPMENTS UNDERMINING THE INDEPENDENCE OF THE JUDICIARY

In 2020 the Disciplinary Chamber of the Supreme Court – the independence and impartiality of which is not guaranteed – continues to take decisions, which have a direct impact on judges and the way they exercise their function. These matters include cases of lifting the immunity of judges with a view to bringing criminal proceedings against them, and the consequent temporary suspension from an office and reduction of their salary.⁸ The DC continues to operate despite the fact that on 8 April 2020, the CJEU, as an interim measure, ordered the suspension of its work in respect of disciplinary proceedings and despite the rulings of the Polish Supreme Court of 5 December 2019⁹ and 23 January 2020¹⁰ which states that DC is not a court within the meaning of the Polish Constitution.

2.2.1 THREE ILLUSTRATIVE CASES OF INTERFERENCE WITH JUDICIAL INDEPENDENCE IN POLAND: WAIVING THE IMMUNITY OF JUDGES AND REMOVING THEM FROM OFFICE

Igor Tuleya, Beata Morawiec and Paweł Juszczyszyn are three judges who have been suspended from office and whose salary was reduced by the DC acting against the interim measure of the CJEU from April 2020. In addition, Judge Tuleya also faces criminal proceedings. Consequently, the court cases they have so far examined will either start from the beginning or substitutes will have to be sought to handle them.

These cases illustrate that the instead of the ostentatious aim of improving the work of the courts and speeding up the examination of cases, changes in the judiciary, in fact aim at the government's capabilities to replace staff and remove independent judges from adjudicating.

➤ CASE OF JUDGE IGOR TULEYA

Judge Tuleya is being criminally prosecuted for his judicial activity. In 2017, he issued a ruling ordering the prosecution to reinvestigate the vote on the budget by the ruling PiS party. The hearing was public with the presence of the media. In announcing the ruling, he quoted politicians' testimonies and materials from the investigation, which showed that opposition MPs were deliberately blocked from attending the Sejm (lower chamber of Polish Parliament) sessions, voting protocols were falsified and that MPs could have given false testimony.

The criminal investigation against judge Tuleya started in 2018. In February 2020, the prosecutor asked the disciplinary chamber to lift his immunity. The request was denied at first instance. The prosecutor appealed and the request was eventually granted by the Disciplinary Chamber in November 2020. The Disciplinary Chamber made the decision on Judge Tuleya's immunity despite the CJEU interim measures.

Consequently, the public prosecutor pressed charges against Tuleya for disclosing classified proceedings. These charges raise serious concerns over their legitimacy and legality. Under the Code of Criminal Procedure, the court has the right to decide whether a session is open to the public.¹¹

In January 2021, Amnesty International and the International Commission of Jurists submitted an intervention¹² to the European Court of Human Rights in the case of Tuleya v Poland regarding the disciplinary proceedings against judges. AI and ICJ argue that disciplinary proceedings against a judge affect their professional reputation and their private life as understood by Article 8.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹³.

On the 21 of April 2021 the Disciplinary Chamber of the Supreme Court declined the prosecutor's request to detain and forcibly bring Judge Igor Tuleya to an interrogation.

⁸ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_224

⁹ http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=331-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach

¹⁰ <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=598-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia>

¹¹ Article 95b par. 1

¹² <https://www.amnesty.org/en/documents/eur37/3548/2021/en/>

¹³ <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>

➤ CASE OF JUDGE BEATA MORAWIEC

Judge Beata Morawiec is the President of the Judges' Association 'Themis', which has been very critical in respect of the changes of the judiciary in Poland since 2015.¹⁴

The prosecutor's office has targeted her with a smear campaign and criminal proceedings. The prosecutor accused her of receiving a payment for preparing a judicial opinion she never delivered from the court's budget and accepting a mobile phone as a bribe to rule in favour of a defendant in a case. In connection with these allegations the prosecutor's office requested the Disciplinary Chamber of the Supreme Court to waive her immunity.¹⁵

In response to the charges brought against her, Judge Morawiec published a report prepared by her in 2013 for the Court of Appeal on social media.¹⁶ The fact that it was prepared in 2013 was also confirmed by an expert witness.¹⁷ The judge also denied that she ever accepted a mobile phone in return for a favourable sentence.¹⁸

On the 18 September 2020, public prosecutor assisted by the Central Anticorruption Bureau (CBA) entered judge Morawiec's house with the warrant. He took her work laptop containing sensitive data. The stated reason was to secure the requested report from 2013 as well as the electronic media on which it was prepared. Judge Morawiec stated that issuing a search warrant for a judge's house and taking her property when a judge was protected by immunity, was an unlawful act.¹⁹

In November 2018²⁰ Judge Morawiec brought a claim against the Minister of Justice for violation of her personal rights violated by reputational damage by the publication on Ministry of justice website.... In 2017, the Ministry of Justice published a statement on its website²¹ alleging that Judge Morawiec did not adequately supervise the operation of the court. ²² On 21 January 2021, the Court of Appeal in Warsaw ordered the Minister of Justice to apologise to Judge Morawiec for a of a statement that damaged her reputation. The Minister of Justice submitted a cassation complaint to the Supreme Court, indicating that he did not intend to apologize to Judge Morawiec.²³

In October 2020 the Disciplinary Chamber lifted the immunity of Judge Morawiec to enable criminal proceedings concerning alleged corruption offences.²⁴ However, on the 7 June 2021, the Disciplinary Chamber reviewed the judge's Morawiec complaint against the waiver of her immunity and quashed the earlier decision. As a result, Beata Morawiec continues to work as a judge.²⁵

This decision of Disciplinary Chamber was criticized during a public conference by the Prosecutor General who is also the Minister of Justice. He said that: "Unfortunately, the Disciplinary Chamber in the persons of judge Łodko and Zubert in the second instance made it impossible to clarify the matter, shamelessly putting the unworthy corporate interest of the judicial community above the law and above the principles that the public expects".²⁶

➤ CASE OF JUDGE PAWEŁ JUSZCZYŹYŃ

On 4 April 2020, the disciplinary prosecutor initiated proceedings against Judge Paweł Juszczyźyń after he – while examining an appeal to a first instance decision- requested the Chancellery of the Sejm (lower chamber of the parliament) to provide copies of the letters of support for the members of the new National Judicial Council. The relevance of the request to the case he was adjudicating was that the first instance judge was appointed by the new NCJ. By issuing the request, Judge Juszczyźyń applied the paragraph 171

¹⁴ <https://www.rpo.gov.pl/pl/content/powazne-watpliwosci-rpo-ws-dzialan-prokuratury-wobec-sedzi-beaty-morawiec>

¹⁵ <https://www.rpo.gov.pl/pl/content/prokurator-krajowy-krytycznie-o-opinii-rpo-ws-beaty-morawiec>

¹⁶ This fact was confirmed in email correspondence with judge B. Morawiec by Amnesty International Poland

¹⁷ <https://wiadomosci.onet.pl/kraj/sprawa-sedzi-morawiec-jest-ekspertyza-bieglego-ktora-moze-obalic-czesc-zarzutow/y5ftczs>

¹⁸ <http://themis-sedziowie.eu/materials-in-english/humiliate-in-order-to-subordinate-judge-beata-morawiec-case-study-prepared-by-judge-dariusz-mazur/>

¹⁹ https://www.rmf24.pl/raporty/raport-batalia-o-sady/fakty/news-cba-w-domu-sedzi-beaty-morawiec-sedzia-mowi-o-zlamaniu-immun,nld,4739500#crp_state=1

²⁰ <https://oko.press/sedzia-morawiec-minister-ma-mnie-przeprosic-za-oczernianie-ziobro-mam-prawo-do-wolnosci-slowa/>

²¹ <https://oko.press/images/2017/12/komunikat-Ministerstwa-Sprawiedliw%C5%9Bci-ws.-Beaty-Morawiec.pdf>

²² The Minister dismissed Judge Morawiec, along with dozens of others, from her position as president of the court.

²³ <https://oko.press/odwolana-prezes-krakowskiego-sadu-idzie-wojne-ministerstwem-sprawiedliwosci-wsrod-sedziow-innych-miast-tez-rodzi-sie-opor/>

²⁴ <https://www.tokfm.pl/Tokfm/7,103085,26782430,zbigniew-ziobro-mial-dwa-tygodnie-zeby-przeprosic-sedzie-morawiec.html>

²⁵ <https://ruleoflaw.pl/the-illegal-disciplinary-chamber-revoked-judge-beata-morawiecs-immunity-under-the-cover-of-night/>

²⁶ <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8185327,beata-morawiec-wracam-do-pracy-ktora-jest-celem-mojego-zycia.htm>, <https://www.polityka.pl/tygodnikpolityka/kraj/2121475,1,sensacja-ikona-oporu-sedzia-beata-morawiec-wraca-do-orzekania.read>, <https://www.onet.pl/informacje/onetkrakow/izba-dyscyplinarna-zmienila-decyzje-sedzia-morawiec-zachowuje-immunitet/qd7yw10,79cfc278>

²⁶ <https://serwis.gazetaprawna.pl/orzeczenia/artykuly/8186227,ziobro-decyzja-ws-sedzi-morawiec-dowodzi-ze-srodowisko-sedziowskie-jest-niezdolne-do-samooczyszczania.html>, <https://oko.press/zbigniew-ziobro-atakuj-nielegalna-izbe-dyscyplinarna-ktora-powolal-pis/>

of CJEU judgment of 19 November 2019 (A.K. v National Council of Judiciary),²⁷ pursuant which every court in Poland may examine whether judges nominated by the NCJ meet the requirement of independence and impartiality.

In February 2020 the Disciplinary Chamber suspended Judge Juszczyzyn from his duties and cut his salary by 40 per cent for the duration of the suspension. Disciplinary prosecutors can keep a judge suspended and out of work for any length of time²⁸.

On 26 April 2021 Judge Juszczyzyn filed a motion to all 46 district courts in Poland to take an action to protect his professional reputation. Judge Juszczyzyn also requested the President of the District Court in Olsztyn to admit him to back to his judicial duties.²⁹ The judge also requested the Olsztyn District Court to order the Supreme Court to place a notice of the suspension on its website next to information about the decision in his case.³⁰

The motion seeks, first, a declaration that the resolution of the Disciplinary panel of the Supreme Court of 4 February 2020, which suspended Judge Juszczyzyn is not a decision of the Supreme Court and, second, an order that the respondent party (according to the claimant, these are the First President of the Supreme Court and the President of the Disciplinary Board of the Supreme Court representing the State Treasury) should cease damaging the reputation and dignity of Paweł Juszczyzyn and, to this end, order that the respondent party should remove the resolution from the Supreme Court's website.³¹

Moreover, on 30 April 2021, the European Court of Human Rights communicated to the government the complaint of Judge Juszczyzyn.³² Judge Juszczyzyn alleges a violation of the right to a fair trial (Article 6.1), the right to respect for private and family life (Article 8), the right to the protection of property (Article 1 of Protocol No. 1 to the Convention). Importantly, he also claims a breach of Article 18 rights, which prohibits the misuse of power.³³

He submits that he did not have the opportunity to have his case heard by an independent and impartial tribunal established by law. He claims that the Disciplinary Chamber does not satisfy these criteria, since it is composed of judges nominated in a procedure involving the new NCJ, to which the judges were elected by the Parliament and not by the judiciary.

He complains about the lack of independence and impartiality of the Disciplinary Chamber, noting that some of its judges are connected to the authorities. He points out that the disciplinary sanctions taken against him had no legitimate aim. Finally he also complains that his right to property was disproportionately violated by the indefinite reduction in his salary.³⁴

2.2.2 THE CONSTITUTIONAL TRIBUNAL RULING ON ABORTION

On 27 January 2021, the government published the ruling of the Constitutional Tribunal from October 2020, invalidating the constitutionality of access to abortion on the ground of “severe and irreversible foetal defect or incurable illness that threatens the foetus’ life.” The implementation of the decision of the Constitutional Tribunal whose legitimacy has been compromised³⁵, risks severely damaging women’s rights and access to sexual and reproductive health and rights. It leads to violations of the rights protected under international and European human rights law, including the rights to freedom from torture or cruel, inhuman or degrading treatment or punishment, to the highest attainable standards of health, to privacy, and to non-discrimination³⁶ and undermines adherence to the EU values of the rule of law, equality, human rights and

²⁷ <https://curia.europa.eu/juris/document/document.jsf?docid=220770&doclang=EN>

²⁸ <https://oko.press/juszczyzyn-nie-boje-sie-bede-czekal-na-powrot-do-sadu-chocby-8-lat/>

²⁹ In his motion, Paweł Juszczyzyn wants the Olsztyn District Court to suspend the enforcement of the decision of the Disciplinary Chamber of February 2020, which suspended him from his duties as a judge and reduced his salary by 40 percent, until the conclusion of his trial with the Supreme Court. <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8130873,sady-okregowe-sedzia-juszczyzyn-powrot-do-orzekania.html>

³⁰ <https://oko.press/sedzia-juszczyzyn-idzie-na-calosc-pozywa-izbe-dyscyplinarna-i-sni-dam-sie-zatluc-po-cichu/>

³¹ Op.cit.

³² Application no. 35599/20, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%5B%22001-210094%22%5D%7D>

³³ https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf

³⁴ <https://t.co/QAVYBipipa?amp=1>, <https://oko.press/europejski-trybunal-praw-czlowieka-ziobro-juszczyzyn-bilinski/>

³⁵ https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_4907-18

³⁶ See for example, K.L. v. Peru, HRC, UN Doc. CCPR/C/85/D/1153/2003 (2005); HRC Concluding Observations: Ireland, UN Doc. CCPR/C/IRL/CO/4 (2014) para. 9; CEDAW Concluding Observations: Chile, UN Doc. CEDAW/C/CHL/CO/5-6 (2012) para. 34.

dignity enshrined in Article 2 TEU.³⁷ The CT's decision is inconsistent with these international human rights obligations and risks paving the way for further violations of women's human rights.³⁸

Because of the serious questions over the legitimacy of the current Constitutional Tribunal, questions remain as to whether its decisions should be considered a decision of a "tribunal previously established by law" - in line with Article 47(2) of the Charter of Fundamental Rights of the European Union. Between July 2016 and December 2017, the European Commission adopted four Rule of Law Recommendations concerning Poland under its Rule of Law Framework and concluded that, considering legislation impacting the functioning and independence of the Constitutional Tribunal, there was a clear risk of a breach of the rule of law as outlined in Article 2 of the Treaty of the European Union (TEU).³⁹ The European Commission expressed serious concerns regarding the independence and legitimacy of the Constitutional Tribunal, noting that, "the constitutionality of Polish laws can no longer be effectively guaranteed. The judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review."⁴⁰ The European Commission reiterated these unresolved concerns in its Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.⁴¹

On 7 May 2021, the ECtHR in the *Xero Flor Sp. Z o.o. v Poland* case also ruled that the bench of the Constitutional Tribunal was unlawful⁴².

2.3 IMPORTANT LEGAL DECISIONS AND JUDGMENTS

2.3.1 THE CJEU ORDERS THE SUSPENSION OF ACTIVITIES OF THE DISCIPLINARY CHAMBER OF THE SUPREME COURT

On 8 April 2020 the Court of Justice of the European Union (Grand Chamber) granted the Commission's application for interim measures against Poland (C-791/19 R), in which it requested the Republic of Poland to immediately suspend the application of the provisions of the law on the Supreme Court constituting the basis for the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges, both in the first and second instance.

The suspension shall continue until the final judgement is delivered in the case of the judicial independence of the Disciplinary Chamber.⁴³ The CJEU also ordered Poland to refrain from referring cases pending before the Disciplinary Chamber of the Supreme Court for consideration by a panel that does not meet the requirements of independence, as indicated in the judgment of 19 November 2019, *A.K. and Others (the Independence of the Supreme Court Disciplinary Chamber)*.⁴⁴

2.3.2 RESOLUTION BY A PANEL OF THREE CHAMBERS OF THE SUPREME COURT

On 23 January 2020, the Supreme Court adopted a resolution by a panel of three joint chambers: the Civil, the Criminal and the Labour and Social Insurance Chambers on the issue of judgments passed by judges appointed with the participation of the new National Council of the Judiciary⁴⁵. In passing the resolution, the

³⁷ <https://www.amnesty.eu/news/eu-request-to-the-portuguese-presidency-to-take-action-on-the-deteriorating-situation-in-poland/>

³⁸ See e.g. CESCR: General Comment No. 22, para. 38; General Comment No. 3, para. 9; General Comment No. 14, paras. 32, 48, 50. See also "Maastricht guidelines on violations of economic, social and cultural rights", 1997, Guideline 14(e); "Limburg principles on the implementation of the ICCPR", 1987, Principle 72

³⁹ https://ec.europa.eu/commission/presscorner/detail/fi/IP_16_2643

⁴⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0835>

⁴¹ Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final - 2017/0360 (NLE)), paras. 92-113 and 175(1).

⁴² Paragraph 289-291 of *Xero Flor Sp. Z.o.o. v Poland* judgment, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-210065%22%7D>

⁴³ Case C 791/19, <https://curia.europa.eu/juris/liste.jsf?num=C-791/19>

⁴⁴ Cases C 585/18, C 624/18 and C 625/18, EU:C:2019:982, <https://www.iustitia.pl/en/new-krs/3793-today-s-cjeu-decision-should-close-the-way-for-abuse-of-the-arbitrary-recognition-of-the-elections-validity-professor-krystian-markiewicz-president-of-the-association-of-polish-judges-iustitia>

⁴⁵ <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=598-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia>

Supreme Court's acted in compliance with the response received from the CJEU on 19 November 2019 - A.K. v National Council of Judiciary.⁴⁶

The resolution of the Supreme Court⁴⁷ indicated that judges appointed to positions on the recommendation of the National Council of the Judiciary created under the Act of 8 December 2017 are not entitled to adjudication.

⁴⁶ <https://curia.europa.eu/juris/document/document.jsf?docid=220770&doclang=EN>

⁴⁷ <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=598-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia>

3. NEW DEVELOPMENTS CONCERNING RULE OF LAW AND HUMAN RIGHTS IN POLAND IN 2021

3.1 LEGAL DEVELOPMENTS

3.1.1 THE NEW AMENDMENTS TO THE LAW ON THE SUPREME COURT

On 30 March 2021 the Parliament passed the law amending the Act on the Supreme Court of Justice.⁴⁸

The key change is that it gives to the President of Poland the power to appoint “the acting Presidents of the Supreme Court”, who may exercise all the powers and duties of the President of the Supreme Court provided for in the Act,⁴⁹ including the power to direct the work of the court’s chambers.

Consequently, the President of Poland, as the representative of the executive power, has a direct role in appointing the President of the Supreme Court which amounts to a substantial interference with the judiciary, although the Constitution does not explicitly grant him such powers.

Moreover, the Constitution does not provide for the function of a “judge performing the duties of the President of the Supreme Court”. For this reason, the power granted to the President by the amendment raises significant concerns over the independence and autonomy of the Supreme Court.⁵⁰

Until the amendment, the President of the Supreme Court was appointed by the President of the Republic of Poland, after consultation with the First President of the Supreme Court, for a three-year term from among three candidates presented by the Assembly of the judges of the Supreme Court chamber.⁵¹

3.1.2 BAN ON PARTICIPATING IN THE ASSEMBLIES INTRODUCED BY THE ORDINANCE

The Ordinance of the Council of Ministers of 25 March 2021 amending the regulation on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic⁵² prohibits -

⁴⁸ <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=935>

⁴⁹ Article 15 § 4, http://orka.sejm.gov.pl/proc9.nsf/ustawy/935_u.htm

⁵⁰ According to the Polish Human Rights Commissioner opinion: <https://www.rpo.gov.pl/pl/content/rpo-nowela-ustawy-sn-niekonstytucyjna>

⁵¹ According to previous version of the Law of December 8, 2017 on the Supreme Court:

“In order to adopt a resolution of the General Assembly of Judges of the Supreme Court concerning election of candidates for the post of the office of the President of the Supreme Court, the presence of at least 2/3 of the number of judges of each chamber is required. If the resolution is not adopted due to lack of the required quorum, in order to adopt the resolution at the next session, the presence of at least 3/5 of the number of judges of the Supreme Court is required. If the resolution is not adopted due to lack of the required quorum, presence of at least 3/5 of the number of Supreme Court judges is required to adopt the resolution at the next session”. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000005>

⁵² <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/zmiana-rozporzadzenia-w-sprawie-ustanowienia-okreslonych-ograniczen-19093713>

in addition to organising assemblies - participation in them, which may lead to further civic space restrictions and prosecution of protestors.

Participants of the assemblies are fined up to 500 PLN (aprox. 100 Euros) or a fine in court up to PLN 5,000 PLN (aprox. 1000 Euros)⁵³ and an administrative fine in the amount of PLN 10,000 to PLN 30,000, imposed by the State Sanitary Inspectorate⁵⁴.

This blanket ban breaches Poland's obligations under international human rights law, which permit restrictions to the right to freedom of assembly only if they are necessary and proportionate. As a general rule, there should be no blanket bans on assemblies and each assembly should be assessed on a case by case basis to impose restrictions only to the extent necessary and proportionate to achieve a legitimate end.⁵⁵ Significant legal developments undermining the independence of the judiciary and prosecutors

3.1.3 TRANSFERS OF PROSECUTORS DURING THE PANDEMIC

On 18 January 2021, seven prosecutors - six of which are members of "Lex Super Omnia" prosecutor's association - learned that in 48 hours they were to report to their new workplaces several hundred kilometres away from their place of residence. They were sent on a six-month secondment to the district prosecutors' offices in small towns. Polish law allows prosecutors to be seconded to another prosecution service, but decisions without adequate notice raise concerns over compliance with an obligation to respect their personal and family life.⁵⁶

Although the National Prosecutor⁵⁷ explained the decision by the necessity to fill vacancies in smaller towns during the pandemic, but according to the information received from superiors of these units, they did not report staff shortages.

According to the prosecutors, this action is a form of punishment and intimidation of the prosecutors who are members of the 'Lex Super Omnia' association. This association is known for its criticism of the prosecution service and defends the independence of the prosecution.⁵⁸

3.1.4 EUROPEAN COMMISSION REFERS POLAND TO THE CJEU WITH ANOTHER REQUEST FOR INTERIM MEASURES TO PROTECT THE INDEPENDENCE OF JUDGES

On 20 December 2017, the European Commission triggered the procedure under Article 7(1) TEU against Poland. EU's concerns over the rule of law in Poland were addressed at three hearings (26 June, 18 September and 11 December 2018) of the General Affairs Council⁵⁹

On 31 March 2021 the EC requested the CJEU for an interim measure to suspend provisions empowering the Supreme Court's Disciplinary Chamber to decide on the waiver of judicial immunity, as well as on matters relating to the employment, social security and retirement of Supreme Court judges.⁶⁰ If granted, the interim measure should protect Judge Igor Tuleya from loss of judicial immunity and criminalisation.

In the request, the EC asked for the suspension of the effect of decisions already taken by the Disciplinary Chamber waiving the immunity of judges. The EC also requested the suspension of those provisions preventing Polish judges from directly applying EU laws protecting their independence; the provisions prohibiting the submission of preliminary questions to the CJEU; and the provisions treating the actions by judges in this regard as disciplinary offences.⁶¹

⁵³ Article 54 of the Code of Offences

⁵⁴ Article 48a 1, point 3 of the Act on combating infectious diseases

⁵⁵ <https://www.amnesty.org/download/Documents/EUR3724212020ENGLISH.pdf>

⁵⁶ <https://wyborcza.pl/7,162657,26701017,dostali-48-godzin-na-zamkniecie-swoich-zawodowych-i-prywatnych.html>

⁵⁷ <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8072378,nielokorni-prokuratorzy.html>

⁵⁸ <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8072378,nielokorni-prokuratorzy.html>

⁵⁹ https://ec.europa.eu/commission/presscorner/detail/pl/ip_21_1524

⁶⁰ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524

⁶¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524

3.2 ISSUES OF CONCERN

3.2.1 THE CASE OF THE HUMAN RIGHTS COMMISSIONER— CONSTITUTIONAL TRIBUNAL JUDGMENT AND ITS CONSEQUENCES

On 15 April 2021 the Constitutional Tribunal ruled that Human Rights Commissioner Adam Bodnar, whose mandate expired in September 2020, cannot continue as an interim until the new Commissioner is appointed. The Parliament (both Sejm and Senate) were unable to elect a new candidate since September 2020.⁶² It has been a common practice for the outgoing Commissioner to act up until a new one was elected to ensure continuity in the protection of human rights.

The ruling provides for a three-month *adaptive period* due to concerns over the continuity of protection of citizens' rights and freedoms. This means that within the next three months, a law regulating situations in which the office of the Human Rights Commissioner is vacant for some time after the expiration of its term should be adopted.

3.2.2 TWO MOTIONS TO THE CONSTITUTIONAL TRIBUNAL TO EXAMINE THE SUPREMACY OF THE CONSTITUTION OVER EU LAW

The first motion was introduced on 29 March 2021 by the Polish prime minister Morawiecki who submitted a motion to the Constitutional Tribunal on the superiority of Polish constitutional law over EU law⁶³.

Prime Minister Morawiecki asked the CT to examine whether the provisions of the Treaty on the European Union are in compliance with the Constitution of Poland. The request focussed on three points:

- Article 1, first and second paragraphs, in conjunction with Article 4(3) of the Treaty on European Union, understood to entitle or oblige the body applying the law to depart from the application of the Polish Constitution or to order the application of legal provisions in a manner inconsistent with the Polish Constitution.
- Article 19(1), second subparagraph, in conjunction with Article 4(3) TEU, read as meaning that, for the purposes of ensuring effective legal protection, the body applying the law is authorised or obliged to apply the legal provisions in a manner inconsistent with the Constitution, including the application of a provision which, by virtue of a decision of the Constitutional Tribunal, has ceased to be binding as being inconsistent with the Constitution.
- The second paragraph of Article 19(1) read with Article 2 TEU, understood as authorising a court to review the independence of judges appointed by the President of the Republic of Poland and to review a resolution of the National Council of the Judiciary concerning a motion to the President of the Republic of Poland for appointment of a judge⁶⁴.

According to the Polish Deputy Ombudsman, the aim of the motion is to have the Constitutional Tribunal ruling that the CJEU judgments setting the European standards in terms of independence and impartiality of judges cannot be applied in the Polish legal system⁶⁵.

In June 2021 European Commission addressed a letter to the Minister of Foreign Affairs and Minister of Justice of Poland requesting that Prime Minister Morawiecki withdraws the indicated motion to the Constitutional Court⁶⁶. It was indicated that Prime Minister's motion "appears to call into question the fundamental principles of EU law, in particular the principle that EU law takes primacy over national law and that the rulings of the CJEU are binding for all national courts and other state authorities of the Member States". Poland has one month to respond to this letter.⁶⁷

⁶² <https://wyborcza.pl/7,173236,26983417,poland-s-constitutional-court-rules-to-remove-the-ombudsman.html>

⁶³ <https://ruleoflaw.pl/the-pm-filed-a-petition-with-the-constitutional-tribunal-about-the-superiority-of-polish-law-over-eu-law/>

⁶⁴ <https://oko.press/wniosek-premiera-do-tk-ma-zalegalizowac-zmiany-w-sadach-to-polexit-z-porzadku-prawnego-ue/>

⁶⁵ <https://oko.press/wniosek-premiera-do-tk-ma-zalegalizowac-zmiany-w-sadach-to-polexit-z-porzadku-prawnego-ue/>

⁶⁶ <https://www.politico.eu/article/commission-chides-poland-respect-supremacy-eu-law-warsaw/>

⁶⁷ <https://www.gazetaprawna.pl/wiadomosci/swiat/artykuly/8187879,ke-polska-miesiac-odpowiedz-na-list.html>

The second motion is a legal question submitted by the Disciplinary Chamber of Supreme Court and concerns the binding nature of CJEU interim measures.

In April 2020, the CJEU issued interim measure to the Disciplinary Chamber because by its political nature and adjudication in disciplinary cases of judges it threatens the independence of the courts.

In response to that the Disciplinary Chamber of Supreme Court submitted an application to the Constitutional Tribunal regarding the obligation of a Member State of the EU to enforce provisional measures concerning the organisation and functioning of the constitutional organs of its judicial power.⁶⁸

The Constitutional Tribunal will assess the compatibility with the Constitution of Poland of the provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union.

There is a risk that the Constitutional Tribunal will rule that the ban on the operation of the Disciplinary Chamber interferes with the Polish judiciary and is contrary to the Constitution. The effect of the CT ruling would be to undermine the rules on which the EU is based.

Crucially, a decision legitimising Poland's failure to comply with CJEU interim measures amounts to a risk of continuation of politically motivated criminal proceedings against judges by disregarding CJUE interim measures concerning judiciary.

3.2.3 REGIONAL COURT OF KATOWICE QUESTIONING THE LEGALITY OF JUDGES APPOINTED BY THE NCJ.

In March 2021 the Regional Court in Katowice decided to refer to the Court of Justice of the European Union a question regarding the legality of the appointment of all judges recommended by the new National Council of the Judiciary.

It is doubtful whether one can speak of a legal court if its composition includes persons appointed by the new NCJ, since the present NCJ, chosen contrary to Polish constitutional and statutory provisions, is not an independent body and is not composed of representatives of the judiciary appointed independently of the executive and legislative authorities.⁶⁹

⁶⁸ <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8151757,tk-tsue-srodki-tymczasowe-prawo-polskie-prawo-unijne.html>

⁶⁹ <https://www.prawo.pl/prawnicy-sady/status-sedziego-powolanego-z-udzialem-nowej-krs-pytania-do-tsue,507261.html>

4. SUMMARY OF POLISH CASES CONCERNING JUDICIARY BEFORE ECTHR AND CJEU

The ECtHR has articulated in its case law many important standards concerning the protection of the rule of law, in particular in the context of safeguarding the independence of the judiciary. These standards have influenced the jurisprudence of national constitutional courts.

The Court examines cases concerning the rule of law in the broad sense Article 6(1) of the ECHR, which guarantees the right to a fair trial. Some relevant standards may, however, also be derived from Art. 8 (right to protection of privacy) and Art. 10 ECHR (freedom of expression). Currently, before the ECtHR there are several cases pending against Poland, which relate to reforms in the broadly understood judiciary.⁷⁰

4.1 CASES BEFORE THE ECTHR

4.1.1 XERO FLOR SP. Z O.O. V POLAND (NO. 4907/18) - CONCERNING THE IRREGULARITIES OF THE APPOINTMENT OF THE CONSTITUTIONAL TRIBUNAL'S JUDGES, THE SO-CALLED “DOUBLE JUDGES”

The company lodged an application to the ECtHR arguing a violation of Article 6 ECHR since the Constitutional Tribunal discontinued the constitutional complaint proceedings in a case brought by the company to the CT. One of the CT's judges who sat in the panel of the Constitutional Tribunal that made such a decision was considered to be defectively appointed to this position by the President of Poland in 2015. Concerns have been expressed as to the lawfulness of the election of three persons adjudicating in the Constitutional Tribunal who were appointed to already taken positions on the Tribunal's bench (so called „judges- doublers”).⁷¹ The company indicated that he had been elected to the Constitutional Tribunal in violation of the constitutional provisions. In the applicants' opinion, this represented a violation of Article 6 of

⁷⁰ <https://www.hfhr.pl/kierunek-strasburg-nowy-przystanek-w-walce-o-praworzadnosc-raport-o-polskich-sprawach-przed-europejskim-trybunalem-praw-czlowieka/>, page 12

⁷¹ <https://www.hfhr.pl/en/ecthr-to-hear-another-defective-judicial-appointment-case-hfhr-explains-causes-of-polish-constitutional-crisis-in-amicus-curiae-brief/>

the ECHR on Human Rights, which guarantees the right to a fair hearing, and due to the participation of an unauthorised person in the bench, the right to fair trial before a court established by law has been violated.⁷²

On 7 May 2021, the European Court of Human Rights issued a judgment in this case⁷³. The ECtHR found a violation of the right to a fair hearing and the right to a tribunal established by law due to the fact that the decision on the discontinuation of the proceedings concerning a constitutional complaint filed by a Polish company was issued by the Constitutional Tribunal with the participation of a judge who was unlawfully elected to the position of judge. The judgment is the first ruling of an international body finding that the irregularities in the functioning of the Polish Constitutional Tribunal violate international human rights law and in particular the right to a fair trial.

In the justification of the judgment the ECtHR noted that the breach “concerned a fundamental rule of the election procedure, namely the rule that a judge of the Constitutional Tribunal has to be elected by the *Sejm* (lower chamber of the parliament) whose term of office covered the date on which his seat became vacant.”⁷⁴ This principle arising from Article 194 § 1 of the Polish Constitution was recognised by the Constitutional Court in its judgment of 3 December 2015 (Ref. K 34/15) and confirmed in its four subsequent judgments. The Court reiterates that the Sejm acted contrary to this principle by proceeding to elect three judges of the Constitutional Tribunal on 2 December 2015, as the seats to which they were allegedly elected had already been filled by three judges elected by the previous Sejm⁷⁵.

Moreover, the ECtHR found that the President of Poland also acted in breach of the same principle by refusing to swear in the three judges elected on 8 October 2015 and by taking the oath of office from the three judges elected on 2 December 2015⁷⁶.

The Court did not provide any guidelines as to the general measures which should be taken by the Government. It is unclear at the moment whether Poland will submit a request for referral to the Grand Chamber in line with Article 43.1 of the European Convention on Human Rights.⁷⁷

The decision of the European Court of Human Rights sends a powerful message to the Polish authorities: interfering with the election of judges to the Constitutional Tribunal makes the bench of Constitutional Tribunal unlawful. This ruling that the bench of Poland’s Constitutional Tribunal is not independent and its judges were appointed in violation of the law must now spur the EU to finally take strong action.⁷⁸

The reactions the President of the Constitutional Tribunal and politicians of the ruling party⁷⁹ suggest that they have no intention of implementing the ECtHR judgment.

4.1.2 ADVANCE PHARMA V POLAND (1469/2074) - CONCERNING THE APPOINTMENT OF JUDGES TO THE CIVIL CHAMBER OF THE SUPREME COURT BY THE NCJ IN ITS CURRENT FORM

This case concerns the alleged lack of independence of the Supreme Court and the fact that the process of appointing Supreme Court judges in 2018 did not meet the requirements of the law. The irregularities were so serious that they nullified the effects of the appointment process. It was not about ensuring the independence and impartiality of the appointees, but about ensuring that the Supreme Court met the expectations of the authorities.⁸⁰ The involvement of the NJC, a body elected by the Polish Parliament disqualifies it as an independent, objective initiator of proposals to the President of the Republic of Poland regarding appointments to judicial positions. The Advance Pharma complained therefore of a violation of art. 6 of the ECHR.⁸¹

⁷² <https://www.rpo.gov.pl/pl/content/panel/sesja-6KPO-niezaleznosc-sadownictwa-przed-TSUE-i-ETPCZ>

⁷³ [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-210065%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-210065%22]})

⁷⁴ <https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/>

⁷⁵ [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-210065%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-210065%22]})

⁷⁶ Op. cit.

⁷⁷ <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>

⁷⁸ <https://www.amnesty.org/en/latest/news/2021/05/poland-ecthr-ruling-on-unlawful-constitutional-court-must-spur-action/>

⁷⁹ <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8157961,kaleta-wyrok-etpc-nie-niesie-ze-soba-zadnego-skutku-prawnego-wobec-trybunalu-konstytucyjnego.html>

⁸⁰ <https://www.iustitia.pl/en/disciplinary-proceedings/4098-written-comments-of-the-commissioner-for-human-rights-in-the-case-of-advance-pharma-sp-z-o-o-v-poland>

⁸¹ Op. Cit.

4.1.3 RECZKOWICZ AND OTHERS V. POLAND (NOS. 43447/19, 49868/19 AND 57511/19) - CONCERNING THE APPOINTMENT OF JUDGES TO TWO NEW CHAMBERS OF THE SUPREME COURT: DISCIPLINARY CHAMBER OF THE SUPREME COURT AND THE EXTRAORDINARY CONTROL AND PUBLIC AFFAIRS CHAMBER

In the proceedings, the ECtHR will examine three combined complaints. The facts of the first one are connected with the dismissal by the Disciplinary Chamber of the Supreme Court of the applicant's cassation appeal against a ruling of the disciplinary bodies of the Bar. The other two complaints concern judgments handed down by the Extraordinary Control and Public Affairs Chamber after it had examined the applicants' appeals against resolutions of the NCJ not to nominate them for appointment as judges.

In the first case, barrister Joanna Reczkowicz was suspended for three years after several incidents when she represented a client. She appealed the decision to the court. Her case was eventually dismissed in 2019 by the Disciplinary Chamber of the Supreme Court, one of two new chambers created as a result of judicial changes.

The other two applicants, Monika Dolińska-Ficek and Artur Ozimek, are district and district court judges who applied for positions elsewhere. The NCJ decided not to recommend their applications in 2018. The judges filed appeals with the Supreme Court. The Chamber of Extraordinary Control and Public Affairs rejected their complaints in 2019.

The case pending before the Court addresses the lawfulness of appointments to the Polish Supreme Court since 2018. The essential questions are, whether the newly shaped nomination process met the ECHR requirements; whether it was based on objective criteria and a fair procedure; whether it guaranteed independence and impartiality of those nominated, and in the end, whether they were lawfully established as judges. The applicants complain that the composition of the Supreme Court hearing their appeals did not meet the standards of an "independent and impartial court established by law" within the meaning of Article 6(1) of the ECHR. In addition, the complaints allege, concerning the procedure for judicial appointments, that the proceedings before the NCJ did not meet standards of impartiality and independence. The case is pending.

4.1.4 SOBCZYNSKA AND OTHERS V POLAND (NOS. 62765/14, 62769/14, 62772/14 AND 11708/18) - CONCERNING THE ADMISSIBILITY OF JUDICIAL REVIEW OF THE APPOINTMENT OF A JUDGE BY THE PRESIDENT.

In their complaints to the ECtHR, all non-appointed candidates raised allegations of violations of Article 6 (right to a court) and Article 13 ECHR (right to an effective remedy). The above-mentioned candidates not appointed by President also alleged a violation of Article 8 ECHR (right to protection of privacy) indicating that the arbitrary refusal to appoint them destroyed their careers. The case is pending.

4.2 CASES BEFORE THE CJEU

4.2.1 WALDEMAR ŻUREK (C-487/19) AND MONIKA FRĄCZKOWIAK (C-508/19)

In 2018 Judge Żurek was transferred from the division of the Regional Court in Kraków, where he sat, to another division.⁸² Dissatisfied, he appealed against this decision to the National Council of the Judiciary. The latter, however, discontinued the proceedings. In September 2018 the Judge appealed against the NCJ

⁸² <https://www.prawo.pl/prawnicy-sady/byly-rzecznik-krs-sedzia-waldemar-zurek-przeniesiony-do-innego,295285.html>

resolution to the Supreme Court and requested that all judges from the Supreme Court's Extraordinary Control and Public Affairs Chamber be excluded from ruling on his case.⁸³

The case concerns a question referred by the Polish Supreme Court to the Polish Civil Chamber in the case of Judge Waldemar Zurek. The case came before the CJEU due to fundamental doubts of the Supreme Court as to the proper implementation in the Polish judicial system of the principle of effective judicial protection, one of the fundamental principles under EU law. The obligation of all EU Member States to implement this principle follows from the second subparagraph of Article 19(1) of the Treaty on European Union. It is further specified in Article 47 of the Charter of Fundamental Rights of the EU, which provides *inter alia* that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'.⁸⁴

In the case of Judge Zurek's appeal against a resolution of the new NCJ unfavourable to him, Aleksander Stępkowski, appointed to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court by President Andrzej Duda, ruled on a one-man basis. In connection with this ruling, the Civil Chamber of the Supreme Court asked the CJEU a preliminary question (i.e. a preliminary legal question) as to whether such a one-man body appointed in flagrant violation of the law is a court within the meaning of EU standards.

In a similar case, also the judge Monika Frąckowiak seeks a declaration that a judge from the Disciplinary Chamber who was appointed to the Disciplinary Chamber in 2018 by the President of the Republic of Poland at the request of the National Council of the Judiciary was elected to this chamber illegally - not with compliance with the Polish Constitution. In her case, the Disciplinary Chamber set up by the National Council of the Judiciary is taking action in proceedings that can amount to punitive measures for daring to challenge the political subordination of the judiciary.

This case is relevant to all cases brought before the Labour Chamber of the Supreme Court to determine whether also other new judges of the Supreme Court from the Disciplinary Chamber, the Extraordinary Control and Public Affairs Chamber and the Civil Chamber were effectively appointed as judges of the Supreme Court.

In both cases the CJEU will assess the effectiveness of the appointment of judges to the Disciplinary Chamber and the Extraordinary Review Chamber in the Supreme Court in a procedure that involved the new National Council of the Judiciary⁸⁵.

On 15 April 2021 CJEU Advocate General Evgeni Tanchev announced the opinions in two cases concerning the newly created chambers of the Supreme Court: C-487/19 and C-508/19⁸⁶.

The Advocate General pointed out that a national judge who can rule on matters covered by EU law is covered by Union treaty protection. For that reason, his or her appeal can only be heard by a body that meets the requirements of effective judicial protection, that is, a body that is independent, impartial and established by law (case C-487/19).

Similarly, disciplinary proceedings against a judge must respect that protection, he has the right to be tried by a court meeting the requirements of EU law, which, at the same time, cannot be appointed in flagrant breach of the law (case C-508/19).

According to the Advocate General the appointment of judges to the Supreme Court, prior to a final judgment of the Supreme Administrative Court in appeal proceedings against a resolution of the NCJ recommending their appointment to the Supreme Court, constitutes a flagrant breach of national provisions governing the procedure for appointing judges and, consequently, of the requirements of EU law.

Until the proceedings before the Supreme Administrative Court are concluded, the President of Poland may not exercise his prerogative to appoint judges and is required to refrain from handing in an appointment letter. By challenging the NCJ's resolution with the Supreme Administrative Court, the legal existence of the resolution becomes dependent upon the decision of that court.

The Advocate General also found that the breach of the Supreme Administrative Court's binding decision suspending the execution of NCJ resolutions on recommendations to the Supreme Court was intentional and deliberate. It was intended to ensure government influence over judicial appointments. This demonstrates a lack of respect for the rule of law and breaches fundamental principles of the system and functioning of the judiciary.

⁸³ <https://prawo.gazetaprawna.pl/artykuly/1254353,waldemar-zurek-zlozyl-odwolanie-do-krs-ws-przeniesienia.html>

⁸⁴ <https://wyborcza.pl/7,162657,26325390,jozef-k-z-procesu-kafki-sprawa-sedziego-waldemara-zurka.html>

⁸⁵ <https://oko.press/tsue-ocenia-reformy-ziobry-to-rewolucja-przeciwko-panstwu-prawa/>

⁸⁶ <https://www.politico.eu/article/eu-court-poland-judicial-problems-extradition-bans/>

Further, in the Advocate General opinion, irregularities in the process of appointing judges to the Supreme Court include the lack of the required countersignature of the act initiating the nomination procedure and the participation of the new NCJ, which was appointed in an unconstitutional manner and does not warrant independence.

The Advocate General also found that limiting, let alone retroactively excluding, the effectiveness of national judicial review of the appointment process amounted to a breach of the requirements of EU law. An effective review must make it possible to establish that there has been no excess or abuse of power, error of law or manifest error of assessment in the appointment procedure.

Advocate Tanchev concludes that if a judge has been appointed to the Supreme Court in flagrant breach of the rules of national law, then - considering the principle of effective judicial protection and the right to a fair trial - the body of which he sits does not satisfy the conditions for recognition as a court constituted under the law and therefore does not comply with the requirements of EU law.

If the validity of the appointment of a judge to the Supreme Court cannot be reviewed in any domestic proceedings, the national court must nonetheless, in accordance with the principle of the primacy of EU law, be able to rule that appointment has not validly taken place, even if national law does not so permit. The national authorities cannot use arguments based on legal certainty and the removability of judges. Such arguments merely constitute a smokescreen and do not detract from the intention to disregard or infringe the rule of law.

In the view of the Advocate General, the serious breaches of law in the procedure for judicial appointments to the Supreme Court also justify limiting the binding nature of the judgments issued by such appointees, even contrary to the principle of legal certainty. Consequently, based on the principle of the primacy of EU law, the national court may annul or disregard the judgments delivered by them.⁸⁷

⁸⁷ <https://www.rpo.gov.pl/pl/content/opinia-rzecznika-generalnego-tsue-sadownictwo-z-udzialem-rpo>

5. CONCLUSIONS AND RECOMMENDATIONS

Amnesty International noticed with concern the deterioration of the rule of law and lack of respect for human rights in Poland. The situation in Poland is well described in an open letter addressed to the European Commission by a number of NGOs and eminent jurists and law professors. In the letter, it is concluded that the country has now reached a stage where independent judges seeking to apply EU law and the Court of Justice's judgments are threatened with abusive criminal charges and coercive measures.

"The deadline set by the EC in its additional reasoned opinion addressed to the Polish government regarding the "muzzle law" and the suspended Disciplinary Chamber passed at the end of February 2021. Even so, the Polish authorities have not stopped systematically breaching EU law and ignoring the Court of Justice's rulings [.....] What is at stake in this case is the independence and integrity of the whole of the judiciary in Poland.

More statements, dialogue and reports are not going to contain, let alone solve Poland's rule of law crisis. It is indeed no longer a crisis that Poland is facing but a total breakdown in the rule of law which, in turn, represents a threat to the interconnected legal order that underpins the European Union."⁸⁸

Against this background, Amnesty International calls on EU Member States to respond to this serious situation and to urge the Government of the Republic of Poland to take the following measures:

- Comply with the CJEU's order of 8 April 2020 temporarily suspending the activities of the Disciplinary Chamber of the Supreme Court.
- Amend the law on the National Council of the Judiciary (NCJ), so that members of the Council who are judges are elected by other judges, not by representatives of the executive and/or legislative branch and have the legally required number of judges supporting them.
- Revise the system of disciplinary responsibility which currently concentrates power over disciplinary proceedings in the hands of the Minister of Justice and repeal the provisions extending disciplinary responsibility for judges introduced by the "muzzle law".
- Stop the unjustified secondment of prosecutors to remote prosecution units and the initiation of retaliatory disciplinary and criminal proceedings against judges and prosecutors who oppose the subordination of the judiciary and prosecution services to the executive.
- Implement the ECHR ruling in the case *Xero Flor Sp.z.o.o. v Poland*, as soon as it becomes final with the aim of bringing the procedure before the Constitutional Tribunal in line with article 6 ECHR.

⁸⁸ See also: https://ruleoflaw.pl/open-letter-to-the-european-commission/#_ftn6

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BRIEFING ON THE RULE OF LAW AND INDEPENDENCE OF THE JUDICIARY IN POLAND IN 2020-2021

This briefing provides an update on the state of judicial independence in Poland for the period 2020 - 2021. It summarizes the developments in the proceedings against Poland that are currently pending at the Court of Justice of the EU, particularly those in relation to the Supreme Court (SC) and the National Council of the Judiciary (NCJ). It also provides information on the proliferation of disciplinary proceedings against judges and prosecutors who have publicly criticised the government's efforts to undermine the independent functioning of the judiciary in Poland. The so-called reform of the judiciary in Poland has in fact been used as a pretext by the government to undermine the independence and integrity of the judiciary. Judicial independence is an essential requirement of the right to a fair trial, which is of crucial importance to guarantee and ensure the enjoyment of other human rights.