

1) Constitutional Court: appointment of members and change of procedure

The crises started in **autumn 2015** when three new members of the Constitutional Tribunal had to be appointed: they were **properly elected** but (after general elections) the new president of the Republic **refused to take the oath from those judges** (who had been properly elected by the old parliament before) and did not allow them to take office. Instead, **the new parliament elected three other judges**.

The Prime Minister **did not publish verdicts of the Constitutional Tribunal** of the year 2016 (only 2 years later).

In **December 2016**, the president of the Constitutional Tribunal retired and the Polish president **appointed an “acting president” of the Constitutional Tribunal (in flagrant violation of the Polish constitution)**.

This new “president” of the Constitutional Tribunal **re-shuffled the panels of judges and admitted three new judges** who were appointed by the Polish parliament. His (new) peers elected the “acting president” as president.

The **Minister of Justice challenged the appointment of those 3 (old) judges** of the Constitutional Tribunal who had already been appointed in 2010 (when he was a party to a case). As a consequence:

=> the president of the Constitutional Tribunal **re-arranged the sitting panels so that these three (old) judges were not part of the deciding judicial panel**.

Furthermore organizational/procedural changes:

=> now the president of the Constitutional Tribunal **can exchange the reporting judge** of a panel in case the panel did not agree with the proposal of the reporting judge

=> the **size of the necessary deciding majority of a panel** to revoke a legislative act has been increased

=> a **case must be pending for a minimum of 6 months** before a decision in a constitutional case can be made

⇒ These changes were introduced with immediate effect.

Inter alia see Venice Commission, Opinion CDL-AD(2016)026,
[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)026-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)026-e)

2) change of the public prosecutor’s office

These legislative changes were initiated in 2016.

In principle, the amendment was the **merger of the office of the Minister of Justice** and that of the **Prosecutor General**, thus the Minister of Justice is Prosecutor General at the same time, in one person.

This has **effects on the ongoing disciplinary and criminal investigations against judges** (see below). These new competences for the Minister of Justice are noteworthy also when it comes to the judicial governance of judges and courts.

See inter alia opinion Venice Commission CDL-AD(2017)028,
[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)028-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)028-e)

3) change of National Judicial Council

A new law on the Polish Council for the Judiciary was initiated in 2017/2018, allowing the **parliament to elect the judge members of this new Judicial Council (21 out of 25 in total) and stopping prematurely the terms of all judge members of the “old” (incumbent) Judicial Council.**

Most of the new judicial members have **strong affiliations, strong connections (private or professional) with the Minister of Justice**; mainly that they have worked in the Ministry of Justice before or having been appointed as court presidents (vice-presidents) discretionally by the Minister of Justice briefly before (see below under 4)).

Furthermore, **allegedly procedural mistakes were made concerning the appointment procedure** of some of the new judge members of this new Judicial Council (not sufficient supporting signatures etc.). In this respect see reference to case below under 9).

Inter alia, see also:

- Venice Commission (CoE) Opinion:
[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e)
- CCJE Comments of 26/10/2016, CCJE-BU(2106)9:
<https://rm.coe.int/comments-by-the-ccje-bureau-following-the-request-of-the-polish-judges/16806b6144>
- Statement of the European Network of Councils for the Judiciary:
https://www.encj.eu/images/stories/pdf/Members/statement_by_the_executive_board_encj_17_july_2017_final.pdf
- joined cases C-585/18, C-624/18 and C-625/18, CJEU of 19/11/2019:
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=220770&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21597987>

4) powers of the Minister of Justice were enlarged (e.g. discretionary changes of court presidents and court vice-presidents and concerning the internal organization of courts)

Within a period of 6 months the Minister of Justice could **dismiss and appoint presidents of courts at his discretion** (in Poland court presidents have vast powers vis-à-vis judges of the court and play an important role in the case management process). Approximately 70 presidents and 70 vice-presidents lost their posts, no judicial review available.

Furthermore the Minister of Justice has **received stronger organizational powers**. The Minister of Justice has also broad powers in case of “mismanagement of the Court” by the sitting president of the court.

5) changes of the Polish Supreme Court

A law in 2017 **reduced the retirement age with discretionary option for the president to extend it**, when a judge applies for extension. See decision of CJEU in the Case C-619/18.

See also that in parallel also the retirement age of all ordinary judges was lowered with respective discretionary powers of the Minister of Justice, like for the Supreme Court judges. See in this case: judgement of CJEU in the Case C-192/18.

Furthermore, this law provided **two new extra chambers within the Supreme Court**, Chamber for **Extraordinary Appeals** (which is also competent to assess the validity of elections) and the **Disciplinary Chamber**. These Chambers are somehow extraordinary with special status and internally quite independent from the other chambers of the Supreme Court and of supervision by the president of the Supreme Court compared to the “normal” chambers of the Supreme Court, (the chambers also include lay members who are elected by the parliament).

Furthermore the **number of judges of the Supreme Court was increased** (from 93 to 120) and the president of the Republic is **involved in the appointment of the First president of the Supreme Court** (who has substantive powers in disciplinary proceedings against judges as well as to initiate the secondment of a lower court judge to the Supreme Court as well as to define discretionarily the composition of a deciding judicial panel, also on a case to case basis).

Supreme Court and its Disciplinary Chamber:

The Disciplinary Chamber of the Supreme Court was established: this is a specific chamber of the Supreme Court, **hearing disciplinary cases against (ordinary) judges¹** (in first or second instance) **and deciding to waive immunity of judges** (judges have broad immunities, broader than in most other European countries), to decide on **suspension of judges** during disciplinary proceedings and in this context to **lower judge's salary** (25-50%). Only Judges, who were selected by the new Judicial Council, are member of this Disciplinary Chamber. The Disciplinary Chamber enjoys a broad autonomy within the Supreme Court structures.

Please note: the Supreme Court referred a case to CJEU asking whether its new disciplinary Chamber can be regarded as an independent court or whether the case has to be transferred to another chamber of the Supreme Court.

- ⇒ **The judgement of CJEU of 19/11/2019** (joined cases C-585/18, C-624/18 and C-625/18) determines criteria for the **assessment of the independence of a court** (in this case: on the Disciplinary Chamber of the Supreme Court) and on the right/obligation of a national court to disregard those national provisions conferring exclusive jurisdiction to such a body (here: Disciplinary Chamber) to adjudicate on a given category of cases.
- ⇒ The **subsequent judgement of the (referring) Supreme Court of 5/12/2019** assessed the Disciplinary Chamber not to be lawful. Furthermore, the Supreme Court issued **a resolution**

¹ For all administrative judges (from Wojwodship courts and Supreme Administrative Court) - Supreme Administrative Court (NSA) is Disciplinary Court.

on 23/1/2020 (resolutions of the Supreme Court are binding for the ordinary judges) that courts should assess on a case-by-case basis if the manner of appointment through the new Judicial Council may have an impact on the fairness of proceedings.²

⇒ However, the **Muzzle Law of February 2020** (a reaction to the judgement of CJEU of 19/11/2019, see below under point 6.b) **forbids judges to assess so and to question the lawfulness/independence.**

This is in contrast to the judgement of CJEU of 19/11/2019 and the resolution of the Supreme Court of 23/1/2020.

⇒ **Disciplinary investigations** were initiated against several colleagues who nevertheless have assessed the lawfulness of other Polish courts (in line with judgement of CJEU).

The Commission brought a case to the CJEU on the disciplinary regime for Polish judges: C-791/19, Commission v Poland, case is pending.

Exemplified see:

CJEU judgements C-619/18 and C-192/18

CJEU of 19/11/2019 (joined cases C-585/18, C-624/18 and C-625/18):

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=220770&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=20831173>

Venice Commission (CoE) Opinion:

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e)

Urgent Interim Opinion of OSCE/ODIHR: <https://www.osce.org/odihr/443731>

CCJE statement on the Independence of the Judiciary in Poland (CCJE-BU(2018)6REV,

https://archiwumosiatsynskiego.pl/images/2018/06/CCJE-BU20186rev-EN-Statement-Poland_EN.docx.pdf

6) changes of the disciplinary system for judges and developments of proceedings so far:

a) the work of the Disciplinary Commissioner of Common Court Judges came under strengthened political overview of the Minister of Justice:

Disciplinary Commissioner and his two Substitutes play a major role in the disciplinary proceedings: they can initiate proceedings and can take control of any other disciplinary proceedings conducted by local commissioners.

The **Minister of Justice appoints the Disciplinary Commissioner and his two Substitutes.**

² For administrative judges formally this resolution is not binding, but now Art 5 par. 1a i 1b of the Law of the System of administrative courts provides that nobody cannot verify independence of administrative court or judge

b) **composition of disciplinary courts** was changed:

Now the **Minister of Justice appoints the judges who act as disciplinary judges** (first instance) in the disciplinary courts (i.e. courts on the appeal courts level).

Before: it was the general assemblies of judges of the respective appeal court.

Furthermore the **new Disciplinary Chamber** (composed of judges appointed by the new Judicial Council) was created (see above under 5).

c) **disciplinary liability of judges was broadened**³ by the „Muzzle Law“ of February 2020:

inter alia this was the Polish answer to the CJEU judgement of 19/11/2019 (see above under 5): now by this national law Polish colleagues can be disciplined if they question the legal effect of a judicial appointment (which is not in line with CJEU judgement of 19/11/2019).

Inter alia, this Muzzle law also strengthened the position of court presidents (and their deputies) in the judges' self-governing bodies (on the change of court presidents: see point 4 above).

Furthermore, the President of the Republic now makes the Rules of Procedure of the Supreme Administrative Court. Normally, ex ante the disciplinary Senate of the Supreme Administrative Court chooses the Disciplinary Prosecutor. However, now the Polish President has powers in principle ad hoc to appoint a disciplinary commissioner from among the judges of the Supreme Administrative Court (relevant for administrative judicial system).

d) **procedural rights of judges were weakened** in disciplinary proceedings: serious imbalance between disciplinary officer and the accused judge.

e) **Discrepancy between the number of launched disciplinary proceedings and cases which were finally referred to disciplinary courts**: initiation of proceedings as such are sufficient for a chilling effect on all judges! Between June 2018 and January 2020 the Disciplinary Commissioner for Common Courts initiated preliminary inquiries in 152 cases whereas only 16 cases were referred to disciplinary courts.

7) **exemplified pending disciplinary cases**:

a) **case of judge colleague Igor Tuleya**:

Colleague Tuleya works as judge in criminal appeal court in Warsaw: in December 2017 he had to adjudicate in criminal case on alleged criminal offence: to hold the vote outside of the plenary

³ This is also relevant for administrative judges

chamber. Charges by (opposition) MEP and citizens had been notified, because in a certain parliamentary turbulence and heated debates and occupation of the parliament podium the parliamentary session had to be interrupted but was resumed in another chamber in the parliamentary premises and not in the parliamentary chamber.

The prosecution discontinued the criminal proceedings (prosecution office is not independent body).

The decision of the prosecution office was challenged and the case came to judge Tuleya. He decided that the prosecution must investigate and has orally pronounced his judgement (three judge's chamber) and has allowed members of the media to be present during pronouncing the judgement. The Polish Code of Criminal Procedure says that hearings are in camera unless the court decides otherwise. Only the trial is usually held in public. Judge Tuleya has decided that media may be present and may record. No objection at that time from the parties to the case to his decision.

⇒ He was criminally charged with: „abuse of power“ and „violation of the prohibition against disclosure of the materials from a criminal investigation“ because of this decision to allow media to be present and to record

The disciplinary chamber has denied the request of the prosecutor's office to waive immunity. The prosecutor has appealed to the „new“ Disciplinary Chamber of the Polish Supreme Court (on the Disciplinary Chamber see above under 5).

On 18/11/2020 the Disciplinary Chamber has partly granted prosecution's appeal to waive colleague Tuleya's immunity concerning the alleged offence („violation of the prohibition against disclosure of the materials from a criminal investigation“). It dismissed the appeal of the prosecution concerning the alleged „abuse of power“.

The reasoning was that there is a certain degree of legal responsibility for actions as a judge and a judge cannot do anything in the courtroom.

The Disciplinary Chamber has made this decision despite huge international protest to do so: the CJEU has issued an interim measure by decision of 8/4/2020 by which the Disciplinary Chamber is not allowed to adjudicate such issues. See below under 8).

The decision to waive the immunity is regarded to constitute a threat to the independence of judiciary in Poland.

See inter alia: open letter by AEAJ, EAJ, MEDEL and Judges4Judges to the European Commission of 30/9/2020:

<https://www.aej.org/media/files/2020-10-02-86-joint%20open%20letter%20to%20European%20Commission%20.pdf>

b) case of judge colleague Beata Morawiec:

She is former president of the Cracow Regional Court. She is one of the leaders of the Polish judicial association THEMIS.

The Minister of Justice dismissed her as court president in 2017 because allegedly she had not correctly supervised the court director. It was also insinuated that she was somehow linked to corruption scandals discovered in courts in Krakow. She brought a civil action against the Minister of Justice and won in the first instance, the case is still pending.

In September 2020 the prosecutor's office applied to the Disciplinary Chamber to waive her immunity in the context of a corruption scandal in Krakow courts, allegedly she had abused power and accepted bribes.

By decision of the Disciplinary Chamber of 12/10/2020 her immunity was lifted, salaries reduced by 50%. Again, the Disciplinary Chamber did not follow the orders of CJEU of 8/4/2020 (see below under 8).

See inter alia:

Statement of AEAJ (in line with other European Judicial Associations) of 13/10/2020:

<https://www.aej.org/media/files/2020-10-18-25-AEAJ%20judge%20Morawiec.pdf>

c) case of judge colleague Irena Majcher:

She had to decide a case of forfeiture of property, which belonged to a company, which had failed to apply in a specific register in time.

Now the prosecution argues that judge Majcher should have ordered the company to register within an appropriate period and thus have committed professional misconduct.

However, this company had not registered in time – for 16 years.

Judicial immunity was NOT lifted by the Disciplinary Chamber.

d) case of Poznan judges – Roman Giertych case:

Roman Giertych is former deputy prime minister (not of the now ruling governing majority). He run a law firm, representing many corporate clients. He was charged with fraud and arrested in October 2020.

During the taking into arrest he fainted and was unconscious in the moment when the charges were read out to him. This was reason for judges to suspend certain supervision measures of the police. For this decision the Disciplinary Commissioner has started disciplinary proceedings immediately afterwards. The cases are pending.

e) case of judge colleague Maciej Zelazowski:

colleague Zelazowski heard an appeal against a judgement which was issued by a court composed of also a judge who had been appointed by the new National Judicial Council.

Background: the resolution of the Polish Supreme Court (on the basis of judgement CJEU of 19/11/2019) of 23/1/2020 stresses that the courts should assess on a case by case basis if the manner of appointment through the new Judicial Council may have an impact on the fairness of a proceedings. On the other hand the Muzzle law forbids so (see above under 5).

Colleague Zelazowski has examined and decided that the fairness has not been influenced. Still the Disciplinary Commissioner has launched disciplinary proceedings against him for this decision. The case is pending.

f) case of judge colleague Waldemar Zurek:

Colleague Zurek is former spokesperson of the old National Judicial Council.

He filed a lawsuit against judge Zaradkiewicz, a judge nominated by the new Judicial Council and who was interim president of the Supreme Court for some time. Colleague Zurek claimed that this judge would not be a legally appointed judge and has no competences.

The reaction of the Disciplinary Commissioner was to launch disciplinary proceedings against colleague Zurek because he had questioned the legality of judge Zaradkiewicz appointment.

Colleague Zurek also made public statements concerning the independence of the new Polish Constitutional Tribunal and the Polish new Judicial Council.

Because of these incidences disciplinary charges were made against him, cases are pending.

Colleague Zurek was delegated to another court department by the court president (regional court in Cracow). Because of his allegedly refusal to start working in this new court's department he faces another disciplinary proceedings, also pending.

g) disciplinary investigations against 16 judge colleagues of Regional Court of Piotrkow Trybulalski in August 2020:

reason: an open letter signed by them (in total signed by 1.200 Polish judges) in April 2020 addressed to OSCE/ODIHR. In this open letter they express their concerns regarding fairness of the upcoming presidential elections because of the pandemic situation which restricts fundamental freedoms as well as that the new Chamber for extraordinary appeal of the Supreme Court, which is in charge to review election complaints, consists only of judges who have been appointed by the new Judicial Council.

h) Judges Cooperation Forum – disclosure of membership in an organization

The Forum is an informal collaborative platform for Polish judges of all court levels. The Forum is coordinated by a 15-member committee. A key task of the Forum is to disseminate and prepare joint statements of the judicial community. The Forum is an informal group.

By Muzzle Law judges are required to disclose their membership in an association.

On the illegality of such a provision, see inter alia:

- Urgent Interim Opinion of OSCE/ODIHR: <https://www.osce.org/odihr/443731>
- CCJE, CCJE-BU(2017)10 of 2/11/2017 Opinion following the request of the Bulgarian Judges Association, <https://rm.coe.int/opinion-of-the-ccje-bureau-following-the-request-of-the-bulgarian-judg/16807630af>
- Opinion CCJE 23 (2020), <https://rm.coe.int/opinion-23-en-ccje-2020/1680a03d4b>

The Disciplinary Commissioner brought disciplinary charges against 14 members of the Forum's committee because allegedly they had not complied with this provision of the Muzzle Law.

i) cases of judge colleague Dariusz Mazur and judge colleague Maciej Czaika (Regional Court in Cracow):

Both colleagues (as well as some more Polish colleagues) hung up posters on the walls and on courtroom doors in their court. The posters expressed solidarity with judge Juszczyszyn (who had

been suspended) and which presented a list of proposals to restore the rule of law and independence of judges (e.g. “to discontinue repressive measures against judges in Poland”).

The court manager ordered to remove the posters and notified the police about an “unauthorized display of posters in a public place” (which is a petty offence). In addition the court president asked the local disciplinary commissioner to launch disciplinary proceedings.

73 judges from the Cracow Court notified the Court president that they had participated in hanging these posters. However, the court president requested disciplinary investigations only against the two colleagues mentioned above.

The local disciplinary commissioner refused to proceed with the request. The Minister of Justice opposed this decision. Thus in June 2020 the local disciplinary commissioner officially launched the disciplinary proceedings. The cases are pending.

8) infringement proceedings of the EC – preliminary references of Polish courts to CJEU

a) infringement proceedings launched by the European Commission:

- in April 2019: on the judicial disciplinary system in Poland. => case is pending before CJEU, C-791/19 (European Commission v Poland).

Please note: CJEU ordered **interim measures in April 2020 (C-791/19R)**: interim relief order of CJEU of 8/4/2020).

By this order Poland is obliged to suspend the respective national legal provisions on the powers of the Disciplinary Chamber. This order is clear in its meaning and with sound understanding comprises activities to lift judicial immunities.

A hearing in the main proceedings has taken place on 1/12/2020 in this case. The opinion of GA will be announced in March 2021.

- The European Commission has launched another infringement proceedings (initial stage) on certain aspects of the so-called judicial reform in Poland
- C-192/18, judgment CJEU of 5/11/2019 on lowering of retirement age of common court judges in Poland; case European Commission v Poland.
- C-619/18, judgment CJEU of 24/6/2019: concerned the lowering of retirement age of judges of the Supreme Court and disciplinary systems, case European Commission v Poland.

b) several preliminary references made by Polish colleagues to CJEU:

C-216/18 PPU: reference by an Irish/Dutch courts on the independence of Polish courts in a case of the European Arrest Warrant, see also C-354/PPU and C-412/PPU

C-824/18: pending, reference by the Supreme Administrative Court, see the recent opinion of GA: the Polish law, which was introduced in order to exclude the possibility of a legal review of the National Council of the Judiciary’s assessment of judicial candidates to the Supreme Court, violates EU law.

C-585/18, C-624/18 und C-625/18: judgement of 19/11/2019 on the independence of the Disciplinary Chamber of the Polish Supreme Court and (by extension) of the National Judicial Council.

C-558/18 und C-563/18: effective legal protection must be guaranteed by Member States; reference was declared inadmissible.

C-491/20, pending: on competences of the president of the Disciplinary Chamber after the order of CJEU of 8/4/2020, inter alia on primacy of application of EU law vis-a-vis national disciplinary laws, independence of judges and access to justice.

C-748/19 – C-754/19, pending: concerns different issues of independence (Art. 19 TEU) in a criminal case

- furthermore a reference was made by colleague Tuleya (see above under 7.a) in November 2020 on the Disciplinary Chamber and certain powers of it.
- colleagues from Warsaw Regional Court referred cases to CJEU after colleague Tuleya was suspended (see above under 7): asking whether a different judicial panel should decide a case which was initially assigned to a judge suspended by the Disciplinary Chamber

9) pending proceedings before ECtHR

- a) Xero Flor v. Poland, No. 4907/18: on judicial appointments in the Constitutional Tribunal
- b) Grzeda v Poland, No 43572/18 and Zurek v Poland, No 39650/18: on the early termination of terms of judicial members in the National Judicial Council
- c) Broda and Bojara v Poland, No 2669/18 and 27367/18: on discretionary dismissals of court vice-presidents by the Minister of Justice
- d) Reczkowicz a.o. v Poland, No 43447/19, 49868/19 and 57511/19: on the two new Chambers of the Supreme Court
- e) Sobczynska a.o.v Poland, No 62765/14, 62769/14 and 62772/18: on the decision of the State president to refuse to appoint a judge candidate recommended by the National Judicial Council
- f) Tuleya v Poland, No 21181/19: on the judicial disciplinary system

The recent landmark decision of Grand Chamber ECtHR in the case of Astradson v Island (appointment procedure for judges) might be relevant: irregularities of the appointment procedure for judge members of the new Judicial Council have been reported. In this case the question remains what effect an illegally constituted National Judicial Council has on the further appointment procedures of judges.

10) next possible steps:

In an interview the Chairman of PIS, Kaczynski, has talked about a **planned “verification of all judges” in Poland, a replacement and re-organization:**

<http://themis-sedziowie.eu/materials-in-english/kaczynski-directly-announced-a-purge-among-judges-for-the-first-time-mariusz-jaloszewski-oko-press-22-december-2020/>