

## **How the ruling party wants to control the courts**

**Thanks to the “reform” of courts and the Prosecutor’s Office, politicians are now able to take control of the judicial system. They have been partially successful. The Prosecutor’s Office has been subordinated to political power. The courts continue to defend their independence, but they are under pressure from the ruling party.**

- **Courts have not become fully subordinated to the ruling party, but the degree of their independence depends mainly on how judges act - whether they resist the pressure and rule according to their conscience or whether they bow to it.**
- **The ruling party acquired the power to exert this pressure through a series of changes, which started with the subordination of the Constitutional Court, and moved to the capture of the National Judiciary Council and Supreme Court as well as attempts to subordinate common courts. The Minister of Justice can also put pressure on prosecutors.**
- **The “reform” - i.e., changes in the Acts on Common Courts, National Judiciary Council and the Supreme Court -sparked protests. Lawyers claimed that the changes were introduced illegally. In order to legalise this illegality, the Constitutional Court, subordinated to the ruling party, ruled that the Act on the National Judiciary Council, which allowed further takeover of courts, was constitutional.**
- **The new National Council of the Judiciary (KRS), the so called “neo-KRS” fills positions in courts with judges who are loyal to the ruling party. The Disciplinary Chamber of the Supreme Court pushes judges who do not agree out of these courts - a clear breach of the independence of the third pillar of power - and are discouraged from voicing their opposition. In courts and in the Disciplinary Chamber of the Supreme Court, hundreds of cases, of varying gravity, are being conducted against The point is to make it impossible for those judges to adjudicate until the case is settled, or even forever, to make them feel uncertain about their future, or cause a ‘freezing’ effect.**
- **This system of intimidation is based on fragile foundations and EU courts have questioned the legality of the introduced changes and have called for them to**

**be withdrawn.**

## **What has led to the crisis?**

Amendments by the ruling majority in Poland to restrict courts' independence were introduced in breach of the legislative rules and rules of the separation of powers - in a coarse, quick way, without consultation with those it would affect.

Still, politicians had the courage to do that because the Polish judiciary had been in need of reform for a long time: protracted hearings, courts using old-fashioned methods instead of new technologies, bureaucratic formalities for citizens and unfriendly and complicated communication. All this made citizens feel unsafe and lacking a sense of justice. After 2015, politicians tapped into this sentiment and ran a public campaign against judges.

The "reform" of the justice system was preceded by a billboard campaign "Fair courts", directed against judges and organised by the Polish National Foundation. Media outlets favourable to the ruling party called judges a "caste" and presented them as going unpunished; a privileged professional group which robbed citizens without batting an eyelid and "staining the honour of the robe". The objective was to turn citizens against judges and thus justify the so-called "reforms", which in reality, far from improving the situation for citizens, instead made it possible to control courts, whilst cumbersome procedures remain in place and proceedings take even longer than they did previously.

## **Subordination of prosecutors**

It all started with "reform" of the Prosecutor's Office. The authors of the bill promised acceleration of proceedings, but in fact, prosecutors have been subordinated to the Minister of Justice, by whom they are disciplined and controlled. Of course, the Prosecutor's Office has always been a hierarchical institution, with certain authority, but still, prosecutors were independent when they conducted proceedings.

However, they lost this independence after 2015. One of the key changes that was introduced, and which subordinated the Prosecutor's Office to politicians, was the amalgamation of the position of the General Prosecutor and the Minister of Justice. The positions had been separate since 2010 (the change was introduced by the Civic Platform government). A solution used in Europe and proposed by Polish lawyers was introduced, which protected the Prosecutor's Office from political pressure. Prosecutors should be independent, ready to conduct an investigation against the ruling party and those with close ties to them. If they are subordinate to a politician from the party in power, i.e. the Minister of Justice, they might be afraid of being punished for proceeding with a case or that they would not be able to conduct it without undue pressure from above.

One clear example proving that the separation of the positions of the Minister and Prosecutor General is necessary was the activity of the Prosecutor General and Minister of Justice, Zbigniew Ziobro, during the first PiS government, in 2005-2007. This was when Ziobro filled important positions with his own people in order to conduct investigations which could bring him political benefits. During the first PiS government, it was quite common for the secret service and the Prosecutor's Office to cooperate in prosecuting political opponents, forging allegations, and organising provocations.

The act which separated the position of the Prosecutor General and the Minister of Justice stipulated that the General Prosecutor would be appointed by the President of Poland from among two candidates submitted separately by the National Council of the Judiciary and the National Prosecution Council.

The Prosecutor General was banned from conducting any political activity. Political pressure on the Prosecutor's Office was not supposed to happen. The first and last General Prosecutor under these rules was Andrzej Seremet.

The Act on the Prosecutor's Office also guaranteed prosecutors' independence. Only direct supervisors of prosecutors conducting investigations could have an influence on the decisions made during the investigation.

On 28 January 2016, less than two months after the inaugural session of the PiS-led Sejm, MPs adopted a new Act on the Prosecutor's Office, which again combined the positions of the Prosecutor General and Minister of Justice. Since then, the post has been held by Zbigniew Ziobro.

The "reform" also created the Internal Affairs Department in the National Prosecutor's Office, which deals with crimes committed by judges, prosecutors and assistant judges. Thanks to the changes, the Prosecutor General obtained the right to appoint and recall, at the request of the National Prosecutor, heads of district, circuit and regional prosecution offices. The "reform" abolished terms of office of heads of prosecution offices at all levels, so that they could be recalled immediately. This is contrary to the very idea of the terms of office, which serves the purpose of making sure that no one can be recalled from the post when they become inconvenient or if someone wants to fill the post with their own people. Competitions for higher positions in the prosecution office were abolished, which means that the Prosecutor General can appoint whomever they want and whenever. The same goes for regional prosecution offices, which replaced appellate prosecution offices which had very similar tasks (so the move was made only to change the composition of the offices). The changes made it possible for the Minister of Justice to fill prosecution offices at all levels with his own people.

Under Zbigniew Ziobro, almost all senior prosecutors in the National Prosecution Office were replaced, as well as those in district and circuit offices. In many cases, members of the Ad Vocem association, founded by Zbigniew Ziobro, who have ties to PiS politicians, were

promoted.

“After the new Act on the Prosecutor’s Office entered into force on 4 March 2016, people in senior positions in the National Prosecution Office were replaced at the speed of light, including in all regional prosecution offices, 44 (out of 45) circuit offices and over 90% of district offices” [“Królowie życia w prokuraturze dobrej zmiany” (Kings of life in the prosecution office of good change), report by the Lex Super Omnia Association of Prosecutors].

“A group of prosecutors, who were friends and colleagues, had ties with the current management of the Prosecution Office, were faithful and loyal, replaced those who were independent, experienced and competent prosecutors in senior positions. In order to achieve that, terms of office for senior positions and competitions for higher positions were abolished. Thus, very young, ambitious, but inexperienced prosecutors could be promoted.” [“Kings of life in the prosecution office of good change”, report by the Lex Super Omnia Association of Prosecutors].

The Prosecutor General has thus been granted both hiring and decision-making competences and can significantly interfere in proceedings and activities undertaken by prosecutors. At the same time, there are no traces of such orders left in case files, so it remains unknown who made a controversial decision and the prosecutor in charge of the case bears responsibility.

## **What did the Prosecutor’s Office did and what they didn’t do**

Prosecutor Tomasz Kuroszczyk, head of the circuit prosecutor’s office Warsaw-Praga, promoted in August 2016, first refused to initiate a proceeding on the failure to publish the rulings of the Constitutional Court by Prime Minister Beata Szydło in the Journal of Laws, and then discontinued it. (link do analizy o TK )

The investigation on the misuse of 40,000 EUR of EU grants for a climate conference organised by Solidarna Polska, Zbigniew Ziobro’s party, was slow and ineffective. A video showing how money was spent on organising a party convention was deleted from YouTube. In 2016, the Prosecutor’s Office in Ostrów Wielkopolski prepared an indictment against Daniel Obajtek, the current CEO of PKP Orlen, and owner of various local media outlets. He was accused of accepting a bribe and acting to the detriment of the state-owned company that he was then in charge of. A few months later, the indictment was withdrawn and the case was taken over by the branch of the National Prosecutor’s Office in Krakow. The same evidence was assessed differently and in June 2017, the case was discontinued. (link do analizy o mediach.)

In July 2016, an investigation into numerous law infringements by the then head of the Central Anticorruption Bureau (CBA), Mariusz Kamiński, during “Operation Krystyna”

(intended to compromise the former First Lady Jolanta Kwaśniewska regarding purchase of land in Kazimierz Dolny) was launched and discontinued on the same day. The prosecutor initiated the proceeding anew only to state that Kamiński's activities did not constitute a crime.

In the same Prosecutor's Office, an investigation against a former CBA agent, Tomasz Kaczmarek, aka "agent Tomek", suspected of breaking the law during "Operation Krystyna", was discontinued on 30 September 2016 by a prosecutor who was later promoted to a higher position.

In August 2016, head of the Circuit Prosecution Office in Opole questioned the judgement acquitting an influential right-wing journalist, Dorota Kania, from the charge of taking money for recommending in PiS Marek Dochnal, entrepreneur and lobbyist. One week later, she withdrew the cassation that she lodged herself.

The investigation on the Sejm's session - which was moved to the Column Hall (from the Meeting Hall, where parliamentary sessions are held under internal regulations), in order to vote through the budget and make it more difficult for the opposition to vote against it - was discontinued twice in the District Prosecutor's Office in Warsaw.

Prosecutors who conduct investigations that Zbigniew Ziobro or his compatriots do not like are posted to work in other cities, hundreds of kilometres from home, they are also demoted and receive tasks below their competences. For example, one prosecutor who specialised in difficult organised crime cases was transferred to a Prosecutor's Office where he now handles bike thefts. Disciplinary and demotional proceedings have been added to the Act on the Prosecutor's Office and, whilst no one can be dismissed without justification, it is nevertheless possible to make their life difficult, which can effectively weaken resistance against pressure.

According to the Venice Commission, the Prosecutor's Office in Poland today is neither independent nor autonomous, it does not provide the guarantees protecting it against government interventions in specific cases.

## **Common courts**

Although changes in the functioning of courts have also officially been labelled "reforms", courts in all divisions operate more slowly than they did before.

The most important result of the "reform", however, has been giving politicians the possibility to exert pressure on judges. The independence of the third pillar of the constitution, and hence a citizen's right to an impartial court, has been limited, thus seriously undermining the rule of law.

Under the Polish Constitution, but also according to the basic rule of law, courts and tribunals are a separate power, independent of others, and judges are likewise independent

in their office and only subject to the Constitution and acts of law.

In order to implement these constitutional provisions, judges are irremovable from their positions by law. No politician who dislikes the decisions of a judge should be able to remove the judge and replace them with a different, controllable one. This is why judges are appointed for an indefinite period as it is supposed to guarantee that they will adjudicate according to the law and their conscience, not worry that their ruling might bring about any repercussions from the authorities. This is what their independence means. For the same reason, judges cannot be moved to a different court or to a different position without their consent: there should be no possibility to exert pressure on them.

In principle, the Common Courts Act gave judges these guarantees, but there were certain exemptions. A judge cannot remain unpunished, break the law or rule against it. The aim is to find a balance between a judge's independence and controlling whether they act according to the law. This is why the Act, from the very beginning, contained specific conditions under which a judge can be removed from their post, banned from adjudicating, brought to court or transferred. And the essence of the "reform" was to extend the catalogue of these exemption conditions. The Ministry of Justice and MPs did so by gradually amending the Acts on Common Courts, National Judiciary Council and the Supreme Court with the aim of creating a system which will make it possible to easily accuse judges of committing disciplinary offences and ban them from adjudicating, deprive them of the right to practice their profession and accuse them of breaches or crimes, and through this exert pressure on them.

Amendments to the Common Courts Act were the first changes. In spring 2017, Minister of Justice, Zbigniew Ziobro, became the superior of directors of common courts. Until then, presidents of courts were court directors' superiors, and directors were selected through open application competitions. Since the change, they are now appointed and recalled by the Minister of Justice, without the request of the court's president and not through competition.

Why does this matter? Directors are superiors of employees who are not judges. They manage financial departments, decide on purchases and secretariat staffing, and hence influence the efficiency of court proceedings. The Minister has replaced around fifty of these directors.

In July, thanks to another change of the Act, the Minister of Justice was granted the right to recall and appoint court presidents freely.

A court president is an official superior of judges, assistant judges (judges who are on probation, before they are appointed indefinitely) and other employees involved in adjudication; they give positions to functional judges (heads of divisions and their deputies, inspectors who control judges' work); they appoint judges and assistant judges to positions or recall them (which does not mean that presidents can dismiss anyone); they analyse case-

law in the court and if they find any discrepancies, they inform the First President of the Supreme Court.

Zbigniew Ziobro made use of his powers quickly, letting go 158 presidents and deputy presidents of courts by fax and replacing them with the people he selected himself.

First and foremost, however, the Act introduced a new model of disciplining judges - it gave the Minister of Justice tools to appoint and recall judges and disciplinary prosecutors to disciplinary courts. This means that people who are dependent on the Minister conduct disciplinary proceedings against judges, indict them and give rulings. This is how the Minister, by moving a few pieces of the jigsaw, was able to exert pressure on judges, who should be independent. What happened after 2017 has shown that he was happy to exercise these new powers. Before it was possible, however, more steps were necessary.

They were two acts from the three voted on in July 2017 - the amendment of the Act on the National Judiciary Council and the Act on the Supreme Court. This next stage of "reform" sparked mass social protests, with thousands of people taking to the streets in the evening, with torches in their hands, creating chains of light and asking President Duda to veto the Act. The slogan was "3 times veto".

The President vetoed two Acts - on the National Judiciary Council and the Supreme Court but signed the Common Courts Act (discussed above). A few months later, the President presented his own draft proposals, although these too did not guarantee judges' independence. The Sejm added amendments and they entered into force as new Acts on the National Judiciary Council and the Supreme Court. They were not significantly different from previous versions and they paved the way for staffing theoretically independent institutions with people with ties to the ruling party, making it possible for politicians to control judges.

## **The National Judiciary Council**

The National Judiciary Council (KRS) has an enormous influence on the work of courts and judges. After the changes introduced as part of the "reform", the Council was granted additional powers. The composition of KRS has also changed, and is now made of politicians and people with ties to the ruling party. These people have the tools to exert pressure on judges and make decisions about their professional career.

Let us walk through these tools step by step. Under the new KRS Act, the Sejm interrupted the terms of office of its members and appointed new members of the Council. This happened despite the fact that terms of office serve the purpose of protecting members from being removed prematurely, when political power changes. As mentioned above, terms of office guarantee independence. Secondly, terms of office of specific KRS members started and finished at varying times, which also made it impossible for all the members to be

replaced by one political option. Once the Sejm interrupted their terms of office and selected new KRS members, this safety valve was removed. This was possible thanks to the judgement of the Constitutional Court of Julia Przyłębska of 20 June 2017, stating that individual terms of office of judges were unconstitutional. In other words - the terms of office of all of them could be interrupted at the same time.

Next, in order to staff KRS with their people, the Sejm majority changed the Act on KRS, under the pretext of the judiciary "reform", and appointed a new KRS, with their own people.

The Sejm also adopted a new structure and method of staffing KRS. After the changes, KRS now consists of two chambers with the second filled by politicians. The first chamber consists of fifteen judges, selected by the Sejm, although, as the Venice Commission noted, the majority of judicial councils should be selected by judges.

Judges selected to this "neo-KRS" are usually close to Zbigniew Ziobro or are supported by his people.

The Sejm Chancellery did not initially disclose lists of support for candidates to the "neo-KRS", and only did so in February 2020, after the ruling of the Supreme Administrative Court in June 2019.

Thus, an illegally functioning body was created.

As a result, the now-politicised neo-KRS gives opinions about candidates for judges and presents requests for their appointment to the President of Poland; reviews requests for judges' retirements; gives consent for judges above 65 years of age to keep working; selects disciplinary prosecutors for common courts; requests disciplinary proceedings against judges; gives opinions on normative acts on the judiciary and judges; and has a right to ask the Constitutional Court for an examination of the constitutionality of acts on the judiciary and judges.

In March 2019 the Court of Julia Przyłębska ruled that the provision on the selection of 15 judge-members to the Council by the Sejm was constitutional, meaning that there were no more obstacles for the "neo-KRS" to function.

The main task was to staff courts with trusted judges. In the Supreme Court, thanks to neo-KRS appointments, there are now more neo-judges than judges selected correctly; in total there are over 1000 judges selected by the "neo-KRS". Of course, many of them could also have become judges if the KRS functioned legally, but the fact that they were appointed by a body which had no capacity to act in such a way will weigh on their careers. Judges refuse to adjudicate with neo-judges, they believe it is their duty and say that the panel with neo-judges is not a court (please read below about the basis for that). Rulings given by incorrectly appointed judges can be challenged. The consequences of the functioning of "neo-KRS" are a manifestation of the chaos introduced by the "reforms" in the Polish judiciary system.



On a wider scale this means that the neo-KRS is supposed to fill the judiciary system with loyal people. The Disciplinary Chamber is supposed to discourage judges who do not agree with the breach of their independence or with illegal changes to the judiciary from protesting or to remove them from the profession.

## **Supreme Court**

The third part of the “judicial reform” package has been the attack on the Supreme Court. First, the legislator followed the same route as for the neo-KRS – all Supreme Court judges were supposed to be selected anew. After the presidential veto, other rules were introduced: all judges above 65 years of age were to be retired and then, possibly, reinstated to work by the President of Poland. This meant that the President would verify 40% of the Supreme Court judges, including the First President, Małgorzata Gersdorf. However, after interventions by the EU (see below), the ruling majority withdrew from the change and First President Gersdorf remained in the post until the end of her term of office.

The most important change in the Supreme Court was the creation of two new chambers: the Disciplinary Chamber and the Extraordinary Review and Public Affairs Chamber. The latter decides, among others, on the confirmation of the results of elections and dispensing public funds for political parties, whilst the former is another part of the “reform”, aimed at disciplining judges and limiting their independence.

In April 2020, the term of the First President Małgorzata Gersdorf expired and in May, the Supreme Court selected her successor, Małgorzata Manowska. The electing assembly was made of judges selected according to the new rules, i.e. illegal ones. Legally selected judges drew attention to the shortcomings and the flawed procedure. Finally, the assembly selected the judges and judge Włodzimierz Wróbel won the majority. Almost all legal judges voted for him. In spite of the fact that the Constitution stipulates that the selected candidates should be presented to the President of Poland for acceptance, the Assembly, under the leadership of non-judges, did not do so. Instead, Andrzej Duda chose Małgorzata Manowska himself, leading to some lawyers believing that the First President of the Supreme Court was not appointed to her position in the right way.

## **Muzzle law**

The last piece of the jigsaw is the “muzzle law” of December 2019, another important amendment of the Common Courts Act and the Supreme Court Act, which entered into force in February 2020. It laid out the tools the politicised KRS and the Supreme Court could use to perform their tasks.

Jan Kathak, politically close to Zbigniew Ziobro, presented the Act in the Sejm.

Before it was adopted, judges could face disciplinary proceedings in a case of blatant and obvious infringement of the law and damaging the dignity of their office. The fact that they were independent did not mean that they were not bound by any norms. A judge who went against their duties and the law could face disciplinary proceedings or be deprived of immunity and charged on criminal grounds. After the introduction of the “muzzle law”, the catalogue of actions leading to disciplinary proceeding was substantially extended. Now a judge can face disciplinary proceedings for the obstruction of the functioning of the judiciary. This term is so broad and ambiguous that it can cover any arbitrarily chosen action of the judge. The judge can also be held responsible for questioning the effectiveness of the selection of the judge and any public activity which cannot be reconciled with their independence and courts’ independence.

Judges need to reveal which parties and associations they belong to. For example, some of them belong to judges’ associations which protest against the changes in the judiciary.

Judges’ self-government cannot adopt political resolutions, especially when it comes to the functioning of the authorities. How are they supposed to protest in their own case, against the changes introduced by politicians and authorities?

The Extraordinary Review and Public Affairs Chamber can review extraordinary complaints regarding the Supreme Court’s and other courts’ rulings.

## **How are judges disciplined and why?**

Advocates from KOS (Komitet Obrony Sprawiedliwości, the Committee of the Defence of Justice - an alliance of legal organisations engaged in the defence of independent courts) calculated that up to July 2021, around 150 explanatory, disciplinary and immunity proceedings had taken place, the last ones in order to hold judges criminally responsible. Most of the proceedings are concluded at the explanatory stage. Disciplinary prosecutors do not indict judges, because there is no basis for it, but just initiating the procedure can have a freezing and discouraging effect against voicing any opposition.

Disciplinary and explanatory proceedings are launched when judges publicly question the changes in the judiciary system (which is why it has been called the “muzzle law”) or adjudicate in a way that politicians do not like. The pretext for proceedings can be tweets, public events or “infringements” found while browsing through the archives of judges’ work. For example, the Disciplinary Chamber deprived judge Igor Tuleya of his immunity at the request of the National Prosecution Office, where the case was handled by the division dealing with prosecutors and judges, created during the “reform”. The Prosecution Office alleged that Tuleya did not fulfil his professional duties and exceeded his powers when he allowed journalists to listen to him giving a ruling and record it, and so he disclosed the investigation as closed to unauthorised persons. The case that he adjudicated on referred to

the Sejm's session when the Marshall from PiS moved the session from the plenary hall to another one (Column Hall), when the opposition blocked the podium. The opposition protested against the plans to restrict journalists' possibility to broadcast Sejm's works. Some opposition MPs were not allowed to the other hall, where an important voting of the Budgetary Act was taking place. The opposition informed the Prosecutor's Office, but they did not find any infringements and discontinued the case. Judge Tuleya ordered a new investigation. In the justification of the ruling, which he allowed to be recorded, he said that opposition MPs were blocked from entering the Column Hall, that voting minutes were tampered with and that possibly, there was no quorum. He asked the Prosecutor's Office to examine whether PiS MPs gave false testimony. The Prosecutor's Office, however, did not do so and instead decided to indict the judge.

In another example, during a delegation to the circuit court in Olsztyn in November 2019, judge Paweł Juszczyzyn from the district court in Olsztyn, reviewed an appeal in a civil matter. In the first instance, the case was reviewed by a judge appointed by neo-KRS. Judge Juszczyzyn decided it was necessary to establish whether the judge had a right to adjudicate. The disciplinary prosecutor presented disciplinary charges to judge Juszczyzyn, and the Disciplinary Chamber of the Supreme Court suspended him from adjudicating indefinitely.

The Prosecution Office also wants to charge judge Włodzimierz Wróbel from the Criminal Chamber of the Supreme Court, who, let us remind, was selected for the position of the President of the Supreme Court by the judges (but the President of Poland did not appoint him), with a crime that did not happen. Due to an oversight in the work of the court's secretariat, one person spent one month longer than he should have under arrest. But the Prosecutor's Office wants to charge the judge and has asked the Disciplinary Chamber to revoke the judge's immunity. The Disciplinary Chamber did not do so. The judge is a lecturer at the Jagiellonian University and is famous for criticising changes in the judiciary system especially Minister of Justice Zbigniew Ziobro.

Judge Waldemar Żurek has been forced to appear disciplinary proceedings in the Appellate Court in Rzeszów because of a 38-year-old tractor that he bought 6 years ago. Disciplinary prosecutors discovered that he did not pay 820PLN of tax on this civil law transaction. The transaction was exempt from tax, which was confirmed by the Revenue Office, but the disciplinary prosecutor believes that Waldemar Żurek damaged the judge's dignity and charged him, and the case will be settled by court. He can face reprimand, reduction of salary by half or removal from the position. This is one of a dozen disciplinary proceedings against this judge. Another one is because of an interview that he gave for Gazeta Wyborcza. The judge observed that prosecutors who criticise Zbigniew Ziobro were posted to work several hundred kilometres away from their homes. Żurek claimed this was a type of harassment unknown even during the end of communism.

Judge Piotr Gąciarek was transferred from the Circuit Court in Warsaw, where he adjudicated in complicated cases, to another division, where he is not even allowed to adjudicate anymore, but only implement rulings given by others. One week earlier, during the hearing, he publicly criticised changes in the judiciary introduced by the ruling party and questioned the promotions made by the neo-KRS. Gąciarek remains one of the judges who are most vocal against the changes in the judiciary. The decision to move him was made by Piotr Schab, President of the Regional Court in Warsaw, nominated by Zbigniew Ziobro.

These are but a few examples and there are hundreds of proceedings against judges. There is one collective proceeding against 32 people who signed a letter to the European Commission, European Parliament and European Council about the Polish government breaking the rule of law. Some proceedings are still at an exploratory stage. “The judge is, for example, asked to explain why he was wearing a t-shirt with the word ‘Konstytucja’, or why he was wearing shorts when he was moderating a simulated hearing at a musical festival Woodstock, or why he signed a letter to OSCE about presidential elections that should not take place in May [the so called “envelope elections” of 2020]. Many explanatory proceedings will most probably never progress into disciplinary proceedings, but the risk is still there and these actions have a freezing effect. Judges are supposed to know that they will face consequences if they do something that the ruling party does not like. They are supposed to be afraid of making a reference for preliminary ruling to the CJEU on the independence of judges threatened by new disciplinary proceedings, as judge Ewa Maciejewska did. They are supposed to be afraid to hand down a verdict that Minister Zbigniew Ziobro does not like. Explanatory proceedings are a deterrent not just for famous judges that everyone hears about, but for those from smaller towns, they are also supposed to be afraid” [Sylwia Gregorczyk-Abram, an advocate from the Free Courts initiative who defends accused judges, in an interview with Kultura Liberalna, May 2021 <https://kulturaliberalna.pl/2021/05/18/bohaterowie-sprawiedliwosci-w-duzym-pokoju/>].

## **What is the European Union saying?**

EU institutions and international organisations have reacted to the gradual, consistent restriction of the freedom of the Prosecutor’s Office and the judiciary from the very beginning. The European Commission, the Court of Justice of the European Union (CJEU), the Venice Commission, and the European Court of Human Rights have all issued opinions, judgements, verdicts, and interim measures and the Polish authorities have either ignored them or questioned their legality in the media and tried to invalidate them (which was ineffective) by force of their own institutions.

Judgements, interim measures (i.e. temporary measures until the ruling is given) or verdicts

looked both at specific cases and referred to key changes in the system. All consider the challenged “reforms” to be illegal.

The most important reactions to the changes in the judiciary system from EU institutions have been judgements, interim measures and rulings on the changes in the National Judiciary Council, Supreme Court and Constitutional Court. They indicate that each step of the plan to subordinate the judiciary to the ruling party has been challenged by EU courts and that all activities undertaken on the basis of “reforms” have been illegal.

On 5 November 2019, the CJEU gave a ruling which made it impossible for the Minister of Justice to get rid of some judges. In 2017, the Sejm lowered the retirement age for judges from 67 years to 60 for women and to 65 for men. Once they reached the age, judges were supposed to be able to continue to work, as long as the Minister of Justice agreed. The CJEU decided that the Act was not compliant with EU law, as it led to gender discrimination and defied a ban on the irrevocability and independence of judges.

Another CJEU intervention also concerned attempts to verify judges, this time those in the highest positions. Changing the retirement age for judges was supposed to make it possible to get rid of unwanted judges. The Sejm decided that all judges of the Supreme Court and Supreme Administrative Court who turned 65 (including the then First President of the Supreme Court, Małgorzata Gersdorf) would retire automatically. On 25 June 2019, CJEU ruled that Poland had again broken the rules of the independence and irrevocability of judges. For the first time in the CJEU’s history, such a ruling was handed down for an EU member state.

The CJEU dealt with the status of the Disciplinary Chamber and neo-KRS because Polish courts made references for preliminary rulings. On 19 November 2019, the CJEU specified the criteria for the assessment of the independence of the neo-KRS from the ruling party and of the impartiality and independence of the Disciplinary Chamber. The Supreme Court implemented the ruling and said that the neo-KRS was not independent, and that the Disciplinary Chamber was not a court, neither under EU law nor Polish law. These statements were then included in a famous resolution of joined chambers of the Supreme Court of 23 January 2020.

Another important decision was on judges of the Supreme Court appointed by the neo-KRS. On 2 March 2021, the CJEU ruled that it was possible that the amendments to the Act on the National Judiciary Council breached EU law.

First, neo-KRS announced a competition for new judges to the Supreme Court, among others, for newly established chambers, including the Disciplinary Chamber. Judges from the Judges’ Association Iustitia, known for their criticism of the changes in the judiciary, applied for the competition. (They would later be called “kamikazes”, because they knew in advance that they would not be appointed for the positions in the Polish most important court). After being rejected, they wanted to appeal against the competition procedure. Or

rather, they knew they would not be able to appeal against it, because the amendment of the Act on KRS made it impossible - a competition participant who was not appointed to the Supreme Court could not appeal against the decision. These judges, just as they predicted, were not appointed and then they complained to the Supreme Administrative Court that they could not appeal against the decision. The Supreme Administrative Court asked the CJEU if it was compliant with EU law (the Court made a reference for a preliminary ruling). If an act is incompliant with EU law, a court should omit it and not apply it. The CJEU stated that a non-transparent selection procedure of judges infringed EU law. This meant that the Supreme Administrative Court should decide whether or not to omit the provisions on the selection of judges to the Supreme Court, and thus acknowledge that the new judges were selected in the correct way. To put it simply, the Supreme Administrative Court had a right to decide whether, for example, judges from the Disciplinary Chamber could remain in their posts.

On 29 March 2021, Prime Minister Mateusz Morawiecki reacted to the CJEU's ruling and requested the Constitutional Court of Julia Przyłębska to recognise the supremacy of the Polish law above EU law. This would make it possible for Poland not to recognise the CJEU's rulings on the changes in the judiciary and rule of law. The case was postponed many times before a ruling was finally given on 7 October 2021. It has come to be known as "Polexit", because the Court of Julia Przyłębska decided that the CJEU cannot decide whether the amendment of the Act on KRS breaks EU law. Therefore, the Supreme Administrative Court cannot rule on the basis of the CJEU's decision whether judges selected by the neo-KRS were really judges. The Court of Julia Przyłębska decided that the CJEU's rulings interfered with the Polish judiciary system and exceeded EU powers. The Disciplinary Chamber continued to adjudicate, and suspended judges could not return to adjudicating. In reaction, the CJEU imposed a penalty on Poland - one million Euros per day - until Poland implemented the CJEU's ruling.

On 7 May 2021, the European Court of Human Rights in Strasbourg ruled that the presence of the judge-doubler (i.e. selected in breach of law, to an already filled position in the Constitutional Court), Mariusz Muszyński, who was on the adjudicating panel of the Court of Julia Przyłębska in the XERO FLOR case against Poland, made the panel illegitimate, i.e. a court with a judge-doubler on the panel is not a court. And if it is not a court, its rulings are not valid. Since then, any ruling given by a panel with a judge-doubler can be challenged and declared invalid. It is worth mentioning the fact that the famous ruling by Julia Przyłębska from 22 October 2020 which effectively banned legal abortion in Poland, was made by an adjudicating panel not only with Mariusz Muszyński, but also another judge-doubler - Jarosław Wyrembak.

On 14 July 2021, the CJEU froze the Disciplinary Chamber's ability to dispense rulings on judges' immunity in the Supreme Court. It ruled that the Disciplinary Chamber cannot

deprive judges of their immunity and those already deprived of it should be able to return to work.

On 15 July 2021, the CJEU ruled that the key changes in the Polish judicial disciplinary were not compliant with EU law and that the Disciplinary Chamber of the Supreme Court cannot be considered an independent and unbiased court. This was another breakthrough, albeit a breakthrough only on paper, and despite the CJEU's rulings, the Disciplinary Chamber has not ceased to exist.

Since the CJEU's interventions, an anti-EU political and media campaign has been underway in Poland, both in state media and other pro-government outlets. On top of this, it has become an emotional issue for many because the European Commission has threatened not to give Poland money from the European Recovery Fund unless CJEU's rulings are implemented.

**Author:** Katarzyna Skrzydłowska-Kalukin, journalist, coordinator of the "PraworzędźMY" project.

**Substantive analysis of the article was made by**

Maria Ejchart-Dubois, lawyer, co-founder of the Free Courts initiative, and KOS -(Committee of the Defence of Justice), CEO of the Zbigniew Hołda Association.