THE TIME OF TRIAL.

How do changes in justice system affect Polish judges?

HELSINKI FOUNDATION
FOR HUMAN RIGHTS

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The time of the reform of the justice system is a time of many extremely successful changes ... This is also shown by the number and breadth of the legislative proposals that we have adopted.

Zbigniew Ziobro, Minister of Justice and Prosecutor General

The rule of those judges who consider themselves to be a special caste cannot, by definition, be the rule of law. For pride does not go along with humility, and humility is the essence of serving in any branch of government, including the judicial branch.

Zbigniew Ziobro, Minister of Justice and Prosecutor General

I feel so helpless as if the whole state apparatus wanted to make my life difficult.

A surveyed judge

I am still working, but I know that there may come a time when I will look around and see nobody I can trust, and I won't know whether those who remain are still judges or rather servants taking orders from some higher-up.

A surveyed judge

In the current situation, I am trying to do the same job as I did a year ago, or five or ten years ago. It's about making judgments according to your conscience.

A surveyed judge

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INTRODUCTION

After almost four years of continuous changes in the justice system, the guarantees of judicial independence and the proper operation of the courts have been seriously compromised. Nearly 20 amendments to key pieces of justice legislation have extended the possibility of politically influencing the work of courts.

In 2018, daily newspaper *Rzeczpospolita*[1] and IUSTITIA Judges' Association[2] published the results of two independent quantitative studies. More than half of the judges (64%) participating in the *Rzeczpospolita*'s survey said that the tense climate affected the way cases were conducted and the sentences passed. The vast majority of judges (92%) also admitted that inquiries taken against judges active in public debate may cause the so-called chilling effect in the judicial community. Furthermore, 30% of the judges surveyed by IUSTITIA admitted that they had heard of political pressure in their community; 15% of the judges pointed to their personal experience of being pressured. Subsequent reports, including those prepared by the Justice Defence Committee KOS[3], Amnesty International[4] and IUSTITIA[5], documented disciplinary proceedings initiated against judges active in the debate on the reform of justice.

Drawing on this data, we interviewed 40 judges about their experiences and attempts made to pressure them into submission. The interviews also enabled us to obtain insight into the work of courts and the mood among judges. Our goal was to determine how the systemic changes in justice and the initiation of disciplinary proceedings against judges active in public debate impact on the actual work of judges. This report is an outcome of the first qualitative study on issues related to the independence of

1 Rzeczpospolita, Niezawisłość sędziów jest zagrożona, a sądom grozi upolitycznienie – ankieta „Rzeczpospolitej", available: https://www.rp.pl/Sedziowie-i-sady/310249921-Niezawislosc-sedziow-jest-zagrozona-a-sadom-grozi-upolitycznienie—ankieta-Rzeczpospolitej.html

2 Stowarzyszenie Sędziów Polskich IUSTITIA, Raport: Stan niezależnego sądownictwa w Polsce z perspektywy sędziów, available: https://www.iustitia.pl/dla-mediow/informacje-dla-mediow/2605-raport-stan-niezaleznego-sadownictwa-w-polsce-z-perspektywy-sedziow-raport-stowarzyszenia-sedziow-polskich-iustitia-10-10-2018

3 Komitet Obrony Sprawiedliwości, Państwo, które karze, available: https://komitetobronysprawiedliwosci.pl/panstwo-ktore-karze-raport-komitetu-obrony-sprawiedliwosci-kos/

4 Amnesty International, Polska: Wolne sądy, wolni ludzie, available: https://amnesty.org.pl/wp-content/uploads/2019/07/Wolne-Sady-Wolni-Ludzie-Report_PL.pdf

5 Stowarzyszenie Sędziów Polskich IUSTITIA, Sędziowie pod presją – raport o metodach szykanowania przez władzę niezależnych sędziów, available: https://www.iustitia.pl/dzialalnosc/opinie-i-raporty/3166-sedziowie-pod-presja-raport-o-metodach-szykanowania-przez-wladze-niezaleznych-sedziow-2019

judges and the working climate in courts carried out after the reform of the justice system introduced in 2017-2019.

The launch of this report is a good time to say "thank you" to all those who contributed to its creation – the employees and collaborators of the Helsinki Foundation for Human Rights (in particular Maciej Nowicki, dr. Piotr Kładoczny and Maria Ejchart-Dubois), members of judicial associations and lawyers who put us in contact with judges willing to participate in the survey. Our special thanks go to the reviewers of the report – Regional Court in Kraków judge Dariusz Mazur and Jarosław Gwizdak, former president of District Court in Katowice-Zachód. We remain solely responsible for any errors or inaccuracies that may appear in this report.

Above all, we want to thank our respondents for their time, trust and consent to participate in the survey. We are grateful that they agreed to share with us their experiences describing the realities of judicial work in times of profound changes to the justice system.

We hope that this report not only will help to document how serious the crisis of justice system is, but also will contribute to flagging the areas that need to be urgently improved in order to restore full guarantees of the independence of judges.

Małgorzata Szuleka
Marcin Wolny
Maciej Kalisz

METHODOLOGY

The study included 40 face-to-face interviews with judges of common courts, conducted between February and July 2019. The interviews were based on a standardized questionnaire (Schedule 1 to the report), whose final version was established after three interviews.

Each interview was divided into three sections. Section one focused on the present situation in a given court. We used this section to evoke answers to the two key questions: what, in the interviewees' opinion, the key problems in the operation of courts were and how then-recent changes (such as the mass dismissals of court presidents between August 2017 and February 2018) impacted on the work of courts. As regards the fist question, we asked about the wider time frame of last six years. We have chosen this time frame on purpose. First, the observations of the Helsinki Foundation for Human Rights show that the justice system is continuously marred by systemic problems that no government has managed to solve once and for all. Second, our interviewees' work experience is quite varied, so the focus on the last six years allowed us to achieve reliable results as almost all interviewees (except two, who worked as judges for less than six years) could equally relate to this time perspective. Moreover, while asking about problems related to the operation of the justice system, we wanted to learn more about the situation in courts, but we also wanted to broaden the context in which the recently introduced changes were assessed.

In the second part of the interviews, we focused on issues related to the experiences of pressure exerted on judges. At the beginning of this section, we asked our respondents an open question about whether they had ever experienced any form of pressure at work. Then we asked about specific actions that may affect judges that we interpreted by us as a form of pressure (e.g. initiating disciplinary proceedings, unjustified media criticism or evaluations of cases decided by a given judge). This was the point where we narrowed the period we were inquiring about to the last six years. We did so to establish how different forms of pressure might have evolved over that period.

In the last part of the interview, we asked the interviewees to assess the existing guarantees of judicial independence and the systemic reforms recently introduced to the justice system (including changes in the Constitutional Tribunal, Supreme Court and National Council of the Judiciary).

This report follows the structure of the questionnaire.

In order to convey the broader context of a given problem, the report also presents information obtained from media releases and other studies and analyses. Information obtained from sources other than interviews conducted as part of this study will be indicated throughout the report.

SAMPLE CHARACTERISTICS

The study involved 40 judges from 26 common courts located in 15 cities.

The average length of interviewees' professional experience was 17 years (the shortest period was 2 years and the longest 31 years). Interviewees worked in courts of different sizes, from small courts with no more than 10 judges in three divisions to the largest courts in the country staffed by more than 60 judges working in more than 20 divisions.

17 interviewees changed their professional position in the last four years. Two of them took up leadership positions (e.g. presidents of a division), while 12 were dismissed from the positions (of presidents or deputy presidents of courts, presidents or deputy presidents of divisions), and three were transferred to another division.

The interviewees were recruited to the survey in two ways. On the one hand, we searched for prospective respondents through contacts with judges' associations, other lawyers and by monitoring media reports. On the other hand, we also wanted to reach out to judges who are neither actively engaged in the public debate nor are members of judges' associations. We were able to find such judges thanks to recommendations given by, among others, local attorneys or other judges.

Ultimately, we interviewed 13 judges whose cases had previously been covered by the media. The remaining interviewees are judges whose cases have not attracted media coverage and have not been publicised by NGOs.

CHANGES TO JUSTICE SYSTEM

Following the parliamentary elections of October 2015, the ruling majority started extensive legislative overhaul of the Constitutional Court, the prosecution service, common courts and the Supreme Court. An overview of the key changes is given below.

◆ Constitutional Tribunal

In August 2015, the new law on the Constitutional Tribunal (Constitutional Tribunal Act), adopted by the 7th Parliament, entered into force. Article 137 authorised the Sejm to appoint 5 Tribunal judges. Three of the newly appointed judges were to fill the posts vacated by the judges whose terms expired on 6 November 2015 and two new appointees were to replace the judges who were to retire in early December. This coincided with the upcoming parliamentary elections, which date was set by the President of the Republic of Poland for 25 October 2015. During the last session of the 7th parliamentary term, the Sejm appointed the judges in 5 separate resolutions, which was strongly opposed by the then opposition and NGOs. The five newly elected judges were not sworn in by the President.

After the elections of 25 October 2015 won by the Law and Justice, the 8th Sejm, during its first session, adopted the first amendment to the Constitutional Tribunal Act, which repealed Article 137 and provided the basis for the re-appointment of 5 judges. The appointments were made on 2 December 2015, after the adoption of a series of resolutions invalidating the earlier appointments and following an amendment to the Sejm Rules of Procedure. Late in the night on the same day, the President took the oath from the newly appointed judges.

On 28 December 2015, the second amendment to the Constitutional Tribunal Act entered into force. The amendment modified the rules of Tribunal's decision-making by stipulating that the Tribunal should, as a rule, hear cases en banc (with its entire membership of 13 judges sitting). The new law provided that the cases would be dealt with on a first-come, first-served basis, and decided by a majority of two-thirds of the votes at a hearing scheduled not earlier than 3 months after the parties are notified. The new rules were to apply to cases already pending before the Tribunal. Moreover, the amendment introduced changes in the disciplinary liability of judges of the Constitutional Tribunal, inter alia, by authorising the Minister of Justice and the President of Poland to institute disciplinary proceedings against Tribunal's judges. The Chief Justice of the Supreme Court, the Ombudsman and two groups of

parliamentarians requested the Constitutional Tribunal to review the constitutionality of the amendment's provisions.

On 9 March 2016, the Constitutional Tribunal ruled that the amendment was, in its entirety, incompatible with the Constitution of the Republic of Poland. The Tribunal found, above all, that the manner in which the law was enacted had been unconstitutional, noting that the hastiness of legislative process had prevented any prior reflection on the compatibility of legislated changes with the Constitution. The Prime Minister refused to publish the Constitutional Tribunal's judgment and to recognise its legal force. On 11 March 2016, the Venice Commission published an opinion[6] in which it shared a critical view that the whole amendment was intended to paralyse the work of the Constitutional Tribunal and pose a threat to the rule of law. The Commission also called on the Polish Council of Ministers to publish the Tribunal's judgment.

The legislative overhaul of the Constitutional Tribunal continued in 2016, when the ruling majority adopted another package of laws governing the operations and the appointment of a new President of the Constitutional Tribunal. In December 2016, after the end of term of then-incumbent Tribunal's President, Prof. Andrzej Rzepliński, the President of Poland appointed Judge Julia Przyłębska, the ruling majority's nominee, as the Tribunal's head. One of the first decisions of the new President was to allow the three judges, appointed to sit on the Constitutional Tribunal in December 2015 without a legal basis, to adjudicate.

Since the end of 2016, the Constitutional Tribunal has been working at a considerably slower pace, facing eroding confidence among members of the judiciary and the public[7].

◆ Another merger of the offices of the Prosecutor General and the Minister of Justice

On 4 March 2016, an amendment to the Prosecution Service Act came into force. One of the most important changes introduced by the amendment was the merger of the offices of the Prosecutor General and the Minister of Justice. Upon its enactment,

6 *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e (accessed on 7.7.2019)

7 Helsińska Fundacja Praw Człowieka, *Pracuje tak, jak powinien? – raport o działaniach Trybunału Konstytucyjnego w 2017 roku*, http://www.hfhr.pl/publication/pracuje-tak-jak-powinien-raport-o-dzialaniach-trybunalu-konstytucyjnego-w-2017-roku/ (accessed on 7.7.2019)

the prosecution service has become entirely controlled by the single member of the executive – the Minister of Justice and Prosecutor General. The Prosecutor General's authority has also been extended: he now may exercise the discretionary power of appointing and dismissing heads of individual units of the prosecution service, issue decisions concerning pending criminal proceedings or provide the media with any information such proceedings.

The offices of the Minister of Justice and the Prosecutor General were merged before, until 2009. At the time, the merger was repeatedly criticised as posing the risk of politicisation of the work of the prosecution service. In 2009, the two offices were separated as part of a legislative reform, with the Prosecutor General being required to present an annual report for the Parliament's acceptance.

◆ Amendments to the Common Courts Act and the Supreme Court Act. Creation of the Disciplinary Chamber of the Supreme Court

In July 2017, the Sejm passed the Act amending the Common Courts Act and some other acts (Journal of Laws of 2017, item 1452). The law introduced a number of new measures, among them a new procedure for appointing and dismissing presidents and deputy presidents of courts, a new retirement age for justices and new rules for judicial promotions. This law, together with the simultaneously legislated amendments to the Judiciary Council Act and the Supreme Court Act, sparked objections from the legal community and mass social protests. The President vetoed the amendments to the Judiciary Council Act and the Supreme Court Act but signed the amended Common Courts Act into law with effect from 12 August 2017.

On 8 December 2017, without any public consultations, the Sejm adopted the new Supreme Court Act in the wording proposed by the President. The Act provided, among other things, for the creation of two new chambers in the Supreme Court: the Chamber of Extraordinary Review and Public Matters and the Disciplinary Chamber. The judges sitting in the newly formed Chambers are appointed by the new National Council of the Judiciary. The Chamber of Extraordinary Review and Public Matters is to handle the recently introduced type of special appellate remedy, the "extraordinary appeal", and confirm the validity of elections. The Disciplinary Chamber, on the other hand, was established to deal with disciplinary proceedings brought against Supreme Court justices and, as the court of second instance, other legal professionals (e.g. attorneys or notaries). The Common Courts Act also provides that the Disciplinary Chamber operates as the first instance court in those professional misconduct cases

brought against judges of common courts that involves charges of an intentional criminal offence prosecuted by public indictment, and also in cases of appeals against judgments of first instance disciplinary courts.

◆ National Council of the Judiciary

While working on a new law on the Supreme Court, the Parliament debated on the President-sponsored proposal of an amendment to the law on the National Council of the Judiciary (Judiciary Council Act). Upon its entry into force (17 January 2018), the law of 8 December 2017 amending the Judiciary Council Act ended terms of all judge-members of the Council. A controversy has also arisen over the changes to the process of electing 15 judge-members of the National Council of the Judiciary. According to the new law, judges are elected to the Council by the Sejm, by a majority of three fifths, from among candidates proposed by a group of 25 judges or 2000 citizens.

◆ Dismissals of presidents and deputy presidents of courts

The law amending the Common Courts Act gave the Minister of Justice the power to freely dismiss presidents and deputy presidents of courts, without consultation, within 6 months of the Act's entry into force. In the period from 12 August 2017 to 12 February 2018, the Minister exercised this power to dismiss a total of 158 presidents and deputy presidents – 148 in common courts and 10 in military courts.[8] New presidents and deputy presidents were appointed to fill the vacant positions. At the same time, the law authorised court presidents to review and dismiss judges performing leadership and supervisory roles (heads and deputy heads of divisions, heads of sections and judges-auditors), and to appoint arbitrarily new persons in their place.

◆ Changes to disciplinary proceedings

The amended Common Courts Act also introduced changes to disciplinary proceedings taken against common court judges. The main thrust of these measures is to enhance the relevant powers of the Minister of Justice.

8 M. Jałoszewski, "Lista 158. Stowarzyszenie Iustitia zdobyło nazwiska prezesów i wiceprezesów zwolnionych przez resort Ziobry", https://oko.press/lista-158-stowarzyszenie-iustitia-zdobylo-nazwiska-prezesow-i-wiceprezesow-zwolnionych-przez-resort-ziobry (accessed on 7.7.2019).

According to the new provisions, the Minister appoints the newly created Disciplinary Officer for Common Courts Judges and his two deputies and assigns judges of Disciplinary Courts attached to Courts of Appeal. The Minister may also request the launch of proceedings against a particular judge and lodge an appeal against the decision to discontinue the proceedings. Moreover, the Minister is entitled to appoint a special disciplinary officer for the particular proceedings. However, when it comes to disciplinary offences constituting crimes prosecuted ex officio, such a special officer should be chosen from among prosecutors, subject to the Minister, who is also the Prosecutor General. As the superior of the Disciplinary Officer for Common Courts Judges, the Minister also has an indirect influence on the selection and work of disciplinary officers at courts of appeal and regional courts. The Minister of Justice has also appointed arbitrarily all of the disciplinary judges of the first instance, functioning at appellate courts.

◆ A loss of confidence in judges

The changes being implemented in the broad area of justice since October 2015 have not remained indifferent to the social perception of judges and the judiciary.

According to a recent survey shows, public trust in judges in Poland declined by 8 percentage points in 2018 (from 54% to 46%). In the ranking of the most trusted professions, judges occupy a low 28th place, which is a situation characteristic for countries with unstable political systems and that struggling with problems)[9]. The declining confidence in judges may be a consequence of, among others, the controversial reform of the common courts system, which has allowed the Minister of Justice to dismiss presidents of courts and appoint their replacements[10].

The media campaign *Sprawiedliwe Sądy* (Just Courts) conducted in 2017 and financed by the state-owned Polish National Foundation may also have had an impact on the lowering public confidence in judges[11]. The campaign featured billboards, displayed across Poland, with slogans referring to examples of unfair judgments, judicial

9 K. Sobczak, *Zmalało zaufanie do sędziów i wszystkich prawników, Prawo.pl,* https://www.prawo.pl/prawnicy-sady/zaufanie-do-sedziow-i-prawnikow-nizsze-raport-z-badan-opinii,366877.html (accessed on 7.7.2019).

10 *Trust in Professions 2018 – a GfK Verein study. From firefighters to politicians*, available: https://www.nim.org/sites/default/files/medien/135/dokumente/2018_-_trust_in_professions_-_englisch.pdf, p. 49.

11 M. Orłowski, "PiS kontratakuje ws. sądów. Rządowe billboardy zawisną w całej Polsce", Wyborcza.pl, available: http://wyborcza.pl/7,75398,22335331,pis-kontratakuje-ws-sadow-rzadowe-billboardy-zawisna-w-calej.html (accessed on 8.7.2019).

misconduct and grossly reprehensible behaviour allegedly committed by judges. However, as journalists found out, many of the described situations either have been taken care of (e.g. a judge accused of theft has been already removed from the bench due to a mental illness), or have never actually taken place (e.g. a sex offender has note been released pending trial by a regional court)[12].

12 *"Złodziejka spodni, kradzież kiełbasy, aplikantka i wypuszczony pedofil. A jak jest naprawdę?"* (author: pk/sk, source: tvn24), tvn24.pl, https://www.tvn24.pl/wiadomosci-z-kraju,3/kampania-billboardowa-jak-jest-naprawde,774675.html (accessed on 8.7.2019).

WORK IN THE COURTS IN 2019 – JUDGES' PERSPECTIVE

The first of the topics raised in the study is the question of the key problems faced by judges at work. The study has shown that the way in which courts are managed and the allocation of responsibilities between judges can be important factors that strengthen (or weaken) the feeling of pressure and professional uncertainty.

In this respect, we focused on the four aspects we think crucially affect how the courts operate these days: the replacement of court presidents, the freezing of judicial posts, the workload of judges (especially resulting from the random allocation of cases) and the situation of court administrative staff.

The changes in leaderships positions in courts

In the vast majority of the interviewed judges' courts (19), the Minister of Justice dismissed presidents in the period from August 2017 to February 2018.

According to interviewees, the change of the president has mostly resulted in further reshuffling of lower-level leadership positions. In some of interviewees' courts, deputy presidents pre-emptied the anticipated dismissal by the Minister of Justice by resigning from their posts in a gesture of solidarity with the already dismissed presidents. Some of the newly appointed presidents made changes to division leadership roles – 8 out of 19 new presidents replaced heads and deputy heads of divisions of a given court. In few cases, the new court presidents also changed the court's staffing structure by transferring certain judge's clerks and secretarial staff between divisions.

Almost all interviewees admitted that the judges appointed as presidents would never be considered by the assemblies of judges[13] () as candidates for these roles. The interviewees expressed many different objections against new presidents. In the first place, they pointed to cases in which newly appointed presidents had no experience in a judicial leadership role, and also lacked sufficient interpersonal skills required to effectively manage teams of subordinates. Some interviewees spoke of the extreme cases of presidential appointments given to judges convicted for misconduct in disciplinary proceedings whose sentences had been erased due to the passage of time.

13 The judicial profession's consultative bodies functioning at appellate and regional courts whose main competence is to give opinions on candidates for judges' posts

> *"We are currently dealing with the leaders that would have previously been considered unfit for such high-profile positions. They most likely wouldn't have been endorsed by the judicial community."*

> *"This is probably the worst imaginable choice. If it was up to us, that person would never have been considered for that position ... this is a trend, people with problems becoming appointed as leaders."*

> *"No one can wait until the new president is promoted to a higher court."*

Second, some interviewees pointed out that in their courts the leadership appointments were a consequence of the nominees' private and professional ties with the Ministry of Justice.

> *"Let's just say it: the new president was appointed based she was well connected. She told me that herself."*

Interviewees pointed out that people who were described as "loyal to the Ministry" were promoted not only to the positions of presidents and deputy presidents of courts, but also were appointed as heads of divisions or nominated to sit on examination boards. All these roles involve bonuses to the salary, which were supposed to present an incentive for judges to accept promotion proposals.

> *"Those who were successfully tempted to take up new positions automatically check several payroll boxes which means a big raise. They become big-time bosses."*

Third, the surveyed jurists said that appointments of court presidents by the Minister of Justice without any consultation with the judicial community had led to conflicts and tensions between judges. Interviewees recalled situations in which an appointment of the new president and his decisions concerning the management of the court were strongly opposed by judges, who expressed their views e.g. by assessing negatively the annual report presented by the president. Some of the interviewees also pointed out that new presidents took action aimed at further escalation of conflicts within the community. Such activities included, among others, selective strengthening of administrative staff in the "native" division the new president in order to improve this division's performance at the expense of other divisions, mobbing behaviour against administrative staff, conflicts with the court's governing board and attempts to exert pressure on individual judges through transfers between divisions or threats of disciplinary proceedings.

> *"I note a declining mood, especially in the civil department because the president is a criminal judge and tries to show his better self to the criminal division. Plus, the deputy president for civil matters has no real authority. Frankly speaking, conflicts fester and may erupt at some point because he's not respected."*

> *"Each governing board's session ends with a major disagreement. Previously, the board usually accepted the president's ideas, there was no struggle like that. Now the president is "an alien", and the judges we've elected to the board are "our people", so we have two opposing sides now, the professional organisation of judges vs. president."*

Only in a small number of cases (three) the interviewees said that although they contested the procedure and rules of appointment of new presidents of courts by the Minister of Justice, they had no objections to the new appointees' day-to-day work. In these cases, judges appointed as presidents had previously held leadership positions in the court (most often they served as deputy presidents) and were fairly well assessed by the assembly of judges.

> *"I have nothing against the new president. He is not a political nominee, but the right choice for the job."*

However, even in these cases, judges pointed out that the very fact of the new leaders stepping up had created a rift between judges.

> *"This was a big surprise for us. Because if he became president after the expiration of his predecessor's term, nobody would have any problem with that, but the fact that he took this offer during the former president's term came as a big surprise to us. There are people who doesn't want to work with him anymore, but there are also people, myself included, who don't understand his decision, but still want to work with him. There are also judges who don't care much about that."*

> *"There is a feeling among judges that the former president was dismissed in an outrageous way and that this shouldn't have happened. Still, the new president is trying to behave decently: there have been no personal shuffles, no mobbing."*

Regardless of their assessment of new presidents, none of the interviewees suggested that the new appointments would in any way improved the work of their courts. In interviewees' courts, new presidents either follow the policies implemented by their predecessors or do not take any new decisions. Pointing to cases of the latter pattern of behaviour, judges indicated that their courts *"are barely managed"*.

> *"Frankly speaking, I have a higher regard for the new president than for his predecessors as he at least doesn't try to cover up the fact that he was politically appointed. All of his antecedents were politically appointed but they created an illusion that they weren't [...] The difference between the former presidents and the present one is that in the past I used to meet them in the corridor and nowadays I don't see the president at all. This court has no president."*

The lack of adequate management was particularly evident in those situations where new presidents were immediately assigned to sit on a higher court on a temporary basis, which limited their contacts with their "native" court. It impeded significantly not only their management of court but also hearing cases assigned to them.

The freezing of judicial posts

From the beginning of 2016, the Ministry of Justice has significantly reduced the number of notified competitions for vacant judicial positions, which has led to the "freezing of judicial posts". Since 2016, the number of vacant judicial posts has started to grow exponentially, reaching 745 in April 2019[14].

The failure to fill the vacancies is directly reflected in a decline in the courts' case processing performance. The surveyed judges had no information about the general number of judicial vacancies in their courts (this topic was addressed in much greater detail in a previous study by the Helsinki Foundation for Human Rights, which focused on the process of court presidents' dismissals[15]). However, the vast majority of interviewed judges said that the number of their cases landing on their dockets has significantly increased in recent years. This trend was particularly evident for civil and commercial judges, who, for the most part, pointed out that they had difficulties in dealing with their caseload.

> *"This is the first time I don't know how many cases I have on my docket."*

On the other hand, judges of regional courts (especially those who also sit on the courts governing boards), had a clear perspective on the effects of lower courts' judges being temporarily assigned to regional courts: although such assignments enhance the working capacity of higher courts, the prevailing vacancies in district courts result

14 M. Kryszkiewicz, Zła sytuacja kadrowa w sądach: Najgorzej jest na szczeblu okręgowym, Gazeta Prawna.pl, dostępne: https://prawo.gazetaprawna.pl/artykuly/1405826,braki-kadrowe-w-sadach.html

15 Helsinki Foundation for Human Rights, *It starts with the personnel*, http://www.hfhr.pl/wp-content/uploads/2018/07/It-starts-with-the-personnel.pdf

in significant backlogs in proceedings. An interviewed judge invoked a particularly catastrophic situation in district courts located in his judicial circuit.

> *"The situation at the district level is absolutely catastrophic. District courts do not administer justice anymore, period. Dear Minister Piebiak [deputy Minister of Justice – editor's note], congratulations, your job is already done, justice system does not work anymore ... If a district judge has 700, 800 cases on his docket, what can he do about it? This is not an effective administration of justice. As a civil judge, you can manage 300 cases on the docket, if you work really hard, but with more than 400 cases you can't do anything effectively."*

Furthermore, since 2018, the general assemblies of judges in individual appellate circuits have been refusing to present their opinions on judge candidates. These refusals were an effect of the unconstitutional composition of the National Council of the Judiciary. In recent months, the number of refusing assemblies has started to increase. Ultimately, as at the beginning of July, the assemblies of all 11 appellate circuits took part of the protest[16]. The opinion of the judicial community is an important element of the process of judicial nominations and appointments regardless of its non-binding nature and the fact that the final nomination decision is taken by the National Council of the Judiciary, which presents the candidates for the President's appointment. In May 2019, the Council called on the presidents of courts "to send, without delay, all available documents related to the nomination procedure". Currently, it conducts the procedure despite the absence of opinions of judges' assemblies[17].

The work organisation and workload of judges. The system of random assignment of cases

Both the statistics and survey data show that Polish judges are heavily overburdened with work. In the first half of 2018, there were 1,500 cases per judge on average[18]. Poland is among four European Union countries with the largest number of civil cases (including commercial cases) filed in 2017. Despite numerous amendments to laws governing both the organisation of in the justice system and the rules of procedure,

16 M. Pankowska, "Sędziowie w całej Polsce odmawiają współpracy z nową KRS. Prof. Łętowska: 'Rozpaczliwa przezorność'", Oko.press, https://oko.press/sedziowie-w-calej-polsce-odmawiaja-wspolpracy-z-nowa-krs-prof-letowska-rozpaczliwa-przezornosc/.

17 K. Sobczak, "KRS: Możemy wskazywać kandydatów na sędziów bez opinii samorządu", Prawo.pl, https://www.prawo.pl/prawnicy-sady/krs-wskazuje-kandydatow-na-sedziow-bez-opinii-samorzadu,356805.html.

18 M. Kryszkiewicz, "Sędziowie nadal obłożeni pracą, MS ma inne priorytety", Dziennik Gazeta Prawna, 2018, https://prawo.gazetaprawna.pl/artykuly/1243999,zmian-w-prawie-i-odciazenia-sedziow-brakuje.html.

the average duration of court proceedings increased from 4 months in 2015 to 5.4 months in 2017[19].

A major factor contributing to increasing judges' workload is the functioning of the system of random allocation of cases. In 2018, an amendment to the Rules of the Functioning of Common Courts introduced a system of random allocation of cases, managed at the national level. In a nutshell, every case that comes before a court is registered and then, at the end of the day, randomly assigned to a judge from the court of proper venue. The system assigns cases to judges according to their capacity to take on new cases expressed as a percentage (the percentages may decrease or increase depending on e.g. leadership role taken by a judge in the court). The Ministry of Justice explained that the introduction of the random allocation system was needed to prevent abuse in the assignment of cases and to ensure more balanced and fair caseloads between judges[20]. However, the Ministry of Justice refused to provide the source code on which the system is based[21].

According to the interviewees, after the year of the system's operation, it became clear that it fell short of expectations. However, it should be noted at the outset that some interviewees agreed with the concept of introducing a random case allocation system. In the opinion of interviewees, the previous system of case allocation, which was managed by the heads of divisions who allocated incoming cases on a first-come, first-served basis to judges whose names appeared on a list in alphabetical order, was not optimal and could lead to abuses and disproportionate distribution of cases.

> *"My impression is that this system was designed to vindicate certain judges who have been wronged by their presidents. I do understand them, I am really empathetic to those people at the Ministry who think that district judges were treated unfairly and there were divisions which seasoned presidents managed the caseloads so that they would not do anything themselves. Not everywhere, but in many divisions this actually happened."*

19 A. Łukaszewicz, "Coraz dłuższe postępowania sądowe – przyczyny", Rzeczpospolita, https://www.rp.pl/Sedziowie-i-sady/307279986-Coraz-dluzsze-postepowania-sadowe—przyczyny.html.

20 Ministerstwo Sprawiedliwości, *Wejście w życie przepisów usprawniających prace sądów* (an archived entry), https://www.ms.gov.pl/pl/informacje/news,9648,wejscie-w-zycie-przepisow-usprawniajacych-prace.html.

21 Sieć Obywatelska Watchdog, "Tajemniczy algorytm losowania sędziów", https://siecobywatelska.pl/tajemniczy-algorytm-losowania-sedziow/. See also Aleksandra Kamińska, Fundacja e-Państwo, *Maszyny w służbie państwa. Jak algorytmy wpływają na życie obywateli i obywatelek w Polsce i wybranych krajach regionu,* https://epf.org.pl/pl/2019/05/13/maszyny-sluzbie-panstwa-algorytmy-wplywaja-zycie-obywateli-obywatelek-polsce-wybranych-krajach-regionu/.

However, a rather favourable assessment of the very concept of the system did not change the critical assessment of its practical operation. None of the interviewed judges stated that the new system did indeed lead to more balanced allocation of cases between judges. On the one hand, this is due to the fact that the system is unable to realistically assess the complexity of a registered case. This assessment is based only on the size of case files, which is not a reliable metric given that cases with multiple volumes of files are not necessarily the most complicated cases. Another issue is that the system cannot properly identify the actual workload of a judge, which is a particularly acute problem for judges transferred between divisions who need to conclude proceedings started in their former division but are already included in the pool of judges eligible to take on new cases.

> *"The system treats me like a new judge. As I changed divisions, one of the judges went on sick leave and cases started to be allocated to me because the system saw that I have an empty docket. [...] For the first time I'm in a situation where I can't even figure out how many cases I have on my docket."*

> *"When the system started filling our dockets, it filled them to the point of despair. Others have 50-60 cases each, and each of us has been assigned hundred cases in a matter of weeks. It's an easy way to have backlogs. Is it the way this supposed to be?"*

Second, interviewees indicated that, for instance, judges on sick leave or holidays were excluded from the draw. The system also does not take into account a situation in which a given judge should be excluded from the draw of a given case (e.g. because they decided the case in the first instance). This leads to backlogs in the disposition of proceedings because after the draw the judge must recuse themselves from the case, which only then returns to the system to be drawn again.

> *"Earlier, the motion to disqualify a judge was ruled on in 30 minutes and you went on with the trial after a recess. Now the motion goes to the head of division, who passes it on to the registrar, who in turn places it into the drawing drum. The reporting judge is appointed to examine this motion, which takes several days. "*

Moreover, the system leads to many other organisational problems such as overlapping dates or hearings taking place during pre-scheduled judges' holidays.

Finally, judges pointed to irregularities in the allocation of cases according to the "balanced caseload" formula. In this context, interviewees notably mentioned situations

in which certain judges, especially those assuming leadership posts in the wake of the Government-led "reforms", were excluded from the draw.

> *"There is a whole range of options which, as I see it, are being abused and lead to judges being exempt from the draw of individual cases."*

> *"I know that presidents of certain courts, for example, opt out from the hearing of petty offences cases. To be eligible to hear certain types of cases, a judge must have the written consent of all the judges working in a given division. I am surprised that after a year into the system's operation, the Ministry, seemingly so meticulous, does nothing about it."*

One of the surveyed judges provided us with a written memo in which the new president instructed to assign a certain case to a certain judge.

Such practices led the interviewees to observe that the system was not transparent. Based on these examples, the judges pointed out that it is possible to interfere in the way the system works but did not indicate who could do so directly. The fact that the Ministry has divulged only few specific information on the system's operation only reinforces the suspicions about potential interferences of the government administration in the system's functioning and the rationale for its introduction.

> *"(...) the system isn't free of interference. It can either be done at the central level, while establishing the weighting factors, or in individual court departments, since heads of departments are entitled to manipulate some elements."*

> *"I feel that cases have been randomly assigned since I became a judge. I don't know any other way of allocating cases ... [The system] is a public relations trick that can be used to manipulate the allocation. Especially since we know nothing about the case allocation algorithm."*

Situation of administrative staff

Almost all interviewees drew attention to the difficult situation of courts' administrative staff. As the survey started, employees of courts and prosecutor's offices were already engaged in a protest, demanding pay rises.

According to data presented by trade unions of courts' administrative staff, 95% of persons employed at courts (excluding judges, associate judges, referendaries, family

and probation officers) earn a monthly salary lower than PLN 2853.95 after tax, while 20% of administrative personnel receives basic remuneration of PLN 1808.10 or lower[22] (however, according to the Ministry of Justice's recent announcement, their salary is supposed to increase by PLN 450 from 1 October 2019, and by another PLN 450 from 1 January 2020[23]). Their low earnings are hardly commensurate with the amount of work done by the administrative staff. As interviewers stated, registry offices are overloaded with work, which affects the staff themselves. The problem related to the standards of employment for courts' administrative staff has been growing over the years. A survey of a representative sample of judicial staff carried out in 2015 concluded that "the psychosocial working conditions in courts should be considered, in general, as detrimental to the employees' health. These conditions urgently need to be improved". The survey also showed that the working conditions in courts cause "a stress spiral" a phenomenon occurring when "the level of work-related stress contributes to the experience of certain ailments", which, in turn, translates into an increased risk of making errors at work[24].

According to those of the surveyed judges who commented on the situation of administrative staff, the salaries of non-judicial employees are too low, given their professionalism and skills. According to interviewees, the present working conditions in courts put an extensive pressure on the administrative staff. As one of the judges put it,

> *"Working in court is heroism because you can earn more as a cashier in a shop."*

Courts' administrative staff earn less than similarly skilled employees working in the private sector, for example. One of the interviewees also noted the risks associated with such low salaries, in particular pointing to the risk of corruption.

> *"Besides, I'd like to note that this situation may lead to corruption – for someone who takes home 1900 zloty [approx. EUR 450] a month, 200 zloty [approx. EUR 50] is a considerable amount of money. And we're talking about the people with access to case files and evidence."*

22 Rzeczpospolita, "Zarobki pracowników sądów – apel do premiera RP", https://www.rp.pl/Sedziowie-i-sady/312269989-Zarobki-pracownikow-sadow—apel-do-premiera-RP.html.

23 K. Sobczak, Związki sądów i prokuratury wywalczyły 900 zł, ale bez mnożnika, Prawo.pl, avaialable: https://www.prawo.pl/prawnicy-sady/podwyzki-w-sadach-i-prokuraturze-porozumienie-ms-ze-zwiazkami,441243.html

24 K. Orlak, *Stres zawodowy w sądach powszechnych i jego skutki zdrowotne. Wyniki badania TEMIDA 2015,* http://zdrowapraca.org/orka/wordpress/wp-content/uploads/2016/12/Stres_w_sadach__wyniki_TEMIDA2015.pdf.

Interviewees noted the link between inadequate remuneration and the growing frustration among courts' administrative staff, which leads to low levels of employee retention and the resultant lack of stability in employment. The more experienced the administrative employee is, the more likely they are to leave their court job quickly. Low salary, on the other hand, does not encourage people with appropriate experience to apply for a court administrative position. This leads to the situation where persons employed in non-judicial roles have no proper qualifications and education.

Under the current administrative staff employment scheme, there are no proper on-boarding procedures for newly recruited employees – no uniform system for professional training has been developed and the development of their professional skills depends primarily on their personal abilities.

Another major problem identified by surveyed judges was the insufficient access to the services of judicial clerks. In fact, none of the interviewees said they had a clerk at their sole disposal. Usually, a clerk is "shared" by several judges, and while a clerk may effectively lessen some of a judge's workload if he or she works for the judge for a full day once a week, the interviewees noted that in the most drastic situations a judge had access to a clerk only once in a few weeks.

> *"We used to have two clerks for a judge, and today the president told me that we had one clerk for five judges. It's like there would be no clerks at all."*

Both judicial clerks and members of administrative staff have no professional development opportunities. At present, there is no system currently in place that would provide law clerks with any tangible career development opportunities. In effect, according to the interviewees' observations, clerks work at the court for several years, gain useful experience and move on to the private sector.

> *"The month is ending soon so yesterday, I was saying goodbye to five clerks who are leaving the court."*

The deteriorating situation of non-judicial staff is not without relevance to the judicial work of judges. Some interviewees – especially those working at district courts where caseloads are the largest – stressed that the professionalism of a recording clerk may either significantly improve the work of the judge or cause a number of problems and errors in the conduct of proceedings, which in effect may result in serious consequences for the judge.

THE FORMS OF PRESSURE EXERTED ON THE JUDGES

Our survey identified five main forms of the pressure currently being exerted on judges: attempts to influence the judicial decision making process, disciplinary proceedings, the impact of ongoing conflicts in the court (e.g. changes in court management intended to hamper the work of specific judges, promotions of particular judges), attacks by the media and the reduced sense of judges' safety (in particular the lack of confidentiality of their conversations and correspondence).

As we pointed out at the outset, we began this part of the interview by asking the interviewees whether they had ever encountered pressure at work. Interviewees most often answer this question by pointing to cases where they were asked to take specific action (usually to set an earlier hearing date, but never to make a specific ruling), became subject to unjustified criticism from the media or were targeted by disciplinary proceedings. The next set of questions concern the forms of pressure that we have identified prior to the survey and which served as means of gathering in-depth information on individual ways of influencing the work of judges during the period of six last years.

Among 40 interviewees, 24 declared that they had experienced at least one of the aforementioned forms of pressure. In the vast majority of cases, this pressure was linked to the changes made to the justice system over the last four years.

Judges and the adjudication process

None of the interviewees indicated that anyone had ever tried to pressure them into deciding a particular case in a particular way. This does not mean, however, that the entire judicial adjudication process is free of any interference. Interviewees pointed to examples of the behaviour of, among others, judicial leaders or politicians, which may affect judges both before and after they pass a judgment and may then serve as a form of punishment for the judge or a warning to the entire judicial community.

> *The court is a place where everything has its consequences, whatever you do comes at a cost. Pressures are real. A judge who says he hasn't seen them is either so tough that he doesn't notice them or doesn't want to tell the truth. Everybody has seen pressures.*

First of all, some interviewees admitted that they had occasionally received requests from the former presidents or deputy presidents to take certain actions. The surveyed

judges spoke of nine cases where former court presidents summoned them and asked them, for example, to fix a sooner court date. According to the interviewees, such requests had nothing to do with the concrete outcome of a given case but were meant to draw their attention to the need for a more urgent resolution of the matter. The interviewees were also somewhat divided in their assessment of whether such requests could be regarded as pressure. For some interviewees, they were already an example of overstepping the boundaries of administrative supervision. Others, on the other hand, considered such requests to be understandable. Those of the surveyed judges who treated these requests as pressure ignored them.

> *"Some of these suggestions concerned the situation when I made some interim disposition orders (as opposed to final decisions – editor's note) in a certain type of cases, which were many and these orders were against the practice of the rest of the division. I do not consider this to be pressurising, because it is well known that in such cases must be dealt with in an orderly fashion."*

> *"I took the liberty of ignoring the president's request, who acknowledged that, and I had no problem with this."*

> *"There have been cases where the president mentioned of a serious human or social problem present in a case, asking for treating that case as a priority. But that is the president's or division head's job, that was not a pressure."*

> *"It is not a form of pressure – those requests are not formulated so as to seem enforceable in any way, they are just requests. Thus, if I see that I can speed something up, I do it."*

The surveyed judges recalled two instances, which occurred in previous years, in which they have been asked by the court's leadership about the reasonableness of their decisions. In both cases, the interviewees concerned admitted that this had not changed their decisions or influenced their subsequent decisions in similar cases. The interviewees described two other cases in which a judge of a superior court told a lower court's judge that the case concerned a person close to them or suggested how this case should be decided.

> *"It wasn't pressure to make a certain ruling. It was more like telling me, in a casual conversation, that I should confine myself to delivering a procedurally correct judgement, without getting into justice. I took it as an attempt to tell me how I should rule."*

> *"There are pressures, more or less veiled, like making it known that the case involves a someone who knows someone. This would shock me at first, but I'm telling you, without bragging, that I've earned the reputation of being deaf to such "news"."*

The interviewed judges also raised concerns about cases of judges who had been criticised by both the media and politicians for handling the case before they had even given their judgment in the last four years. In these cases, the judges perceived the critical statements as the direct attempts of exerting pressure on them.

> *"These comments should never have been made in a state ruled by law. The most outrageous part is that it happened between the closure of the case and the judgment."*

> *"Once a case is referred to an independent court and before this court makes the ruling, there is no place for comments from active politicians."*

The interviewees pointed to another three cases in which they felt a pressure related to presidents' decisions setting the time frames for taking certain decisions (in one case, the president reportedly asked a judge to influence the decision of another judge), as well as pressures generated by the system that randomly allocates cases and determines the composition of judges' panels.

> *"For me, being forced to decide cases assigned at random and not being able to choose a lay judge to my panel – that's the pressure. Our decision making powers are becoming more and more limited."*

Activities of parties to the proceedings were also an important factor in the assessment of whether judges are or not pressured in the course of the adjudication process. In this respect, the conduct of some prosecutors, who are taking steps to exert more pressure on the judges presiding over a case, is particularly worrying. In particular, such conduct have taken the following forms: making unjustified motion for the disqualification of the judge, launching criminal proceedings that may involve steps taken by the judge, requesting disciplinary proceedings to be taken against the judge[25], or sending official communications concerning judgments given by judges to the presidents of their courts.

25 J. Schwertner, Prokuratura wszczęła śledztwo ws. sędzi prowadzącej proces dot. śmierci ojca Zbigniewa Ziobry, Onet.pl, dostępne: https://wiadomosci.onet.pl/tylko-w-onecie/prokuratura-wszczela-sledztwo-ws-sedzi-prowadzacej-proces-dot-smierci-ojca-zbigniewa/7dy32r0

> *"Prosecutors are becoming the key actors in court proceedings. They can do anything. They are superjudges. There will be payback to any judge who opposes them."*

As the surveyed judges observed, the gaining momentum of the negative narrative on the judiciary led to certain changes in the approach of the parties to proceedings to judges and courts.

Interviewees pointed out that the public onslaught against the courts had encouraged some parties to express unfair criticism of judges. Interviewees observed more frequent verbal aggression against the court, as well as more frequent and unjustified attempts to seek help from courts' disciplinary officers. In one of the discussed cases, an interviewee received a letter from a party's attorney requesting revocation of the issued decision and threatening to notify the Minister of Justice of the judge's failure to comply with this request.

> *"In one of my cases, I have not yet started the trial, but I had to explain myself to the disciplinary officer."*

> *"The parties have been more outspoken and feeling more entitled, it is easier for the defendant to express uneducated opinions on the court's decision. The parties get emotional and speak unfairly of judges. Their opinions revolve around the unfavourable message disseminated by the media."*

> *"I've seen situations when a litigant stands up, yelling "Ziobro [Polish Minister of Justice – ed.] will rein you people in!" This is an effect of this reform."*

According to interviewees, the mood in their courts has worsened and the sense of pressure has grown as the changes in the judiciary and the reshuffling of the court leadership proceeded. It should be once again stressed that the interviewees' statements show that the pressure exerted on judges does not currently take the form of specific instructions to take certain decisions, but rather consists in fostering a chilling effect and spreading among the judges the fear of being frowned upon for taking certain decisions (to find out more, see **» Judges and disciplinary proceedings** and **» Judges and internal pressure in courts**).

◆ The chilling effect

Among the interviewees who noticed the occurrence of a chilling effect among judges, 11 said that this effect may have an impact on the judges' adjudication activity.

As the interviewees admitted, judges are afraid to pass decisions that may be seen as controversial by the public or representatives of the ruling majority.

> *"Judges are afraid, especially that they may be transferred to another division, they are afraid of a disciplinary action, they are afraid of consequences for their private lives."*
>
> *"I've heard my colleagues warning me: "you shouldn't do this, or you'll be disciplined"."*
>
> *"Everyone is afraid, because every single day you hear that your ruling or a mistake may get you audited. The pressure we feel at work makes us think that anything we do may be a disciplinary offence. It is not like that errors were not treated as disciplinary offences before – but not as much as they are now."*

At the same time, some interviewees admitted that judges could never be certain which of the cases they try would turn out to be a "political case". In this context, two surveyed judges drew attention to the case of Judge Alina Czubieniak, who decided to revoke a pre-trial detention order. Despite the fact that the case attracted no media coverage and the decision was made in accordance with the law, Judge Czubieniak was charged with committing a disciplinary offence.

Moreover, some of the interviewees noted that the chilling effect and the fear of consequences also extended to the realm of non-judicial activities. In this respect, judges pointed out that while most judges in their courts contest the new "reforms", only a small majority openly protest against the changes by wearing t-shirts with the "Constitution" logo or proposing resolutions on the changes in justice.

> *"There are people who are afraid to fill in an anonymous questionnaire, wear a Justice Day pin, or take a joint photo as a sign of protest."*
>
> *"There are many judges in my court who quail at the sound of the word "Constitution"."*

On the one hand, some of the interviewees who noted that the chilling effect was spreading among judges, at the same time acknowledged that the ability to cope with pressure was a standard requirement of judges' job description. On the other hand, the interviewees recognised the difference between the pressure they face on a daily basis and the risk of being targeted with disciplinary action.

> *"Somebody disagreeing with your decision is a part of the business of being a judge. It is obvious that your rulings are reviewed at a higher instance. What is very disconcerting is that your ruling may be an object of disciplinary proceedings."*

The discomfort caused by the threat of disciplinary proceedings hampers judges' work. Its side effect is stress and the associated medical conditions. At least two of the judges we have interviewed said that the climate around the courts and the pressure exerted on judges had negatively impacted on their health.

> *"I get obsessive at times, but when a man is attacked on so many fronts it's hard to stay calm."*

On the other hand, three interviewees admitted that they had not noticed the spread of a chilling effect (or its consequences) in their courts. According to these judges, despite the worsening working climate in and around the court system, judges has not let their public activities (e.g. at judges' assemblies) or, more importantly, their adjudication be guided by the fear of consequences they may face.

> *"If someone succumbs to the chilling effect, they shouldn't be a judge."*

> *"Are judges afraid? Yes. Will they be conquered by this fear? No."*

Judges and disciplinary proceedings

Since the 2018 amendment to the Common Courts Act (discussed in more detail in the sections **» Changes to justice system** and **» The assessment of the new model of disciplinary proceedings**), disciplinary proceedings have become one of the most intimidating forms of the pressurisation of judges. Interviewed judges pointed to disciplinary proceedings as a form of pressure both spontaneously and while answering the in-depth questions on specific forms of influencing judges. The surveyed judges clearly stated that the practice of using disciplinary proceedings had deteriorated significantly over the last year.

More than half of the judges participating in the survey (21) were threatened with the initiation of disciplinary proceedings, called upon to provide explanations before a disciplinary officer or were subject of pending disciplinary proceedings (the disciplinary proceedings against three judges were pending before 2018).

Threats of launching disciplinary proceedings were formulated against interviewees by new presidents or deputy presidents of their courts, disciplinary officers and persons from outside the courts system, including, for example, parties to proceedings who informed judges in the courtroom that they would file a request to initiate disciplinary proceedings against them. While the threats made by the parties to the proceedings are quite explicit ("a gentleman shouted at me that he would write to Mr Ziobro"), those originating from presidents or other judges are far more veiled.

> *"Such threats are never uttered directly, it is done in a more subtle way, e.g. disciplinary proceedings are launched against another judge so to scare the one who's the real target."*

> *"Such a threat has never been explicit, but I can see what is going on around me. I share a feeling sensed by other judges that it does not take much to initiate disciplinary proceedings. And there's no telling why it happens."*

The risk of being targeted by frivolous disciplinary proceedings was perceived also by those judges who did not experience any more severe forms of pressure. Among some of them, the fear of disciplinary proceedings remained very pronounced.

> *"Recently, I was phoned by our president's secretary: "Your Honour, I have Justice Schab [Chief Disciplinary Officer, CDO – Editor's note] on the line". The secretary accidentally misspelled the name and the caller was someone else, not the CDO, but believe me, these seconds that passed before we got this sorted out, it was a nightmare. Only then did I realise that those people who've been approached by a disciplinary officer, even if they know they didn't do anything wrong, feel the stress that they should never have experienced."*

Those of the surveyed judges who have been approached by the Chief Disciplinary Officer were most frequently asked to provide explanations in connection with their rulings, the performance of their judicial duties or public activities. In two cases, the interviewees concerned suspected that the threaten disciplinary proceedings could be a form of repression for a ruling or event other than that cited as the official cause of their appearance before the CDO (for example, a judge who has decided a high-profile case was summoned to provide explanations about a case that has not attracted a comparable public interest). The interviewees pointed out that they had been summoned after several weeks or months. In one instance, a judge wondered whether the request to provide explanations (and the subsequent disciplinary charges) related to another case that has only recently landed on his docket and has not yet been decided. Another interviewee said that several disciplinary officers had previously refused

to launch disciplinary proceedings in his case and that the actual proceedings had only been initiated when the disciplinary framework was changed in 2018 and the newly-appointed officers brought the charges. In this context, some interviewees also noted the increased activity of new disciplinary officers.

> *"Before, I didn't even know what disciplinary proceedings were. Now I have to explain myself on a monthly basis."*

Only in one case did an interviewee conclude that being summoned by the Deputy Disciplinary Officer was a normal procedure necessary to resolve a matter raised by the parties to the proceedings. In other cases mentioned by interviewees, requests for explanations were, as they felt it, the first warning indicating that the activities of a given judge are of interest to a disciplinary officer. Whether or not the initial request for explanations is followed by any further procedural steps, the very fact of taking this measure can reinforce pressure exerted on the judicial community.

> *"Judges are scared of being singled out by a disciplinary officer and that may be used to create the chilling effect. For me, being asked to provide explanations triggered you-had-it-coming-kind of reactions."*

> *"I am aware that I may be officially prosecuted, but I believe that only will happen if the ruling political formation wins the elections and remains in power for another parliamentary term."*

Similarly to requests for explanations, disciplinary charges brought against judges are nowadays related to both their judicial and non-judicial activities. The interviewees, including the judges subject to pending disciplinary proceedings, often pointed out that very few proceedings initiated by disciplinary officers over the last year had the potential to uncover obvious and blatant violations of the law.

> *"Based on media reports we can see that a whole bunch of proceedings are about nothing."*

Interviewees' statements on the current model of disciplinary proceedings included comments on the professional methods and ethics of the Chief Disciplinary Officer and his deputies (to find out more, see the section **» The assessment of the new model of disciplinary proceedings**). Some interviewees criticised the officers' practice to publicise information about presenting charges or initiating disciplinary proceedings. Interviewees emphasised that news releases on disciplinary proceedings are published

on anonymous social media accounts before the official notification is made to the judges concerned (to learn more, see **» Judges and the media**).

Judges and internal pressure in courts

Judges experience both external pressure (from disciplinary officers or the public) and internal pressure originating from within the courts where they work.

In the majority of the interviewees' courts which presidents have been dismissed by the Minister of Justice, there is a growing tension between rank-and-file judges and the leadership. Some interviewees admitted that tensions between presidents and other judges had been always present, but at the same time expressed concerns over the escalation of such tensions, which affects the work of the court and individual judges.

First, the majority of the interviewees who are members of the court's governing boards pointed to the constant disagreements with the new court presidents.

> *"Every board session and every meeting with the new leadership is a dramatic struggle."*

> *"The governing board of our court is against the president, which leads to constantly erupting fires."*

In this context, the judges put particular emphasis on their work in general assemblies of judges which include adopting resolutions. Judges pointed out that presidents were starting to restrict the assemblies ability to adopt resolutions defending the rule of law and opposing the ongoing changes to the justice system. These restrictions reportedly take form of blocking the possibility to vote on these resolutions, introducing a requirement to notify the names of sponsors of such resolutions or imposing the requirement of an open ballot.

> *"We've reached the point where we can't speak at assemblies because the president won't let us. He won't let us pass resolutions. We have a row about this at every session."*

As a result of increasing tension between presidents and individual judges, interviewees observed changes in the way their courts are managed and administrative supervision is exercised, which lead to the risk of judges being pressured or to the actual pressure exerted on individual judges.

Three interviewees said that the new presidents of their courts had tried to transfer (or had transferred) them to another department. These measures were justified by the need to enhance the working capacities of particular divisions (in one case, the division remained within the scope of the interviewee's judicial specialty, the other case involved a judge transferred to a division dealing with a completely different legal field). According to the interviewees, they learned about the transfer when they were presented with the amended job description. In both cases, the interviewees perceived the transfer as a clear pressure exerted on them.

> *"You can do anything with a judge these days. Even if the law says you have the right to appeal, the Judiciary Council won't consider your appeal ... In December, I was given a new job description effecting my transfer to a new division without any mention that I have the right to appeal."*

Conflicts between the new president and judges gain in relevance when a given judge becomes the subject of disciplinary proceedings. In the case of eight interviewees, presidents of their courts audited their cases, i.e. checked the files of proceedings concluded by the interviewees. In seven of these cases, the audit was related to the pending disciplinary proceedings, and in one case to a notice of such proceedings. Importantly, some of the affected judges did not know that the audit was taking place.

> *"I found out that the deputy president was taking the files of my cases and read through them. There's no procedure for that. I only know this because the registrar recorded which files went to the deputy president and when they came back. I don't know if they were checking them against any specific charges."*

In the cases of another three interviewees, which involved a major conflict with the court's president, the latter made decisions with respect to the interviewees which ostensibly had no bearing on the work of the judges concerned but in practice could significantly impede their professional performance. By making these decisions, presidents implemented such measures as the denial of access to additional training, cancellation of car park privileges, the reassignment of a judicial clerk and change of a recording clerk or the change of chambers.

> *"I was told to move to a room that was awaiting renovation. This room looked like a broom closet – no phone, no internet, cobwebs hanging everywhere – it looked terrible. Ultimately, I was transferred again, twice. These changes were justified by things like computers and printers being unable to work together in my old office."*

> *"Other methods of exerting pressure on us is the forced sharing of clerks, clerk teams are shared between divisions. And if one of them is sick, we have to share a clerk, but it never works the other way around."*

In isolated cases, the surveyed judges also noted that new presidents of courts had been criticised their rulings or granted shorter extensions of professional tenures (e.g. a year instead of the promised three).

The working environment at courts was also affected by the practice of promoting certain judges who decided to take up positions after the judges removed from office. According to interviewees, the judges who assumed these posts could have either been opportunistic or had no other choice than to accept the promotion. The interviewees who observed this practice admitted that they had moral objections against working with these judges and pointed to the growing mistrust towards them.

> *"Some took this as an opportunity to pursue their own angle, they want to get promoted – they are trying to show how much in common they have with the new government."*

> *"For judges, the worst part is being repeatedly called into president's office, being cajoled into taking up the post. There are several people, not necessarily biggest fans of the sitting government, who are still invited over and over and getting their arm twisted. They are told about all the perks they can get if they agree. If they are still not persuaded, their permission to teach is revoked."*

> *"I am familiar with the case of my colleague who agreed to take up the post of Division Head. We all agreed that we could not take up this post, given the way in which the previous president was dismissed. It turned out later that the colleague had been blackmailed into agreeing: he was threatened with revocation of his temporary assignment to another court if he did not play along."*

Some interviewees also noted the financial benefits associated with being promoted to leadership roles in courts and other bodies, e.g. examination boards. The interviewees were certain that the financial aspect had an impact on the development of opportunistic attitudes.

Another benefit stemming from the exercise of additional functions is the prospect of a significantly reduced caseload. Over the last four years, the Rules of Procedure for the Offices of the General Courts have been amended several times to improve the situation of judges performing certain leadership and administrative roles. These

amendments allowed for a reduction of their "case allocation ratio", or the percentage share in the allocation of cases registered with a given division. In 2015, the Chief Disciplinary Officer and his deputies had to maintain this ratio at the level of at least at 50%, while at present the figure is only 10%. Similarly, the case allocation ratio for members of the National Council of the Judiciary was reduced from 50% to 25%. The list of administrative roles entitling to reduced case allocation thresholds also included the newly created positions of the Coordinator for the Computerisation of Common Courts and coordinators for international cooperation and human rights. The above list also includes judges delegated to the National School of Judiciary and Public Prosecution. To sum up, taking up certain functions can have twofold benefit for judges: an increase in their salary and a reduction in their caseload.

However, not all interviewees' courts have experienced such profound changes to work management methods and climate at work. Only a small group of interviewees, judges from 3 courts, said that the introduced changes had not in any way affected the mood at work in their courts. According to these interviewees, the new presidents continue the work of their predecessors, and their appointments to leadership roles were not much of a surprise to judges.

> *"Speaking of the work and treatment of judges in my court, I can't really complain. I have the impression that I am lucky compared to what I hear from my colleagues working elsewhere."*

Judges and the media

The majority of the interviewees noted that the media narrative on the way the justice system works had changed in recent years. Over the last two years, the coverage of justice by public and some private media outlets has become much more accusative, biased and one-sided.

> *"When the media reported on my case, nobody wanted to know what my position was or asked me for a comment. It's offensive. Such a complete subordination of the message to some pre-established assumptions."*

> *"I've always enjoyed working with the media. But the fact is the public television is more problematic. They tend to repeat the same questions during interviews over and over and after cameras are off, those journalists start explaining to me that they have to ask like that because they've been told to do so."*

Interviewees indicated that during the whole time they have been serving as judges, they sometimes faced criticism for their decisions. However, during the last four years, the criticism they face is not factual, but increasingly more personal. This is particularly evident in the critical opinions about judges appearing on social media.

> *"We often hear negative opinions about us, but they are light on facts and heavy on emotions. I don't even want to talk about what's happening on the Internet – if I looked up my name, I'd surely find some negative opinions about myself."*

Among the media outlets most frequently attacking judges and the judiciary, interviewees mentioned the public television, wpolityce.pl news portal and an anonymous Twitter account, @kastawatch ("castewatch"). According to interviewees' observations, a judge who passes a judgment that may be unfavourable to the ruling majority or incompatible with their worldview almost immediately is targeted by the "loyalist" media.

> *"If someone makes a controversial ruling, even locally, they automatically become the subject of personal attacks. It wasn't like that before."*

> *"This hate for judges, especially that disseminated in the right-wing media, is a complete nightmare. This shapes the perception of judges as a caste, culprits, some public outlaws that should be destroyed."*

The language used by these media describes judges as a "privileged caste", corrupt and entangled in political disputes, while their protests against the changes in the justice system are termed "hysteria". Nine interviewees indicated that they had been attacked in this or similar way in the media because of their rulings.

Another six interviewees admitted that the publications covering their judicial and non-judicial activities the main thrust of criticism was directed at their persons and private lives rather than the outcomes of their work.

In four cases, the interviewees, apart from discussing the manner of presenting information on judges in the public media, some private media outlets and on the @ kastawatch profile, drew attention to the fact that authors of these publications had been able to access information stored in internal judicial databases. This information should be freely accessible only to court employees while their disclosure to the general public should be done by means of the public information request procedure. The surveyed judges found it striking that the information that should theoretically be

protected (e.g. part of official correspondence or information about judges' employment) is uncontrollably and immediately shared with the media.

> *"One of the right-wing news site to learn about my ruling almost immediately [...] It wasn't the criticism that pained me so much but the fact that they weren't telling the truth. I asked the new president who gave the portal this information, but I did not get an answer."*

In this context, the activities of the @kastawatch profile are of a particular relevance, as the portal publishes information on the progress of disciplinary proceedings against judges even before this information is officially notified to the party concerned. It was the immediate access to this kind of information that has raised the suspicions of some interviewees commenting on the activities of this account that the account is run by persons close to the Ministry of Justice.

> *"I suspect Judge [...], the grey eminence of the Ministry of Justice, is behind this profile."*

The climate around judges and courts is also affected by the critical statements about judges expressed by the ruling majority's politicians (the publicised cases of judges' reprehensible conduct that are presented as typical for the entire judicial community, or numerous negative comments about courts and judges).

Interviewees pointed out that this rhetoric had no impact on the way they decide cases, but it nevertheless contributes to a decrease in public trust in the judiciary and its judgements. Continuous attacks on judges mean that their judgments are analysed not only in terms of their substance, but also in terms of whether a given judge has any relationship with the ruling majority (which may involve the expression of either support for or criticism of the changes made).

> *"From the perspective of the people and their right to a court, it is awful that we start to scrutinise judgments looking at who handed them down."*

> *"I believe that this undermines confidence in the courts and also serves to create a post-truth that is perpetuated in the minds of the people. This is extremely harmful and destructive."*

On the other hand, an interviewee admitted that the trend of author focused analysis of judgments had already been present. However, the same interviewee admitted that in the current situation, the assessment of such judgments may translate not only

into a social perception of the judiciary, but also affect the professional career of the judge in question.

> *"I wouldn't exaggerate this – it's always been that way. There has always been speculation in these high-profile cases whether the court has yielded or not ... but I can't imagine a judge who makes a certain judgment in the fear of a political response. But I can imagine that a judge fears that his decisions may affect his promotion prospects. I can't tell if that happened before, but I certainly can see them now."*

Judges and the right to privacy

The last form of pressure identified in the interviews concerned the impact of interviewees judicial work on their private life and right to privacy. Differently from other forms of pressure mentioned above, negative changes in this respect were noted by only some of the interviewees.

Six interviewees indicated that their work had an impact on their private lives. Two of these judges received letters with threats related to their professional or social activities. The remaining four judges felt the negative consequences related to, among other things, their family situation (judges themselves or their loved ones were scared by the attacks, which also affected their health).

The vast majority of interviewees (24) raised the issue of unauthorised access to their correspondence (both private and official). As all these interviewees admitted, they use their phones and other means of communication on the assumption that their communication may be monitored. By and large, the interviewees had no evidence that e.g. their conversations could be intercepted (law enforcement agencies are not required to inform individuals about surveillance upon the conclusion of such operations). However, based on their own experience and the fact that judicial control over the law enforcement's access to intercepted communications is illusory, judges acknowledged that they had to recognise that they could have been put into surveillance.

> *"As for the telephone conversations, of course I have suspicions. I know it's very easy to get a wiretapping authorisation, the procedure is pretty simple, you just need to notify the carrier and court's approval is a purely technical measure."*

> *"A law that is now in force allows to use surveillance to an extent unprecedented in a democratic society. The law establishes some review procedures, but*

> *that is a fig leaf. The sole purpose of this review is to legalise actions that are illegal anyway – a court, by rubberstamping these measures, gives the services a kind of safe conduct letter, but their conduct is very far from "safe".*"

In four cases, the judges had a reason to believe that the confidentiality of their conversations and correspondence had been violated. In all these cases, parts of their conversations or correspondence were casually quoted by third parties who should not have access to this information.

> *"I'm not a fan of conspiracy theories, but there I had a suspicion that other people knew the content of my communications. I can say – with conviction bordering on certainty – that my non-judicial activities as well as those of my colleagues are constantly being watched and recorded by someone.*"

THE ASSESSMENT OF THE CHANGES IN JUSTICE SYSTEM

In the closing part of the interview, the interviewees were asked to assess the existing guarantees of judicial independence and the key systemic reforms introduced to the justice system over the last four years, including the changes in the Constitutional Tribunal, Supreme Court and National Council of the Judiciary as well as in the model of disciplinary proceedings.

The assessment of systemic guarantees of judicial independence

The overwhelming majority of interviewees (37) admitted that after almost four years of judicial reforms, the systemic guarantees of judicial independence have been, at best, compromised and seriously undermined. According to the interviewees, the deterioration of standards of protection of judicial independence was caused, above all, by changes in disciplinary proceedings, the establishment of the Disciplinary Chamber of the Supreme Court, the limiting of the role of courts' governing boards, the marginalisation of the role of judges' assemblies of and the institutional changes concerning the National Council of the Judiciary. The interviewees also pointed out that although the Constitution, which guarantees judicial independence (e.g. by establishing the principle of irremovability of judges), had not been changed, in reality this protection was perceived as illusory.

> *"Thanks to the fact that the judges are irremovable, we've managed to keep our heads above water. All other guarantees went down the drain."*

> *"If the Chief Justice of the Supreme Court could have been publicly insulted and nearly ousted from office, then we have no guarantee that the regular judges won't be treated like that."*

Some of the interviewees pointed to the announced flattening of the structure of courts and introduction of a uniform status for all judges as factors that undermine the guarantees of judicial independence. These interviewees said that the adoption of the uniform status would serve primarily the purpose of negative vetting of the judiciary.

> *"I don't think the uniform status reform is pursued in good faith. I am convinced that this would be another pretext for remodelling the justice system by means of the replacement of cadres and rewriting rules of appellate review."*

As a side note, some judges have admitted that although the current changes presented the most serious threat to the implementation of the principle of judicial independence, every government made attempts to subjugate the judiciary in some way.

> *"All governments were tempted to subjugate the judges. But it was never done on such a scale as it is done now."*

In none of the interviews did the interviewees express doubts about their personal independence. In fact, all interviewees declared that the proposed changes would not affect the way in which they would decide cases (it is also important to point out at this point that none of the interviewees admitted to recently having been directly forced to make a certain decision, see more in **» The forms of pressure exerted on the judges**).

> *"I don't feel like anyone's influencing my rulings. No one can accuse me of anything, I rule as I please."*

> *"I believe that there are not too many instances of a particular judge being pressured to give a specific ruling in a particular case – I can't really imagine that."*

The interviews conducted offered no means to verify such declarations. However, they have shown that, in the face of weakened legal safeguards, the internal independence of judges remains as the only protection of individuals' right to an independent court. As the judges noted, they are entirely responsible for ensuring that they remain independent and do not give in to the exerted pressures and the chilling effect.

> *"Nowadays, the guarantee of judicial independence is solely based on the strength of the judge's character."*

> *"Other guarantees aren't worth more than the paper they've been written on. We often talk about the internal and external guarantees of independence. Those internal guarantees are in us we're are entirely responsible for keeping them alive. Institutional guarantees, on the other hand, are increasingly being violated."*

The assessment of the Constitutional Tribunal

Almost all interviewees asked about the assessment of the activities of the Constitutional Tribunal since 2016 have expressed a negative opinion, which were mostly prompted by doubts about the status of three Tribunal's judges, the way in

which the Tribunal works, its judicial efficiency and the lack of credibility. Some of the interviewees also raised the issue of the procedure for appointing judicial panels at the Tribunal, as such appointments have recently primarily depended on the discretionary decision of the Tribunal's President. The interviewees argued that matters important for the ruling party are considered by judges elected only by the current ruling majority.

> *"I have consequently taken the view that the Tribunal is not working properly. Even if all the judges had been legally elected by the Parliament, without any double appointments, the whole nomination process, the things done by the president and deputy president, all these mean that the Tribunal can't perform the role for which it was created."*

The interviewees expressed their concerns about the relationship between the President of the Constitutional Tribunal and politicians of the ruling party. An interviewee recalled the Tribunal's President accepting an award from a politically engaged daily newspaper, while another pointed to press reports on the private relations between the President and politicians of the ruling coalition.

> *"It is beyond my comprehension that the President of the Constitutional Tribunal may receive the Prime Minister or the leader of the ruling party. It's like the president or a district court and the mayor were drinking buddies and later the court would be ruling in the case of acquisitive prescription of property by the mayor's town."*
>
> *"I regret to say that the Constitutional Tribunal has turned into an on-demand service."*

Because of many concerns surrounding the Tribunal's work the interviewees became highly doubtful as to whether they would refer a legal question for the Tribunal's ruling. As many as 26 interviewees declared they would not refer such a question. Several would deeply consider the point of taking such a procedural decision. One of the interviewees said that he would refer the question and then, after a panel is appointed to hear the case, consider withdrawing it.

A far greater expression of mistrust in the Constitutional Tribunal was the statements of the 6 judges who indicated that they would not accept the Tribunal's ruling as a basis for the resumption of judicial proceedings. However, one of the judges challenged this approach by pointing out that the issue cannot be assessed solely from a legalistic point of view: he argued that the interest of the individual is at the core of every such case and it must be taken into account.

The assessment of the National Council of the Judiciary

None of the 40 interviewees would express definite enthusiasm for the activities of the incumbent National Council of the Judiciary (NCJ). There were two main reasons for the negative assessment of the Council: the way in which the NCJ membership was elected and its activities since 2018.

Speaking about the procedure for the election of new members of the NCJ, the interviewees above all criticised the Parliament's election powers, which some interviewees considered to be clearly unconstitutional (such opinions were expressed throughout the survey, regardless of the judgment of the Constitutional Tribunal entered in March 2019 in which the Tribunal found the amended provisions of the Judiciary Council Act to be constitutional).

> *"The Constitution clearly states which members of the NCJ are elected by the Sejm and each lawyer worth their salt must know this."*

> *"I have no doubt that the election of judges by politicians violates the Constitution. And that hush-hush nomination procedure is itself an abomination."*

In addition, two interviewees pointed to the secrecy of the lists of judges endorsing a given candidate to the NCJ. The absence of information about the actual judicial support base of NCJ members poses questions as to whether they have received endorsement of a sufficient number of judges and the question about them simultaneously endorsing one another.

> *"This membership of the NCJ, elected by politicians can't be considered representative of the judicial community, especially that we still don't know who has actually endorsed the candidates. All that secrecy suggests that they might have been backed by the judges working for the Ministry."*

The interviewees were also critical of the selection of the NCJ nominees later elected as members. In this respect, the interviewees made particular note of the private and professional links between some of the newly appointed Council's members and the Ministry of Justice.[26] These links may involve both private acquaintances with officials working at the Ministry of Justice and the unofficial subordination of NCJ members to

26 The scale of the problem is well depicted by the map of relations of the members of the NCJ, prepared by the Civic Development Forum (https://embed.kumu.io/fad65ba32328e8c0c40c0a3af-92c5183#krs, accessed on 5-7-2019).

the Minister of Justice, who may exert pressure on those members by e.g. threatening them with a dismissal from a leadership position, cancellation of temporary assignment to a higher court or withdrawal commission to sit on an examination board. Two interviewees pointed to the insufficient professional competence of some of the newly selected members of the NCJ, questioning their ability to effectively review candidates for superior judicial positions.

> *"I have the impression that these individuals don't have the necessary qualifications. Incompetent people with hateful personal grudges shouldn't review judicial candidates. This can't end well. This said, I think that the previous NCJ kind of fell short of its purpose, too."*

> *"I must add, and I don't want to be rude, but when I listen to what members say, I struggle to see an intellectual potential in the Council."*

Finally, the negative assessment of the NCJ by some of the interviewees was a consequence of individual members' activities in the public debate. The interviewees noticed their obstinacy in defending the Government's positions, willingness to quote reports from the media supporting the Government, statements made in defence of the Prime Minister's words about corruption in the judiciary[27] or the expression of the need for consulting NCJ's actions with the Cabinet[28].

> *"The statements made by the NCJ spokesperson, its chair and individual judge-members, show that this is not a body that cares about independent adjudication or improving the status of judges. This is a body subordinate to the executive."*

The overwhelming majority of the interviewees were also critical of the way in which the current NCJ works. Their reservations related mainly to the Council's performance in two areas: upholding the independence of the judiciary and participating in the appointment of judges and associate judges.

Speaking about the first area, interviewees pointed to the NCJ's failure to address e.g. the ruling majority politicians' critical comments about judges or the initiation of

27 Polsat News, "'Premier nie musi przepraszać'. Przewodniczący KRS nie poczuł się urażony wypowiedzią szefa rządu", https://www.polsatnews.pl/wiadomosc/2019-05-01/premier-nie-musi-przepraszac-przewodniczacy-krs-nie-poczul-sie-urazony-wypowiedzia-szefa-rzadu/.

28 RMF, "Szokujące słowa szefa KRS: Będziemy konsultować się z rządem po decyzji TSUE", https://www.rmf24.pl/fakty/news-szokujace-slowa-szefa-krs-bedziemy-konsultowac-sie-z-rzadem-,nId,2643460#utm_source=paste&utm_medium=paste&utm_campaign=firefox.

disciplinary proceedings against judges by disciplinary officers in response to judges' rulings.

> *"I feel wronged by the opinion expressed by the Prime Minister who compared appointments of Polish judges and the procedure used in Vichy France. Even more painful was the statement of the NCJ's chair who said that the Prime Minister had nothing to apologise for."*

What is more, the general distrust towards the current NCJ was also evidenced by the fact that even in those situations in which the Council has actually taken action, the interviewees considered such actions to be a game of appearances on the NCJ's part.

> *"The NCJ has not fulfilled its constitutional duty to uphold the independence of the courts and judges, except in some instances that I find to be PR stunts [speaking about the NCJ resolution on the earmarking of judges' travel allowances budget to supplement salaries of courts administrative staff – editor's note]."*

Also the second area of NCJ's responsibilities, i.e. judicial appointments and promotions, raised doubts among the interviewees. Eleven interviewees made note of the Council's judicial appointments, but also of those NCJ's decisions which resulted in no candidate being appointed. In the case of the latter, the prevailing opinion was that the support of the judicial community was the element that ultimately ruined a candidate's chance.

> *"The more support you get, the more likely you are to be excluded from the procedure."*

According to these interviewees, this practice was adopted to punish judges active in public debate for their opposition to changes in the judiciary. However, the NCJ also rejected those judges who did not speak critically of the reforms. According to interviewees, these candidates were rejected by the NCJ solely based on them having been positively evaluated by the judges' assembly, governing board or a judge-auditor.

> *"We watched the NCJ session with astonishment. A sad spectacle, really. The assessment of judge-auditors, assemblies or boards were criticised. The only correct assessment was that of the NCJ."*

The above contention is supported by the findings of the Supreme Court's Chamber of Extraordinary Review and Public Affairs, which reviewed some of the NCJ's resolutions.

The Supreme Court noted that the manner in which the grounds for a contested resolution were presented in the resolution effectively prevented the review of its legality. The Supreme Court held that the NCJ had not shown why it had decided to recommend a candidate for a judicial position who did not have the support of the judges and why it had not recommended a candidate who had such support. In the view of the Supreme Court, the NCJ has failed to provide sufficient grounds for the statement that "evaluations of the candidates' qualifications are not reliable because not all of them reflect the actual level of candidates' qualifications ... which is shown by other documents collected in the course of the procedure"[29].

On the other hand, interviewees also had doubts about situations in which judges had successfully completed NCJ competition procedures despite having been negatively assessed by judges-auditors, court governing boards and assemblies of judges' representatives. As an example of these problematic personnel decisions, one can point to a judge who was assessed by a judge-auditor as "professionally mediocre" and "insufficiently efficient and effective in taking procedural steps"[30] but was nevertheless promoted.

The interviewees pointed out that such a practice will produce negative consequences for the justice system in the future. The interviewees considered certain promotion decisions of the NCJ deeply irrational from the perspective of judicial efficiency: this was the case when, for example, experienced judges of a regional court who have already been temporarily assigned to a court of appeal unsuccessfully competed for a permanent posting in a court of appeal, which was ultimately given to a district court judge.

> *"Someone who has never done it [heard a case on appeal – editor's note] will be reviewing my judgments. Horror!"*

Two interviewees also indicated that such a practice could be perceived as demotivating. The above promotion procedures may create a perception among judges that there is no need to try and improve their skills and quality of their jurisprudence, since the Council's promotion decision will ultimately be based on considerations other than merit.

29 Judgment of the Supreme Court of 29 March 2019, case no. C I NO 10/19.

30 Piotr Żytnicki, "Sąd Najwyższy blokuje dziwne awanse w poznańskim sądzie. Uchwała KRS uchylona", http://poznan.wyborcza.pl/poznan/7,36001,24964583,sad-najwyzszy-blokuje-dziwne-awanse-w-poznanskim-sadzie-uchwala.html.

> *"These days, the more reversals you have, the better candidate you are. A candidate's 100% reversal rate was described as a sign of "intellectual freedom"."*

Those of the interviewees who work in courts with vacated judicial posts were severely affected by the Council's refusals to endorse all the candidates nominated for these posts. In their opinion, the NCJ's attitude aggravates the already difficult personnel situation within the justice system, as it prevents filling the vacancies which would result in a reduction of judges' workload. As they pointed out, the ultimate effect of this behaviour is the slowing pace of court proceedings.

> *"We can't even trust the NCJ with simply letting courts do their job properly."*

The negative assessment of the appointment and work of NCJ members s reflected in personal decisions of the surveyed judges. Out of 40 interviewees, 39 explicitly excluded the possibility of applying for a promotion before the NCJ in its current composition. The only interviewee who considered applying for a promotion admitted that he would most likely lose the vote anyway due to a personal conflict with the influential president of his court.

As a rationale for their decision, only few interviewees said that they did not think at all about changing their post. However, the majority of interviewees explained their reluctance to seek promotion before the current NCJ by giving two reasons: their reluctance to recognise the unconstitutionally formed NCJ and the risk that all NCJ's decisions will be declared invalid in the future.

> *"This is not the time when a judge should be thinking about a promotion. It's time for grass roots work, education, defending values, not for pursuing your own interests."*

> *"I have no intention to be evaluated by this Council. I don't want any temporary assignments, I don't compete in any competitions."*

> *"I'd consider doing so with the old NCJ, because that Council actually cared about what a candidate's peers said. Now promotions are given to people negatively assessed by their colleagues, the governing board and the president."*

The vast majority of the interviewees (38) would also not seek the NCJ's support in response to an attack on their independence. Two interviewees said they would notify the NCJ about such incidents only if it was necessary to comply with procedural requirements. However, the NCJ was predominantly perceived as a body completely inept in protecting judicial independence.

> *"There have been several notifications of harassment against judges. The NCJ's answers were all the same – "we don't have the competence, we won't take a position, we are unable..."."*

Seven surveyed judges were also critical of the previous NCJ's activities. They pointed out that the "old" Council had not been sufficiently active in the performance of its core function and that its personnel decisions could sometimes be considered questionable. They stressed, however, that the realities of the former Council's work were different. Occasional problems arising in the work of the previous NCJ have now become a widespread practice.

> *"When we criticise the current NCJ, we don't want to return to what was before. That wasn't cool, either. But the way things are now, there's no even pretending to be any standards."*

Several interviewees stated that changes in the National Council of the Judiciary were necessary. According to those interviewees, it was necessary to ensure greater transparency of NCJ's work (two interviewees positively assessed the introduction of live broadcasts of the Council's sessions) and to guarantee greater involvement of district and regional court judges. However, the actual changes went much further, negating the very purpose of the NCJ.

> *"Changes in this area were certainly needed, but you don't treat the flu with cancer."*

The assessment of the new model of disciplinary proceedings

The interviewees presented predominantly a negative assessment of the new framework of disciplinary procedure, which, on one hand, limited judges' right of a defence and, on the other, strengthened the position of disciplinary officers and the Minister of Justice in these proceedings.

> *"This procedural model is bad. There's no way it will make all judges angels or ensure the speedy processing of cases."*

With regard to the limitations of the right to a fair trial, the surveyed judges highlighted that the standards of the right to a defence in disciplinary proceedings have been lowered as compared to those guaranteed in criminal proceedings. While discussing this aspect, interviewees most frequently mentioned the rules of disciplinary proceedings

that allow for conducting the proceedings in the absence of the accused judge, the use of strict time limits for submitting evidence (14 days from the date when charges are presented), as well as the non-application of the *ne peius* principle. These limitations have often led interviewees to observe that the judge accused in disciplinary proceedings has fewer rights than the defendant in criminal proceedings.

In this context, some interviewees also pointed to the repressive nature of disciplinary proceedings. In their view, the new framework of disciplinary proceedings is designed to make the judges realise that a disciplinary officer can initiate proceedings against any one of them, at any time. Punishment handed down to certain judges should be a warning signal for the remaining ones.

> *"You can't give the proverbial lashes to 10,000 people but it is possible, for example, to punish a few or a dozen judges so to scare the rest. And that is the purpose of these proceedings."*

One of the interviewees pointed to the particular severity of a newly introduced disciplinary penalty, namely a 50% reduction of the disciplined judge's earnings. In his opinion, even a disqualification from office has a weaker effect, because the disqualified judge has in fact more options to deal with the new situation. Conversely, the lowering of the salary leads to economic insecurity. This is a real pressure mechanism.

> *"Having your salary slashed in half for two years may put an enormous strain on your household budget."*

The negative assessment of the current disciplinary framework was also a consequence of the Minister of Justice's ability to influence the appointment of disciplinary officers or interfere with all stages of disciplinary proceedings by such means as stepping in as the lead prosecutor, initiating proceedings or affecting the composition of the Disciplinary Chamber of the Supreme Court.

> *"It's all in the hands of the Minister of Justice, he's calling all the shots."*

In this context, the interviewees presented an equally negative assessment of the work of the deputies of the Chief Disciplinary Officer for Common Courts Judges. In the opinion of almost half of the interviewees, the proceedings initiated by disciplinary officers were primarily aimed at discrediting judges active in public debate, as well as intended to target those judges who had issued a ruling unfavourable to – or unwelcome by – the executive.

> *"This is all about having a big stick in hand, not to get rid of bad apples in judges' ranks."*

Nine judges made note of the significant disparities in disciplinary officers' decision to initiate proceedings, who are eager to take action against judges actively engaged in the public debate on changes in the judiciary but are less eager to investigate cases of possible ethical violations by judges more closely connected with the Ministry of Justice or the NCJ. For example, in the case of one of the disciplinary officers who did not prepare written justifications of his decisions, another disciplinary officer decided not to launch a proceeding.[31]

> *"They aren't disciplinary officers, they are political officers"*

> *"Someone who hasn't written 115 justifications on time should be held disciplinary accountable [...] from what I see, however, is that the proceedings aren't about investigating the cases which should be investigated, but to create pressure on those who criticise the changes"*

When assessing the current model of disciplinary proceedings, the surveyed judges also looked at the way in which disciplinary officers conduct enquiries. In the opinion of three judges, the practice developed by disciplinary officers (e.g. hearing other judges as witnesses or not allowing the accused judge's lawyer to attend questioning) not only undermines the guarantees of a fair trial, but also, and above all, leads to the situation where disciplinary proceedings start to resemble more of a witch hunt than due process.

> *"As for the conduct of disciplinary proceedings, the people in charge give an impression of being completely unfit for the job: if I treated my defendants like that, I would certainly deserve to be disciplined too."*

> *"Disciplinary officers seem to be unfamiliar with the law that has been on the books for quite some time. The purpose of explanatory proceedings, as the name suggests, is to explain the matter at hand but no judges can ever be heard as witnesses in such proceedings. A disciplinary case is not a fishing expedition, you can't just jump in and hope to find some misconduct."*

Importantly, the interviewees were critical of the activities of the Chief Disciplinary Officers and his two Deputies, and not of local disciplinary officers. The interviewees'

31 M. Gałczyńska, Rzecznik Piotr Schab zdecydował. Nie będzie dyscyplinarki dla sędziego Przemysława Radzika, Onet.pl, https://wiadomosci.onet.pl/tylko-w-onecie/rzecznik-piotr-schab-zdecydowal-nie-bedzie-dyscyplinarki-dla-sedziego-przemyslawa/hgetdct

statements contained virtually no critical remarks about the work of the disciplinary officers attached to regional and appellate courts. It appears from the documents provided to HFHR by some of the local disciplinary officers (including, inter alia, copies of disciplinary complaints) that disciplinary proceedings at this level are commenced in justified cases.

Referring to the activities of the Disciplinary Chamber of the Supreme Court, most of the interviewees assessed its creation as an implementation of a political plan rather than a viable way of addressing a critical problem. The creation of this Chamber was an example of scare tactics used to whip the judges into submission. In the opinion of nine judges, the Disciplinary Chamber in its current form does not meet the requirements of an independent court and is a body that does not fit into the constitutional order. The majority of interviewees agreed that the Disciplinary Chamber is a "political body" which is primarily intended to implement "political agenda".

> *"The Disciplinary Chamber is a finishing touch to the system. Even if you can't get a grip on the situation at the level of common courts, there is always the supreme instance where you can do whatever you want."*

Two judges pointed out that the idea of introducing the Disciplinary Chamber in itself deserved consideration. However, the judges pointed out that the operation of the former disciplinary system did not lead to the less strict treatment of judges responsible for disciplinary misconduct. On the contrary, according to these judges, disciplinary rulings were harsh and the judges who committed disciplinary offences did not go unpunished.

> *"A judge with 1000 cases on his docket faced disciplinary action for a delayed submission of grounds for their judgment."*

Those of the interviewees who commented on the appointments of judges sitting on the Disciplinary Chamber noted that some of positions in the Chamber, previously taken by Supreme Court judges, were filled by persons without any judicial experience. According to interviewees, this effectively weakened their authority to evaluate the judicial activity of other judges. The interviewees were equally critical of the situation in which many Disciplinary Chamber judges were appointed from among prosecutors connected with the Minister of Justice, and the overall composition of the Chamber was decided by the National Council of the Judiciary elected by the ruling parliamentary majority. Finally, the interviewees expressed doubts about one of the Chamber's judges' political neutrality and professional integrity.

> *"If a judge of the Disciplinary Chamber of the Supreme Court publicly declares who he will vote for in local elections and this is not considered political behaviour, then what is political behaviour?"*

The interviewees also discussed the institutional framework of the Disciplinary Chamber, its institutional autonomy and independence, which is manifested in e.g. its financial and organizational separation. The surveyed judges expressed concerns over the remuneration of the members of the Disciplinary Chamber, which includes a 40% bonus designed to ensure their loyalty.

THE ASSESSMENT OF CONSEQUENCES OF THE CHANGES IN THE JUSTICE SYSTEM

There was a prevailing fear among the interviewees that the changes in the justice system introduced over the last four years would have profound and irreversible consequences for the system's operation.

First of all, a significant number of the interviewees pointed out that the nearly four years of judicial "reforms" did not in any way translate into more effectively working courts. In their view, nothing or very little has been done to speed up judicial proceedings. Moreover, personnel reshuffles, staff shortages, and the problems related to the high turnover of non-judicial personnel at courts contributed significantly to the deterioration of individuals' right to a court.

> *"Any lucidly-thinking judge who has a tiniest clue about this job will say the same thing I've been saying: the current reforms have nothing to do with improving the work of the judiciary. Nothing at all. I'm talking about the quality of working environment and the social perception of our work."*

> *"Judicial vacancies, lack of administrative support ... all that will affect an individual's access to a court. With so many cases, we need more judges."*

While discussing the consequences of the introduced changes, the interviewees focused on the issue of confidence in courts. Five judges indicated that the changes would deepen people's mistrust of the courts. In this respect, interviewees pointed to the effects of the smear campaign against judges, but also to the undermining of the stability of law and jurisprudence through new judicial appointments by the new National Council of the Judiciary. In the opinion of those interviewees, parties to court proceedings may have legitimate doubts as whether adjudicating panels hearing their cases have been lawfully appointed. In this context, interviewees also expressed concerns that the infringement proceedings pending before the Court of Justice of the European Union may lead to a challenge to the judicial appointments made by the new NCJ and ultimately undermine the validity of the judgments delivered by these judges.

Another consequence that some interviewees feared was the more rapid retirement of judges. The judges pointed out that the climate around the justice system led their oldest colleagues to conclude their professional careers. Younger judges, who have not yet reached the retirement age, are considering alternatives, looking for an idea

for a life outside the judiciary. Those interviewees who thought about leaving mostly said that they would easily find a place in the legal services market. However, some of them said that changing jobs would not be easy.

> *"I don't have any Plan B. Judging is the only thing I can do."*

Some of the interviewees also noted changes in the judicial community itself. Although the interviewees in general expressed a positive opinion about the behaviour of fellow judges in the face of the changes, which is exemplified in maintaining professional solidarity and supporting each other, they acknowledged that there is a slowly extending rift among judges. This is a consequence of the division between rank-and-file judges and those promoted by a discretionary decision of the Minister of Justice to a leadership position.

Some interviewees pointed out that ongoing attacks on the judiciary forced judges to engage in deeper self-reflection on their work. Some interviewees said that until now, judges had been disconnected from the people, had not been involved enough in communicating with members of the public, and believed that the judge speaks only through his or her rulings. The changes prompted them to realise that they need to change the way they communicate and, where possible, move away from the legal, often hermetic, language.

Here, the interviewees, somewhat paradoxically, were inclined to argue that the introduced changes may also have positive effects such as the judicial community being more receptive of people's concerns and improving their societal communication capabilities.

> *"It is necessary to develop an image of a modern justice system and judges as people who care about the public good."*

Some interviewees also noticed the need for more transparent decision making, reaching out to the public, engaging in educational campaigns. In their opinion, the period of changes in the justice system will force the judges to change the way they communicate with the public.

> *"There's no going back to the past, no ivory tower for the judges to lock themselves in."*

SUMMARY AND RECOMMENDATIONS

The conducted survey demonstrated that:

- **Pressure is exerted on judges**

The mechanisms put in place, both systemic changes to the justice system and the changes in management of the work of individual courts, have been used, to a considerable extent, to increase pressure on judges. During the interviews, the respondents pointed to cases of judges who were subjected to various forms of pressure in connection with their judicial and non-judicial activities. Equally worrying were the cases of pressure being exerted on judges who are not active in public debate but fell victim to the escalating internal conflicts in courts.

The identified forms of pressure involved unreasonable criticism conveyed through the media, attempts to discipline judges (made both by disciplinary officers and other entities, including litigants), changes in managerial practices designed to hinder the work of individual judges, or violations of judges' right to privacy. All of these forms of pressure affected the private lives of some of the interviewees, impacting on their health and sense of security.

- **The constitutional principle of independence of the judiciary and judges has been undermined**

Changes in the justice system weakened constitutional guarantees of judicial independence. At the same time, those changes have failed to bring about an improvement in the functioning of the judiciary, in particular with regard to the efficiency of the handling of court cases. The common features of all the "reforms" were the progressive reduction of the independence of the judiciary, the establishment of mechanisms that may be used to influence the judges of common courts and the undermining of institutions protecting the independence of judges.

- **A chilling effect occurs**

The measures taken to pressurise judges have resulted in the creation of a chilling effect among a section of the judicial community. None of the interviewees admitted that this chilling effect had an impact on their judicial decision making. However, it cannot be ruled out that the fear of disciplinary consequences may become an increasingly important factor in the work of judges, or that it may affect their non-judicial activities.

In view of the fragility of institutional safeguards of judicial independence, it is reasonably possible that this effect will have an impact on the jurisprudence of courts, compromising the exercise of individuals' right to have their case heard before an independent court.

◆ An incentive effect has been created

The changes in the judiciary led to a reshuffle in the leadership positions in courts. Some of these positions have been filled by judges likely to exhibit a loyal attitude towards the ruling majority. This practice leads to the creation of a relatively small but influential group of judges highly trusted by the incumbent government.

The observations of interviewees showed that judges supporting the policies of the executive branch are likely to be rewarded with additional postings, faster promotions and greater tolerance on the part of disciplinary authorities. It cannot be ruled out that this incentive effect may also have an impact on the rulings of individual courts. This is especially true as this effect favours the emergence of attitudes of self-adjustment to articulated – or even anticipated – expectations of the executive.

Recommendations

In order to restore the complete protection of judicial independence, the HFHR considers it necessary to take the following measures:

◆ In the systemic dimension:

- ❖ The process of appointing courts' management should not be depended from political decision and judges should have a possibility to participate in the process of appointing judges for the position of courts' presidents;
- ❖ The Judiciary Council Act should be amended so that the procedure of selection and appointment of the Council's judge-members may once again be free of political interferences.
- ❖ The independence of the Constitutional Tribunal should be restored through the official admission of the three judges legally elected in October 2015 and the introduction of a transparent system for the allocation of cases to Tribunal judges.

- **In the area of disciplinary proceedings against judges:**
  - The framework of disciplinary proceedings should be modified, in particular by abandoning the measures that currently limit the judges' right to due process and the right to have their case heard before an independent court and exclude the actual opportunity to resort to an appellate remedy.
  - The Common Courts Act's provisions on disciplinary proceedings should be amended so that disciplinary proceedings against judges are free from the influence of the Minister of Justice, who should only be able to lodge a complaint in cassation in cases provided for by the law.
  - The unlawful disclosure of personal information concerning judges should be stopped.
  - Decisions issued by judges or their active participation in public debate should no longer give rise to explanatory or disciplinary proceedings.

- **In the context of the performance of judges' professional duties:**
  - Transparent rules for the appointment or temporary assignment of judges to a higher court should be ensured.
  - All forms of *ad personam* attacks on judges in the public media should be discontinued.

According to the HFHR, the ongoing judicial crisis should be met with a further response from the European Union bodies. Therefore, the HFHR recommends that the European Commission and the European Council:

- should continue the procedure under Article 7 of the Treaty on European Union in order to hold the Government of the Republic of Poland liable for a breach of the principle of the rule of law,
- should refer the case of disciplinary proceedings against Polish judges to the Court of Justice of the European Union together with a request for interim measures to interrupt politically motivated disciplinary proceedings initiated by the Chief Disciplinary Officer and his deputies.

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