

# DISCIPLINARY PROCEEDINGS AGAINST JUDGES AND PROSECUTORS

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## **Disciplinary proceedings against judges and prosecutors**

Since 2015, Poland has been facing an ongoing constitutional crisis which affects the work and position of the judiciary. The numerous legal changes concerning the work of the courts (from top-rank courts such as the Constitutional Tribunal and the Supreme Court to common courts) as well as prosecution were accompanied by smear campaigns and attacks against judges and certain prosecutors.

Over last year, media reported on several examples of disciplinary proceedings launched against judges of the common courts in Poland. In all of these cases, the disciplinary proceedings are launched against judges and prosecutors who were vocal critics of the reform of the judiciary in Poland or made decisions unfavourable from the perspective of the governing majority.

### **Legal background**

#### **Disciplinary proceedings against judges**

##### General overview

The structure of disciplinary courts for judges in Poland may be summarised as follows. In the first instance, the cases are heard by disciplinary courts at appellate courts or by the newly created Disciplinary Chamber of the Supreme Court (the latter being proper, in particular, when the disciplinary misconduct constitutes an intentional crime prosecuted by public indictment or when the defendant is a judge of the Supreme Court). In the second instance, all cases are adjudicated by the Disciplinary Chamber of the Supreme Court.

Before the proceedings begin, the disciplinary commissioner (*rzecznik dyscyplinarny* – see more information below) carries out an investigation, during which they may request a written or oral statement from a judge. If, after the investigation, there are grounds for initiating disciplinary proceedings, the disciplinary commissioner institutes them, draws up the disciplinary charges in writing and delivers the charges to the defendant, calling upon them to present the written explanations and to give evidence. The explanations may also be given orally. This stage of the procedure concludes with the disciplinary commissioner filing a motion for hearing the case to the disciplinary court.

The case is examined, in general, at a hearing and the proceedings are open to the public. The defendant may use a defence counsel. A judgement delivered by the disciplinary court of the first instance may be appealed against by the defendant, the disciplinary officer, the National Council of the Judiciary and by the Minister of Justice. The appeal should be heard by the Supreme Court's Disciplinary Chamber within the two-month period. The ruling of the court of the second instance is final and cannot be subject to cassation.

### Disciplinary commissioners

A disciplinary commissioner is a person entitled to act as a prosecutor in disciplinary proceedings against judges in Poland. There are several categories of disciplinary commissioner prescribed by the [Act on common courts](#).

The ones of the highest importance are the Disciplinary Officer for Common Courts' Judges and two Deputy Disciplinary Officers for Common Courts' Judges, all of them appointed by the Minister of Justice for a four-year term of office. They may act as prosecutors in disciplinary cases concerning judges of appellate courts and presidents or vice-presidents of appellate and regional courts. They may also take over any case conducted by a deputy disciplinary commissioner or hand over any case to that commissioner.

The deputy disciplinary commissioners act at appellate courts (and prosecute in cases of regional courts' judges and district courts' presidents or vice-presidents) and at regional courts (where they handle the remainder of the disciplinary cases). There should be at least one deputy disciplinary commissioner at every regional and appellate court, chosen by the Disciplinary Commissioner for Common Courts' Judges from a list of six candidates (for each available post) who obtained the highest number of votes during the meeting of a general assembly of a regional or appellate court, and appointed for a four-year term of office.

The Minister of Justice may also appoint the Disciplinary Commissioner of the Minister of Justice for the purpose of conducting a specific case relating to a judge. The appointment excludes any other officer from taking actions in this case. This kind of disciplinary commissioner may be appointed from among common courts' judges or Supreme Court judges. However, with regard to disciplinary proceedings meeting the criteria of intentional crimes prosecuted by public indictment, the officer may also be appointed from among public prosecutors indicated by the National Prosecutor.

### Disciplinary judges

According to the [Act on common courts](#), the duties of a disciplinary court judge at an appellate court can be entrusted to a person who is a common court judge with at least 10-year professional experience. Judges of a disciplinary court are appointed by the Minister of Justice, after consulting the National Council of the Judiciary, for a six-year term of office. All the cases of disciplinary courts at appellate courts are heard by a bench of three judges. The number of judges in disciplinary courts should be specified by the Minister of Justice, by means of an ordinance.

The composition of the disciplinary court (regarding to a particular case) is decided by lot from among all disciplinary judges of the court, provided that at least one of them permanently adjudicates criminal cases. The longest-serving judge who permanently hears criminal cases should be the presiding judge of the disciplinary court.

### Disciplinary Chamber of the Supreme Court

The new [Act on the Supreme Court](#), which came into force on April 3<sup>rd</sup>, 2018, created two new chambers of the court, Disciplinary Chamber being of them. This chamber is entitled to, first of all, adjudicate disciplinary cases of Supreme Court's own judges as a court of the first instance. It also serves, respectively, as a court of appeals in disciplinary proceedings against judges of common courts, or a court of cassation when it comes to disciplinary cases pertaining to attorneys at law, solicitors, notaries, public prosecutors and bailiffs.

The President of the Supreme Court directing the work of the Disciplinary Chamber has insight into the actions of the disciplinary court of the first instance.

### Liability to disciplinary actions

According to the [Act on common courts](#), a judge is liable to disciplinary actions for misconduct, including an obvious and gross violation of legal provisions and impairment of the authority of the office (disciplinary misconduct). A judge is also liable to disciplinary actions for their conduct prior to the accession to the post if, due to such conduct, they failed to fulfil their respective duties at the state office held at that time or appeared to be unworthy of holding a judicial post.

Disciplinary proceedings may not be initiated, in general, upon the lapse of five years from the time the act was committed (the limitation period being prolonged to eight years in case the proceedings are instituted before the expiration of the 5-year term). The catalogue of possible disciplinary penalties includes: an admonition, a reprimand, lowering the basic salary by 5 to 50% for a period up to two years, dismissal from the function held, transfer to another place of service and dismissal from the office of a judge. A final convicting ruling of the disciplinary court should be published on the Supreme Court's website or in the Official Gazette of the Republic of Poland "*Monitor Polski*".

## **Disciplinary proceedings against prosecutors**

### General overview

The structure of disciplinary courts for prosecutors in Poland may be summarised as follows. According to the [Act on prosecution](#), in the first instance, the cases are heard by disciplinary court of the Prosecutor General and by the Disciplinary Chamber of Supreme Court in the second instance (the Supreme Court may be also the court of the first instance when the disciplinary misconduct constitutes an intentional crime prosecuted by public indictment).

### Disciplinary commissioners

Similarly to the disciplinary proceedings in the case of judges, a disciplinary commissioner is a person entitled to act as a prosecutor in disciplinary proceedings against prosecutors. In the light of the Act on prosecution, there are several categories of disciplinary commissioners, including: Disciplinary Commissioner of the Prosecutor General, first deputy of the Disciplinary Commissioner of the Prosecutor General and disciplinary commissioner's deputies one in each region.

The disciplinary commissioners appointed by the Prosecutor General for the term of 6 years (in the case of the disciplinary commissioner of the Prosecutor General and the first deputy commissioner) or 4 years (in the case of regional disciplinary commissioners). Furthermore, the Minister of Justice (who also acts as the Prosecutor General) Prosecutor General has a competence to appoint a Disciplinary Commissioner of the Minister of Justice to carry out a proceeding concerning a particular case excluding the disciplinary commissioner who carried out the proceeding earlier.

#### Disciplinary judges

Disciplinary judges are appointed by the general assembly of the prosecutors at the regional level. The Prosecutor General appoints the president and deputy president of the disciplinary court

#### Disciplinary proceedings

Similarly to the disciplinary proceedings concerning judges, before the proceedings begin, the disciplinary commissioner carries out an investigation, during which they may request a written or oral statement from a prosecutor. If, after the investigation, there are grounds for initiating disciplinary proceedings, the disciplinary commissioner institutes them, draws up the disciplinary charges in writing and delivers the charges to the defendant, calling upon them to present the written explanations and to give evidence. The explanations may also be given orally. This stage of the procedure concludes with the disciplinary officer filing a motion for hearing the case to the disciplinary court.

The case is examined, in general, at a hearing and the proceedings are open to the public. The defendant may use a defence counsel.

Similarly to certain judges, also some of the prosecutors have faced recently the risk of disciplinary proceedings as a response to their public activity.

### **Exercising fundamental rights by judges and prosecutors**

[The Constitution of the Republic of Poland of 2nd April, 1997](#) guarantees a wide catalogue of fundamental and political rights, including freedom of expression, freedom of association, right to peaceful assembly.

The Constitution, however, provides certain restrictions concerning the exercise of these rights by judges. According to Article 178 point 3 of the Constitution, the judges (regardless of the rank of a court in which they work) cannot be members of political parties, trade unions or perform public activities incompatible with the principles of independence of the courts and judges. This provision creates an obligation for judges to remain non-political. The principle of remaining apolitical is perceived as a key component of judges' independence. In the light of these provisions, judges should not take an active part in public discussion on e.g.

politics, engage in political campaigns and support any political parties as well as comment actions undertaken by state's authorities<sup>1</sup>.

Whereas the restriction for the freedom of association is very specific, neither the Constitution nor particular acts create a specific prohibition for judges when it comes to exercising the freedom of speech or freedom of assembly. In general, judges should refrain from any sort of statements or comments which could be perceived as political or could reveal their political outlook (this is applicable for both their media and online activity). Such a vague definition creates, however, significant practical problems. In the midst of protests against the reform of judiciary, the judges who spoke about the importance of protecting the rule of law and the Constitution faced accusations of being politicised.

Several particular restrictions (often disputable) on judges' freedom of expression have been specified by Polish constitutional law scholars. According to some authors, a judge is not allowed to, for instance, sign a letter of protest, participate in a voting of an association, make remarks on public figures, speak on religious topics or even engage in charity<sup>2</sup>.

Besides this, the Constitution also stipulates the prohibition for judges to serve the mandate of an MP (however, the issue whether judges are allowed to candidate for the position of members of parliament is still disputable<sup>3</sup>).

The Act on common courts, which regulates, among others, the position of judges of common courts, includes further restrictions for judges' political rights. A judge cannot have a dual citizenship (they should have only Polish citizenship), cannot be a member of a board of an NGO which undertakes economic activity. Judges cannot also join or organise trade unions (however, they can be members of judges associations). Furthermore, judges may face disciplinary charges if they "violate the dignity of judges' profession". Similar provisions are included in the Act on the Supreme Court and the Act on the Constitutional Tribunal. The same provisions are also applicable to retired judges of the Constitutional Tribunal.

Also, the Act on Prosecution states that the prosecutors cannot be members of political parties (with an exception to the Prosecutor General, who is also the Minister of Justice and a member of the government). The Act on Prosecution does not provide specific restrictions to prosecutors' freedom of speech or freedom of association – prosecutors can both join and form trade unions, as well as prosecutors' associations. Nevertheless, the Act states that prosecutors should refrain from any actions that could violate the dignity of prosecution or undermine the trust to prosecution's impartiality.

### **Judges' and prosecutors' Code of Ethics**

Each of the professional groups (judges of common courts and the Supreme Court, judges of the Constitutional Tribunal and prosecutors) has their own code of ethics, which regulates

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<sup>1</sup> Safjan M., Bosek L. (ed.), *Konstytucja RP. Tom II. Komentarz art. 87-243*, CH Beck, Warsaw 2016

<sup>2</sup> Banaszak B., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2009, p. 792.

<sup>3</sup> Safjan M., Bosek B., *Konstytucja...*

work ethics in the field of law enforcement. A breach of any of the provisions of the code may result in disciplinary proceedings.

The [Code of Ethics](#) of the Common Courts was adopted by the National Council of the Judiciary in January, 2017. The Code articulates that the profession of a judge entails specific duties and limitations to personal rights. First of all, a judge should refrain from any actions which could undermine the trust to their impartiality or violate the dignity of judges' office. The Code includes several limitations concerning exercising the freedom of speech by judges: the judges should not make comments on potential or pending proceedings. Furthermore, while using the social media, judges' comments should be kept moderate. Also, a judge cannot be a member of or support any organisations that act contrary to the law.

The Code of Ethics of Judges of the Constitutional Tribunal was adopted in July, 2017 (the Code is available only upon the request for public information). The Code is applicable both to judges of the Constitutional Tribunal as well as retired judges of the Tribunal. According to the Code, judges of the Constitutional Tribunal should not engage in public activity which could undermine their independence, moral integrity and impartiality. In general, a judge should refrain from any statements which could undermine the authority and integrity of the Tribunal. Furthermore, a judge of the Constitutional Tribunal could use their freedom of speech and freedom of association in a way which does not jeopardise the dignity of an office and does not undermine the perception of judges' impartiality. The Code also specifies that a judge is entitled to participate in public debate, however, they should not comment on proceedings pending before the Tribunal. A judge cannot participate in a public discussion which concerns political affairs, as well as cannot be a member of political parties or social movements whose activity refers to political developments.

The [Code of Ethics of Prosecutors](#) was adopted in 2017. In general, the prosecutors should refrain from any situations or actions which could undermine public trust to prosecution, its impartiality and diligence at work as well as would create an impression of lack of respect for law. Furthermore, a prosecutor is not allowed to be a member of an organization whose actions are contrary to the law or support such an organisation in any way. According to the Code, if a prosecutor participates in a peaceful demonstration or undertakes any other public activity, they must not demonstrate their political outlook. In case of public statements, a prosecutor's statement should be moderate, emotionless and should not violate norms of culture. The same applies to using social media by the prosecutors. Additionally, while using social media, prosecutors should act carefully and cautiously. If a prosecutor participates in public debate, they should keep their comments moderate and must not use statements deprecating others. A prosecutor, however, should react in cases where interlocutors' statements violate the law.

### **Examples of disciplinary proceedings against judges and prosecutors**

Recent examples of disciplinary proceedings against judges:

- [Justice Olimpia Barańska-Matuszek](#), a member of the Association of Polish Judges *Iustitia*, was one of the authors of the association's recently-issued resolution on the

independence of the judiciary. She is also an active commentator on legal matters in the social media, where she tackles the topics such as the organisation of common courts, the rule of law or constitutional law. The Deputy Disciplinary Officer for Common Courts' Judges requested in September, 2018 an insight into the files of cases that justice Barańska-Małoszek was supposed to examine – from the time period of last three and a half years. No formal complaint regarding to the judge's judicial work has been made so far. The disciplinary officer decided to institute disciplinary proceedings and raise a charge related to delays in the preparation of written reasonings to ten judgments on the part of justice Barańska-Małoszek.

- [Justice Bartłomiej Przymusiński](#), a judge and the spokesman for *Iustitia*, was summoned to testify as a witness before the Disciplinary Officer for Common Courts' Judges. The judge has been long known for speaking critically of the recent changes in the judiciary (for instance, he called the process of appointing new members of the Supreme Court "*a beauty contest*", or described the creation of the new National Council of Judiciary as "*fully dependent on the Minister of Justice*").
- [Justice Igor Tuleya](#), a judge with over 20 years of professional experience, is a defendant in the disciplinary proceedings. Among Judges Przymusiński and Markiewicz, he was summoned to testify in September 2018. In his opinion, the charge he is facing is very enigmatic. Apart from that, there are other five cases pending, in which he is involved (some of them regarding to, for instance, public lectures on legal matters such as constitutional freedoms or tripartition of power). Justice Tuleya has been very critical of the newly-appointed National Council of the Judiciary. In the past, he also delivered a judgement convicting one of the high-rank officials of the present government and, since then, has been an object of constant criticism for the part of the ruling party members.
- [Justice Włodzimierz Brazewicz](#) acted as an announcer during a public meeting on the idea of law with justice Igor Tuleya, which took place in Gdańsk in September, 2018. He was summoned to appear before the disciplinary officer in order to clarify why he had taken part in the meeting of a "*potentially political*" character.
- [Justice Krystian Markiewicz](#) is a judge, a professor at the University of Silesia in Katowice and *Iustitia's* president. He was summoned by the disciplinary officer to testify in the proceedings regarding to "*crossing the boundaries of the judge's freedom of public speech concerning other judges and representatives of the constitutional state organs*".
- [Justices Monika Frąckowiak and Arkadiusz Krupa](#) appeared as guests at a music festival where they took part in a moot court, playing the roles of the presiding judges. It was meant to acquaint the participants – mainly young people – with the rules of behaviour at court and their procedural rights. The justices were later informed that the disciplinary officer was carrying out an investigation, in regard to the impairment of the authority of the office by wearing the official outfit (the gown and the chain) by them. After the investigation, the disciplinary officer has decided not to institute disciplinary proceedings against both judges on grounds of their "*lack of awareness of violating the law and judicial ethics*". However, the proceedings against justice



Frąckowiak were instituted with relation to the delay in preparing 172 written reasonings to the judgements (analogously to the case of justice Olimpia Barańska-Małoszek).

- [Justice Jarosław Gwizdak](#) ran in the 2018 elections to the city council and at the same time in the mayoral elections in his hometown, Katowice. He notified the president of the court in which he worked about his intentions and, according to the provision of *the Act on Common Courts' Organisation*, was granted an unpaid leave for the period of the electoral campaign. The disciplinary officer decided to conduct explanatory proceedings in his case because the abovementioned provision covers only parliamentary and municipal elections, and not the mayoral ones. The proceedings are still in progress.
- [Justice Ewa Maciejewska](#) a judge of Regional Court in Łódź. In August 2018, Justice Maciejewska sent a request for the preliminary ruling to the European Court of Justice. The requests concentrated on the provisions on disciplinary proceedings against judges provided by the Act on common courts and their compliance with the European Union law concerning the independence of judiciary. The disciplinary commissioner found this request as a “judiciary excess” and summoned Justice Maciejewska to present explanation.

Recent examples of disciplinary proceedings against public prosecutors:

- [Krzysztof Parchimowicz](#) is an experienced public prosecutor and the president of prosecutors' association *Lex Super Omnia*, known for speaking against the Minister of Justice – General Prosecutor. He used to work in the General Prosecutor's Office but then, after the criticised new law came into force, he was moved to the lowest-level district prosecutor's office. The disciplinary proceedings in his case concern a comment he made in an interview, referring to the political grounds of the degradation of two other prosecutors (their refusal to indict an opposition politician). The second charge pertains to the remarks he made publicly on the working conditions in his office (“*stuffiness, narrowness, dirt*”). Recently, Mr Parchimowicz was summoned by the disciplinary commissioner to present explanation concerning his participation in a conference on criminal proceeding organised by Ombudsman's office.
- [Dariusz Korneluk](#), a former head of Appellate Prosecutor's Office in Warsaw, an experienced lawyer and co-founder of *Lex Super Omnia*, degraded to serving in the district prosecutor's office by the present Minister of Justice – General Prosecutor. He was charged by the disciplinary officer of failing to fulfil the dignity of the prosecutor's office.
- [Beata Mik](#) is a prosecutor and the long-standing author of many columns published in press titles, including *Rzeczpospolita*, a popular national daily newspaper. In March, 2018, she was accused of not having notified her superiors of her further collaboration with the title, which had allegedly “*weakened public trust in the independence of the prosecution service and prosecutors*”. The accusation related to the articles published in 2016 and 2017, whereas Beata Mik started writing for *Rzeczpospolita* in 2008.

Already in 2000, the prosecutor obtained the consent of then-incumbent Prosecutor General for engaging in the work of a columnist. In November 2016, she informed the National Prosecutor of her intention to conclude a contract for the assignment of copyrights to her columns with the newspaper's publisher. Ms. Mik did not sign this contract, complying with the National Prosecutor's objection, which was not accompanied by any statement of justification. The Disciplinary Tribunal ruled that Ms. Mik had not performed her obligation to notify the National Prosecutor of her engagement in a different professional activity. The Tribunal considered her behaviour a violation of professional integrity.

- [Wojciech Sadrakuła](#), a retired public prosecutor, participated as a lecturer in an event organised to promote constitutional law knowledge among school students. The NGO that organised the event then received a letter from the disciplinary officer for public prosecutors, demanding the details about Mr Sadrakuła's involvement in the event for the purpose of an on-going investigation regarding to a disciplinary misconduct. Wojciech Sadrakuła, a lawyer with a 40-year professional experience, has already been found guilty of a misconduct in other proceedings (he appealed and awaits the ruling). He is known for his critical and public opinions pertaining to the reform of the Constitutional Tribunal in Poland.
- [Piotr Wójtowicz](#), a prosecutor and former chief of Regional Prosecutor Office in Legnica. In 2017, Piotr Wójtowicz participated in a protest in defence of independence of courts. During the protest he gave a comment to a local journalist stating "*What can they do to me? In a worst case scenario they could transfer me to Etk*". The Disciplinary Commissioner launched a disciplinary proceeding against Piotr Wójtowicz accusing him of breaching the rule of impartiality and revealing his political opinions and of giving a comment to media without a permission of his supervisor. The Disciplinary Court of the first instance discontinued the proceeding because of the minor social harm of the disciplinary delict. Both parties, Piotr Wójtowicz and the Disciplinary Commissioner, appealed against this decision. The proceeding is now pending before the court of the second instance,

Apart from the disciplinary proceedings, judges (and – to a lesser extent – public prosecutors) have been under constant pressure coming from two main sources. The first one is public media (the television in particular) with the flagship news programme *Wiadomości*. The media coverage is aimed at stigmatising and exaggerating every case of judges' misconduct (even though, in one case, it was committed by a retired judge with a diagnosed mental illness) and extrapolating them to the entire group of Polish judges. The second wave of unjustified criticism comes from the members of the ruling party, who call the judges "*a caste*" or "[a group of cronies](#)", or, like [Mr Marek Suski MP](#), accuse the former judge-members of the National Council of the Judiciary of hiding gold in their gardens.

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