



# FREECOURTS NEWSLETTER

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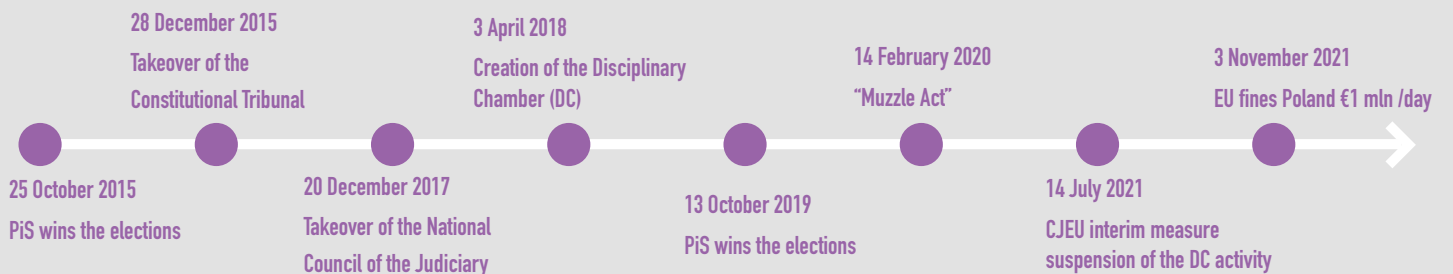
## Introduction

We are pleased to present you the first issue of the Free Courts Newsletter, a regular publication in which we reliably and continuously bring you the most important events in Poland regarding the justice system and the breaches of the rule of law.

As lawyers defending the rule of law in Poland, we are closely watching the activities of the ruling party and speaking out about all irregularities. We do not want any injustice to escape public attention.

The first issue of our Newsletter is being released at a special time. Russia's aggression in Ukraine shows us what the lack of civic control over those in power can lead to. Authoritarian and totalitarian systems are created in silence – with a lack of opposition from the public.

In the current situation, our mission as free citizens takes on new meaning. We have to keep an even closer eye on those in power. This is because we cannot allow the disregard for democratic mechanisms and the rule of law to turn into a disregard for human rights.



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### Top story: From bad ...

Under the 'reform' of 2017, the parliament changed the way the members of the neo-NCJ are elected. Since then, the neo-NCJ has introduced more than 2000 new judges into the system. Both the ECtHR and the CJEU have ruled that the neo-NCJ is the main source of problems with judicial independence in Poland. The Tribunals have also challenged the status and independence of the Disciplinary Chamber formed in 2017.

### ... to worse ...

Despite 20 rulings of the ECtHR and CJEU regarding the condition of the rule of law in Poland, the situation has not improved. 12 Polish judges have been suspended from their adjudicating duties for applying the rulings of the ECtHR and CJEU. As the CJEU's order suspending the Disciplinary Chamber and the provisions of the 'Muzzle Act' was ignored, Poland was imposed with €1 million daily fine.

### ... but our strength is in the civic society!

Polish citizens continue to believe that the EU institutions will take appropriate and firm action to protect the rule of law in their country. Despite the CJEU finding on 16 February 2022 that the conditionality mechanism is compatible with the EU Treaties (cases C-156/21 and C-157/21), the EC has not yet taken effective action against Poland.

WOLNE SĄDY



# Top story: From bad...

The so-called reform of the judiciary being conducted in Poland since 2015 is increasing the influence of the legislative and the executive authorities on the judiciary. Many international organisations and NGOs emphasise that the independence of judges in Poland is under threat. The main concerns focus around the system of appointing judges and the system of disciplinary liability.

Under the 'reform' of 2017, the parliament changed the way the members of the National Council of the Judiciary (the so-called neo-NCJ), the body that plays a key role in the appointment procedure of judges in Poland, are elected. The Act truncated the 4-year term of office of the NCJ members to date that was guaranteed by the Constitution and introduced a new model of their election. The political authorities gained an influence over the election of 24 out of the 25 members of the NCJ. Consequently, the Council became a body that is subordinated to the authorities and is now unable to fulfil its constitutional task of safeguarding the independence of the courts and the impartiality of judges. Since then, the neo-NCJ has introduced more than 2000 new judges (so-called: neo-judges or fake judges) into the system. Judicial nominations with the involvement of such a body are defective and may be declared invalid, while the judgments of the neo-judges may be ineffective. Both the ECtHR (*Grzęda v Poland*) and the CJEU (joined cases C-585/18, C-624/18 & C-625/18) have ruled that the neo-NCJ is the main source of problems with judicial independence in Poland. The disregard for the judgments and views of the European Institutions by the ruling party continues.

On 12 May 2022, the Sejm, by the votes of the PiS party and with strong objections of the opposition, elected 15 members of the next neo-NCJ (so called 'neo-NCJ bis'). The election took place unexpectedly, as this point was not foreseen in the schedule of the session of the Parliament.

It's important to note that so far the Government did not hurry with the elections to the neo-NCJ bis, even though the term of the current one expired in March. The new term of this politicized body is yet another challenge for the EU. Holding off on electing a neo-NCJ bis could have been interpreted as a gesture of goodwill from the Polish Government on the repair of the rule of law, for which the EU is still waiting.

The response to the rulings undermining the status of the neo-judges was the

adoption by the ruling party of a new disciplinary regime for judges (the so-called: **Muzzle Act**). Disciplinary proceedings are now being initiated with respect to judges who challenge the status of other judges and constitutional bodies. Therefore, Polish judges who conclude that the neo-NCJ is not independent and challenge the correctness of the appointment of neo-judges commit a disciplinary offence. Disciplinary cases of judges are examined by the Disciplinary Chamber which was formed in 2017 in the Supreme Court, consisting largely of either people who have never practised the profession of judge or former prosecutors, close collaborators of the Minister of Justice and Prosecutor General, Zbigniew Ziobro. The status and independence of the Disciplinary Chamber has been challenged in judgments of the ECtHR (*Reczkowicz v Poland*) and the CJEU (C-791/19).

## ...to worse – How Poland reacts to EU actions on preserving the rule of law...

Despite the rulings of the Court of Justice of the European Union and the European Court of Human Rights (the European courts have issued 20 such rulings to date) in cases related to the condition of the rule of law in Poland, the situation has not improved. The contested provisions of the repressive system of disciplining judges are still being applied. The Disciplinary Chamber, which does not guarantee impartiality and independence, is still operating. Twelve Polish judges have been suspended from their adjudicating duties for applying the rulings of the ECtHR and CJEU on the basis of decisions of a politician from the ruling camp, namely the Minister of Justice, Zbigniew Ziobro, or the Disciplinary Chamber. Furthermore, the National Council of the Judiciary is still operating, presenting further candidates for judicial positions to the Polish President. The legal chaos in Poland is increasing. As the CJEU's order suspending the Disciplinary Chamber and the provisions of the so-called Muzzle Act in October 2021 was ignored, the CJEU imposed a daily fine on Poland of €1 million until the date that Poland fulfils its obligations arising from the order or, in the event of the failure to comply with the order, until the date on which the judgment ending the proceedings in case C-204/21 is issued. The European Commission sent Poland a first payment demand for ignoring the interim measures on 20 January 2022. The demand was for €69 million for the period from 3 November 2021 to 10 January 2022. Poland has not paid the amount demanded to date. The total fine for failing to comply with the CJEU's ruling on the Disciplinary Chamber at the end of April was €178 million. The imposition of the periodic fine on Poland by the CJEU encountered a swift reaction from the Minister of Justice, Zbigniew Ziobro, who contested the provisions of the European treaties enabling the imposition of a periodic fine or a lump sum for failing to comply with an interim measure (case K 8/21) before the Polish Constitutional Tribunal. The case is pending, although its outcome is easy to predict. The Constitutional Tribunal has already previously played an active role in the dispute over the shape of the judiciary in Poland through judgments regarding the Treaties and undermining the fundamental principles of the European Union. In its judgments, the Constitutional Tribunal has also questioned the implementation of the provisions of the European Convention on Human Rights and Fundamental Freedoms in the Polish legal order (cases: K 3/21; K 6/21; K7/21). In the judgment of the Constitutional Tribunal of 10 March 2022 in case K 7/21, the Tribunal held that Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms guaranteeing everyone the right to a fair trial is inconsistent with the Polish Constitution. According to the Constitutional Tribunal, it is unconstitutional for national courts and the ECtHR to assess the compliance of Acts regulating the administration of justice with the Convention and the Constitution. The objective of the judgment is to prevent Polish judges from examining the compliance of the procedure of appointing neo-judges and the status of the neo-NCJ with the standards of the Convention. The Polish Constitutional Tribunal now resembles the institution specified in the Polish Constitution in name only. The body, which should be a safeguard for democracy, currently protects the unconstitutional actions of the authorities against the Constitution itself and Poland's international obligations. The mechanism of control of constitutionality performed by the Constitutional Tribunal has become

a fiction. The current judicial activity of the Constitutional Tribunal is a method by which those in power escape from political liability for their legislative actions.

See: [How the Constitutional Tribunal of Julia Przyłębska is used to solve the PiS government's problems?](#)

## ...but our strength is the civic society!

The civic society is fully aware of the difficult situation in which Poland has found itself and of the legal dualism that is a direct consequence of the actions of the political authorities.

Polish citizens continue to believe that the EU institutions will take appropriate and firm action to protect the rule of law in their country. Despite the Court of Justice of the European Union finding on 16 February 2022 that the conditionality mechanism is compatible with the EU Treaties (cases C-156/21 and C-157/21), the European Commission has not yet taken effective action against Poland. We are also watching the possibility of unblocking funds from the National Reconstruction Plan in connection with the war in Ukraine with concern. The lawlessness and breaches of fundamental human rights beyond Poland's eastern border do not justify financing the dismantling of the rule of law in an EU Member State.

See: [Petition against the destruction of the rule of law in Poland during the war in Ukraine.](#)

In view of the concerns about the correctness and transparency of the spending of public money in Poland, social organisations have appealed to the European Commission to transfer funds supporting Ukrainians in Poland directly to social organisations and local authorities. Financial aid should be given to those who are closest to the refugees and provide real help to them, instead of to a central authority with autocratic tendencies.



It is inadmissible to build an autocratic state in the European Union.

The pillar of the European Union is a community of common values governed by the rule of law. If this framework is breached, none of the European Union's activities can be implemented, because they all depend on respect for the rule of law. (Michał Wawrykiewicz)

# Polish judges after the judgments of the CJEU and the ECtHR

The recent judgments of the international courts give increasingly more tools and grounds for judges to be able to defend the fundamental principles of the state even better in their judicial activity.

Unfortunately, this activity immediately encounters repression from the politicised disciplinary commissioners, or from court presidents who have taken up their positions after being nominated by the Minister of Justice, Zbigniew Ziobro, or finally from the Disciplinary Chamber.

An example of this can be that of Judge Marzanna Piekarska-Drążek of the Court of Appeal in Warsaw, who overturned a ruling issued by a neo-judge appointed on the motion of the neo-NCJ, citing rulings of the CJEU and ECtHR. Deputy Disciplinary Commissioner Michał Lasota initiated disciplinary proceedings with respect to the judge. The Minister of Justice suspended the judge from her official duties at his request. In his decision, the Minister stated that undermining the status of other judges constitutes an action that is detrimental to the public interest and undermines public confidence in the judiciary. The case of the judge's suspension was referred to the Disciplinary Chamber.

Judge Joanna Hetnarowicz-Sikora of the District Court in Słupsk has encountered similar repression. The judge issued an order to remove a neo-judge from hearing a case, referring to the case law of the CJEU and ECtHR. The Minister of Justice suspended the judge from her official duties for a month on 9 February 2022. The European Association of Judges filed an appeal in the case of Judge Joanna Hetnarowicz-Sikora with a simultaneous request to the European Commission and the Council of Europe to take all possible measures to ensure the effectiveness of the judgments of the CJEU and ECtHR.

Despite the war in Ukraine, the Polish authorities do not intend to respect the decisions of the international courts. Even on the second day after the outbreak of the war, District Court Judge Anna Głowacka was suspended for a month

from her official duties. The decision in her case was made by Dagmara Pawełczyk-Woicka, the president of the Regional Court in Kraków appointed by the Minister of Justice. The judge was suspended for refusing to grant an enforceability clause to a judgment of the Court of Appeal in Kraków issued with the involvement of a neo-judge, on the basis of the rulings of the ECtHR and CJEU.

However, Polish judges can count on the support of the international courts. The European Court of Human Rights issued a precedent-setting interim measure on 8 February 2022 in connection with the pending proceedings before the Disciplinary Chamber to lift Supreme Court Judge Włodzimierz Wróbel's immunity. The Court prohibited the Disciplinary Chamber from taking any action in the case. According to the ECtHR, in the light of the ruling in *Reczkowicz*, (application no. 43447/19) any potential decisions made by the Disciplinary Chamber could breach the standards of a reliable court hearing as specified in Article 6(1) of the Convention.



The ECtHR has only issued interim measures to date in extradition or immigration cases. This is the first time in history

that the Court has issued such an extensive measure and prohibited the Disciplinary Chamber from operating. The ECtHR noticed that the situation in the Polish justice system was not changing and the CJEU's interim measures were being ignored. (Sylwia Gregorczyk-Abram)

The ECtHR issued similar measures in the cases of other suspended judges in Poland in March and April 2022. The Court obliged the Polish authorities to inform it 72 hours in advance of any planned hearing or session of the Disciplinary Chamber held in camera in the cases of suspended judges Synakiewicz (application no. 46453/21), Niklas-Bibik (application no. 8687/22), Piekarska-Drążek (application no. 8076/22), Hetnarowicz-Sikora (application no. 9988/22) and Głowacka (application no. 15928/22). In April, the ECtHR also issued interim measures in the case of Judges Stępka (application no. 18001/22) and Zawisłak (application no. 18632/22) and formally confirmed its communication to Poland of the complaint of Supreme Court Judge Włodzimierz Wróbel (application no. 6904/22).

A line of judgments has also formed in the Supreme Court confirming that systemic irregularities in the process of appointing

judges with the involvement of the new NCJ constitute grounds for challenging judgments issued with the involvement of such people.

See: [The list of judges suspended after the July interim measure \(C-204/21 R\)](#) in which CJEU obliged Poland to suspend the application of the provisions concerning the illegal Disciplinary Chamber and the provisions of the so-called “Muzzle Act”

## Changes in the Polish justice system – are they implementing the EU recommendations?

Polish President Andrzej Duda submitted a draft amendment to the Act on the Supreme Court to the Sejm on 4 February 2022. The proposed changes are ostensibly designed to ensure the implementation of CJEU judgments and end the dispute with the European Commission over the shape of the Disciplinary Chamber. The draft assumes the liquidation of the Disciplinary Chamber and the establishment of a Professional Liability Chamber. Judges currently adjudicating in the Disciplinary Chamber will have the opportunity to move to another chamber of their choice in the Supreme Court or to retire. Furthermore, the draft amendments assume that the membership of the new Professional Liability Chamber will consist of 11 Supreme Court judges elected from among all the chambers of the Supreme Court for a five-year term of office. The draft also introduces a new premise of disciplinary liability of judges – ‘the refusal to administer justice’. Therefore, judges who refuse to adjudicate in a bench with neo-judges can expose themselves to disciplinary charges.

In response to the President’s bill, the ruling majority submitted its own bill on the protection of judicial independence and the detailed principles of criminal and disciplinary liability of judges. The main assumption to the amendments is to transfer the competence of the Disciplinary Chamber to examine disciplinary

cases of judges to the Supreme Court en bloc. The cases would be heard by judges drawn by lots from all the judges of the Supreme Court. However, the Disciplinary Chamber would still have the jurisdiction to adjudicate on disciplinary cases of other legal professions (e.g. attorneys-at-law and prosecutors). According to the proposed amendments, it will not be possible to hold a judge liable on criminal or disciplinary charges for a decision, except in the case of an enigmatically defined exception of ‘serious and completely inexcusable conduct’.

Minister of Justice and Prosecutor General Zbigniew Ziobro opposes the bills that were submitted. His group has submitted its own draft of the Act on the Supreme Court to the Sejm. The proposed changes aim to liquidate the Supreme Court in its current form and deprive it of its current powers. The amendment assumes the reduction in the number of Supreme Court judges from 93 to 30, the liquidation of all Supreme Court chambers, in place of which two chambers – for Public Affairs and Private Affairs – are to be formed, and the deprivation of the Supreme Court of its powers to consider cassation cases. The drastic reduction in the number of Supreme Court judges means that most judges will be removed from the Supreme Court. Anyone who wishes to remain will have to be subject to verification before a politicised neo-NCJ. The objective of the bill proposed by the Minister of Justice is to completely politicise the Supreme Court and deprive it of its constitutional role in the justice system. It should be emphatically stated that none of the announced changes constitute the implementation of either the rulings of the Court of Justice of the European Union or other recommendations regarding the Polish judiciary presented in recent years by the bodies of the EU.

In the context of the above plans, it is worth noting that it arises from a United Surveys poll commissioned by the Wirtualna Polska portal that more than 77% of respondents assess the ‘reform’ of the judiciary conducted since 2015 as being bad, with just over 11% assessing it as good. Furthermore, it arises from a recent Ipsos poll for *Oko.press* that 66% of respondents want the Polish government to end the dispute over the rule of law and comply with the recommendations of the European Union in the face of the war in Ukraine.

It is also worth noting that the proposed bills do not solve the basic problem of the Polish judiciary – the functioning of the neo-NCJ. It is the involvement of this body in the procedure of appointing judges that is causing further irregularities, as judges nominated with the involvement of the neo-NCJ do not offer any guarantee of

independence and impartiality, which is required by EU law and the Convention on Human Rights. All the bills that leave the way the NCJ is elected intact will continue the pathological system of appointing judges in Poland, and therefore they will increase the legal chaos.

The real intention of the authorities is to keep the NCJ dependent on politicians and therefore to influence judicial appointments in Poland. The proof can be easily found in the recent actions of the ruling party which held the election of neo-NCJ bis on May 12, 2022. It can be said that we now have a new but old neo-NCJ, as 11 of its 15 judicial members are repeating their terms. They are the ones who are carrying out the “justice reform” for past years. Meanwhile, according to European case law, a court involving judges nominated by the neo-NCJ is not a court established by law, because the election of neo-NCJ judges – by MPs and not by judges – violates the Polish Constitution.

## NGOs are inspiring the pro-democracy opposition to take steps to restore the rule of law in Poland.

In November 2021, eight NGOs, which have been defending the right of Polish men and women to an independent court and which have been upholding the rule of law in Poland for years, presented a list of actions that are necessary for implementing the judgments of the CJEU and the ECtHR and other judgments of the Supreme Court, the Supreme Administrative Court and the ordinary courts, as well as the European recommendations, which were developed in consultation with the community of judges and prosecutors (the Associations of Judges ‘Iustitia’ and ‘Themis’, as well as the ‘Lex Super Omnia’ association of prosecutors). The initiative took on the name ‘Agreement for the rule of law’.

The NGOs called on all the pro-democracy

and pro-European political forces to develop methods and a schedule for restoring the rule of law in Poland.

At a joint press conference held on 7 December 2021, representatives of 10 opposition groups represented in parliament supported the Agreement for the Rule of Law and signed a declaration of cooperation.

The proposal of the legislative changes developed within the framework of the 'Agreement for the Rule of Law' on the basis of the bill prepared by the Association of Polish Judges 'Iustitia' was submitted to the Sejm. The Sejm rejected the bill on 24 March 2022 in the first reading by a majority vote of the ruling party.

The bill provided for the liquidation of the neo-NCJ and the guarantee that the new members of the Council would be elected by the judicial community. Furthermore, it provided for the removal of neo-judges who were defectively appointed or promoted on the motion of the neo-NCJ and the announcement of correct recruitments so as to fill the vacancies in the courts as soon as possible. The bill also provided for the liquidation of the Disciplinary Chamber. The bill proposed by the 'Agreement for the Rule of Law' was the only one that ensured the full implementation of the rulings of the international courts.



The Agreement for the Rule of Law is a Programme of the restoration of the rule of law in Poland. It is a set of steps

that are necessary to restore the rule of law in Poland, including through the execution of the judgments of the European and Polish courts. The starting point should be changes regarding the National Council of the Judiciary. (Michał Wawrykiewicz)

## About the Free Courts Foundation

The Free Courts Foundation is a non-governmental and non-profit organisation founded by a group of Polish lawyers: Maria Ejchart-Dubois, Sylwia Gregorczyk-Abram, Paulina Kieszowska-Knapik and Michał Wawrykiewicz. As professionals, realising the significance of the harmful changes being introduced into the Polish legal system leading to the politicisation

of the independent courts, we undertake various activities of upholding the rule of law in Poland.

The Foundation's objective is to increase knowledge and strengthen the independence of the courts and judges, as well as conducting activities in support of the rule of law, as well as the broadly-understood protection of human rights, civil liberties and counteracting discrimination.

The Foundation pursues its goals primarily through educational activities related to increasing knowledge in society about the key nature of the independence of judges for a law-abiding and democratic state, activities related to the promotion of a civic society, as well as supporting the development of non-governmental organisations and the idea of volunteering, activities promoting the protection of freedom and human rights especially related to promoting the freedom of speech, the free exchange of thoughts and ideas, as well as equal treatment and prevention of discrimination on grounds of identity, sexual orientation and gender, as well as information, journalism and publishing activities.

The four lawyers who founded the Free Courts Foundation make up the group core. They are the originators and performers of all of its activities. Since the very beginning of the rule of law crisis in Poland, we have been focusing on opposing the violation of the separation of powers, the rule of law and the constitutional order by the ruling majority.

We are constantly working towards ensuring that the courts are independent – preparing films, live broadcasts, infographics, and reports (more than 1000 posted materials in 4 years), as well as organising conferences, debates, protests, and demonstrations.

#FreeCourts co-founded the Justice Defence Committee (KOS) in 2018, the organisation that represents and helps repressed judges of the ordinary courts, judges of the Supreme Court and the Supreme Administrative Court, as well as prosecutors.

Members of the Free Courts Foundation prepare legal opinions and are experts in parliamentary working teams in Poland, e.g., on Constitutional Governance, the Rule of Law and the Reform of the Judiciary, as well as providing expert opinions to MEPs.

The Foundation's founders also regularly present the position of the Polish legal community on the government's activities leading to the demise of the rule of law iPoland, in Brussels, in the EU institutions.

The Free Courts Initiative has been awarded The European Parliament's 'European Citizen's Prize' in 2020 for exceptional achievements in giving concrete expression to the

values enshrined in the Charter of Fundamental Rights of the European Union.

## Also on our channels

**"2000 days of Lawlessness" – Free Courts Report**, which presents step-by-step how the political authority has brought about the destruction of the rule of law. It is a record of all the legislative changes and other decisions of the executive and legislative authorities intended to politicise the judiciary, which we are constantly updating (at the time of publication of the newsletter it is already over 2300 days of lawlessness). It is important to list and put order to these events so that we are aware of the methods by which the authorities took over the courts, which, according to the Constitution, should, after all, be independent, precisely in the interests of the public. The report also shows that none of the steps taken since 2015 intended to implement a genuine and credible reform of the judiciary. Knowing what work has been done will be crucial when the time comes to repair what has been destroyed.

**10 Commandments for Restoring the Rule of Law in Poland – What needs to be done and what compromises should absolutely not be accepted for Poland to become a democratic state governed by the rule of law again? Here are our ten commandments for restoring the rule of law.**

The Free Courts Newsletter is sent at least once every three months. To unsubscribe please send an email to

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