



# FREECOURTS NEWSLETTER

05.23(5)



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## Introduction

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

We are lawyers defending the rule of law in Poland; we watch the activities of the ruling party closely day by day and speak out about all irregularities. We do not want any injustice to escape public attention.

## Breaking news!

### President Andrzej Duda signs new 'Lex Tusk' law!

On 26 May, the Law and Justice-controlled parliament passed a law in Poland (the bill on a commission to investigate Russian influence in Poland between 2007 and 2022) – branded 'Lex Tusk' – that would establish a special parliamentary commission to investigate and suspend the public freedoms of citizens, whom they suspect of "serving Moscow's interests". In particular, targeted individuals would be stripped of their rights to hold public office without due judicial process.

On 29 May, President Andrzej Duda announced that he would sign the bill. At the same time, he announced that he would send it, as part of the so-called follow-up control, to Julia Przyłębska's Constitutional Tribunal.

Thus, the President decided to participate in the legislative process establishing an unconstitutional body that will have in its hands the function of both the prosecutor's office and the court.

# Neo-judges take over the Supreme Court

The source of the destruction of the Polish judiciary is the United Right government's attempt to take control of all state institutions – especially the judiciary. The process of appointing neo-judges to the Supreme Court, namely people defectively appointed to judicial positions with the involvement of the politicised National Council of the Judiciary, has been going on for years. So far, the neo-judges have headed two Chambers of the Supreme Court (the Civil Chamber and the Chamber of Extraordinary Control and Public Affairs). In accordance with expectations, President Andrzej Duda, who has been consistently breaching the Constitution in recent years, appointed a neo-judge Zbigniew Kapiński to the office of President of the Supreme Court managing the work of the Criminal Chamber, even though he was defectively appointed to the Supreme Court. Of the five candidates presented by the Assembly of Judges of the Criminal Chamber of the Supreme Court to the President of the Republic of Poland, the previous President of the Supreme Court managing the work of the Chamber, legal judge Michał Laskowski, received the greatest support (he received 13 votes), while Zbigniew Kapiński was only second (he received 9 votes).

## Just to reiterate:

Judge Michał Laskowski, who was appointed to the office of judge of the Supreme Court in 2009, has been the president of the Supreme Court managing the work of the Criminal Chamber since 2020. Zbigniew Kapiński was defectively appointed to the Supreme Court just one year ago on the motion of the neo-NCJ, which means that judgments made with his participation constitute a breach of the right of citizens to an independent court!

Furthermore, the neo-NCJ has started to select further neo-judges to the Supreme Court in a major recruitment to the Civil Chamber of the Supreme Court. Twelve candidates finally applied for 15 posts. The candidates are judges who were already promoted under the current government and an assistant to Elżbieta Karska, the wife of PiS MEP Karol Karski. If these judges are nominated and appointed by the President of the Republic of Poland, neo-judges will control the Civil Chamber of the Supreme Court. There are already 15 neo-judges in it today (a total of 25 judges adjudicate in the Civil Chamber) and it is headed by Joanna Misztal-Konecka, a neo-judge who serves as the president of the Chamber. Furthermore, according to the judges of the Supreme Court, their work is made exceptionally difficult because of the permanent performance of tests of independence, leading to cases becoming increasingly protracted. This is not the end of the story, as any of the decisions made by a bench which contains a neo-judge can be the subject of

a complaint to the ECtHR and may involve the State Treasury having to pay reparations. There is not the slightest doubt that the judges appointed by the neo-NCJ do not provide guarantees of independence – judgments have already been passed on this matter by the European Court of Human Rights, the Court of Justice of the European Union, the Supreme Court and the Supreme Administrative Court.

## SUPREME COURT 51 % NEO-JUDGES

### CRIMINAL CHAMBER



### CIVIL CHAMBER



### LABOUR AND SOCIAL SECURITY CHAMBER



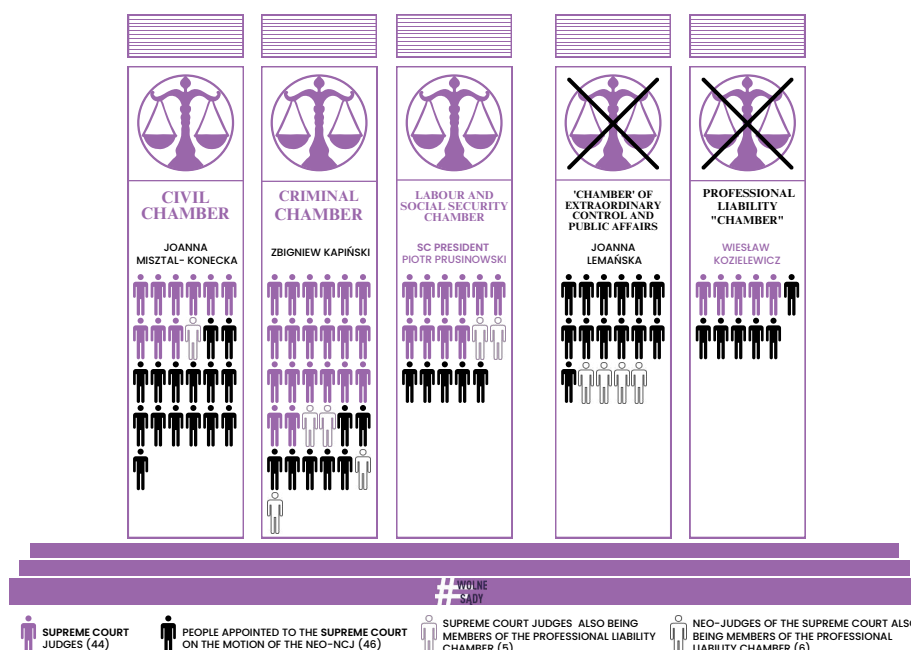
### CHAMBER OF EXTRAORDINARY CONTROL AND PUBLIC AFFAIRS



To avoid 'duplication' of judges, the first chart does not include the Professional Liability Chamber, because judges, who adjudicate in it, adjudicate concurrently also in other chambers of the Supreme Court.

## SUPREME COURT

MAŁGORZATA MANOWSKA



# PiS comes to Przyłębska relief – new bill in the Sejm changing the size of the ‘full bench’ of Constitutional Tribunal

All this to force through the amendment of the Act on the Supreme Court at all costs, which the government claims is supposed to activate funds from the EU Recovery Fund (by the presumed fulfilment of the milestones). The new bill on the Supreme Court leaving the so-called “Muzzle Act” in force and providing for an unconstitutional solution of moving judicial disciplinary action to the Supreme Administrative Court, about which we wrote in the February edition of our Newsletter, has still not been enacted. President Andrzej Duda decided to refer the bill without signing it to Julia Przyłębska’s Constitutional Tribunal.



*However, this Act is in direct conflict with the Constitution and EU law, does not guarantee that the funds contained in the RRF will be unblocked and will not contribute to the repair of the rule of law in Poland.*

Maria Ejchart-Dubois

## What happened next?

It was not until 21 February 2023 that the Chancellery of the President published the motion that was sent to the Tribunal. The scope of the challenge was extensive:

from the transfer of disciplinary cases of judges to the Supreme Administrative Court, through the extension of the test of independence and impartiality of judges, to the short *vacatio legis* of 21 days – a total of 50 provisions of the Act. ‘From the point of view of the constitutionality of legislation, such a critical analysis of the Sejm’s activities is difficult to find among those who are behind the destruction of the rule of law. Very heavy artillery has been brought out. While the Constitutional Tribunal is currently holding the match with which to light the fuse,’ commented Professor Mirosław Wyrzykowski, a retired judge of the Constitutional Tribunal, on the application in an interview with OKO.press.

Julia Przyłębska gave an interview to Polish Radio on 27 February 2023, in which she announced that the case had been put into motion and was given a reference number (Kp 1/23) and announced that it would be quickly considered by the full membership of the court. And here is where the problem arises – six of the judges of the Constitutional Tribunal (including the ‘stand-in’ Muszyński) consider Przyłębska’s term of office to have ended in December 2022 and are demanding a General Assembly of Judges of the Tribunal to be called to elect a new president. Therefore, they say Julia Przyłębska does not have the authority to call an assembly for any other purpose.

A General Assembly of the Judges of the Tribunal was held on 1 March 2023, at which, according to the Tribunal’s official communication, ‘a resolution was passed by an absolute majority of votes in the presence of two-thirds of the judges stating that there were no grounds for calling an assembly to elect candidates for president of the Tribunal.’ However, according to unofficial media reports, this may have been an abuse – a quorum of two-thirds of those present, namely 10 of the 15 judges of the Constitutional Tribunal, is needed to pass a resolution to elect the president.

‘Ten judges initially took part in the Assembly, but then two refused to take part in the vote. According to the judges, this was supposed to mean that the Assembly no longer had a quorum for passing resolutions, which was supposed to have been minuted. This means that eight judges took part in the vote instead of at least ten,’ an interviewee told ‘Gazeta Wyborcza’.

In the light of huge political pressure on the ruling camp to unblock the EU funds, the boycott of the Assembly by some judges only exacerbates the conflict

within the Tribunal. The ‘rebels’ may pressure Przyłębska to step down, while their refusal to adjudicate could bring about a complete paralysis of the Constitutional Tribunal. At least 11 judges are needed to hear cases as a full bench – that is also how many must convene to consider the President’s application to examine the constitutionality of the provisions of the amendments to the Act on the Supreme Court. This is practically unfeasible in the current configuration.



*This is all about money from the RRF, which is supposed to be freed up by the declaration of the constitutionality of the bill that the President sent to the Constitutional Tribunal, as well as about authority, because the group of rebellious people in the Constitutional Tribunal want to take over authority and control in it. Hence such a drive to say that Ms Julia Przyłębska – on the side-line, rightly so – is no longer president, to demand new elections and to hold both PiS and the remaining judges of the Constitutional Tribunal in check.*

Sylwia Gregorczyk-Abram

Therefore, a members’ bill from PiS MPs appeared in the Sejm on 5 May this year. The politicians want to reduce the full membership of the Constitutional Tribunal from 11 to 9 people. The proposed changes constitute just three articles. They apply to the ‘streamlining the activities of the Constitutional Tribunal’ by reducing the minimum size of the General Assembly from 2/3 of the number of judges of the Tribunal (namely 10 judges) to 9, as well as the full bench of the Tribunal from 11 judges to 9. The new provisions would also encompass cases initiated, but not ended before the date on which the new Act enters into force.



*The bravado of the political ‘stunts’ of the authorities has no limits anymore. It doesn’t matter how, it doesn’t matter at what cost, as long as they get what they want, to declare success, win the elections and then repeal the Act – after all, by then the State will be ‘ours’ anyway. This level of impertinence is still astounding.*

Michał Wawrykiewicz

# Decision of the Court of Justice of the EU to reduce the daily fine

On 21 April 2023 the Vice President of the CJEU announced in a press release that the amount of the daily fine imposed on Poland had been reduced from one million euros to €500,000. A complete waiver is not possible because 'it is not apparent from the case file that the measures adopted by the Republic of Poland are sufficient to ensure the implementation of all of the interim measures set out in the order of 14 July 2021.'

The decision is not retroactive, so the fine accrued up to that date will not be reduced and will increase by €500,000 per day until the CJEU issues its ruling in case C-204/21, which is due on 5 June 2023. At the end of April, the penalty was more than €550 million.

## Just to reiterate:

A penalty imposed on Poland for failing to implement the CJEU interim measure in the case (C-204/21) regarding the disciplinary system for judges has been charged since 3 November 2021 at €1,000,000 per day. In a decision of CJEU of 14 July 2021, Poland was obliged, among other things, to suspend the illegal Disciplinary Chamber from operating in the Supreme Court in cases involving the lifting of a judge's immunity, revoke decisions to date in this regard and reinstate the suspended judges, as well as to suspend the application of certain provisions of the so-called 'Muzzle Act'.

The decision may seem surprising for several reasons:

- The Disciplinary Chamber was replaced by the Professional Liability Chamber, which – contrary to the Court's order – does not ensure that disciplinary cases of judges are examined by an independent court which fulfils the conditions of Article 19 of the Treaty on European Union. The

executive branch had excessive influence over the establishment of the Professional Liability Chamber and 6 out of 11 members of it are neo-judges.

- The so-called 'Muzzle Act' still has not been suspended, especially Article 107, para. 1, items 2 and 3 of the Act on the Structure of the Ordinary Courts, which refers to questioning the status of a judge, the correctness of the appointment and the status of a constitutional body, the neo-NCJ. Zbigniew Ziobro's disciplinary commissioners are still taking advantage of these provisions.
- Despite the reinstatement of all judges who were suspended by the Disciplinary Chamber, decisions in their cases were issued by the panels containing neo-judges.
- 'In the opinion of the Vice President, Poland has only partially suspended the application of the provisions establishing the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber to examine complaints alleging lack of independence of a judge or of a court,' we read in the CJEU's communication.
- In December 2022, the CJEU's representative concluded in his opinion that the Polish disciplinary system, which is the subject of interim measures is breaching EU law.

The Polish government initially ignored the execution of all the interim measures specified in the order of 14 July 2021. It was only after they were incorporated into the rule of law 'milestones,' namely the conditions that must be satisfied to unblock €36 billion from the EU Recovery and Resilience Fund, that the ruling camp took any action at all for the fine to be lifted. It should be presumed that all the government's efforts to implement the interim measures from the CJEU's July ruling are inspired by the desire to obtain EU funds. A hearing on the legality of the fines imposed by the CJEU, as well as the interim measures (K 8/21) is constantly being postponed at the Constitutional Court. Zbigniew Ziobro's motion was filed in 2021 – it applied to the examination of compliance of Article 279 of the Treaty on European Union with the Polish Constitution to the extent to which, in cases examined by the CJEU, it allows a periodic fine to be imposed on Poland or a lump sum for failing to comply with an interim measure that has been ordered. The hearing has already been removed from the CJEU's docket several times – on 18 April 2023, it was rescheduled for 14 June 2023.

# Judge Maciej Ferek reinstated to adjudicating after 522 days

## Case background:

Judge Maciej Ferek signed a declaration on 20 September 2021 refusing to adjudicate on cases in benches with neo-judges. Given the case law of the ECtHR regarding the status of neo-judges, Judge Ferek overturned an order which had been issued by a neo-judge, which resulted in his case file being taken away from him by the President of the Regional Court in Kraków. In another case, Judge Ferek dismissed an application for an enforceability clause, acknowledging that the judgment of the court of the first instance was not final because it had been issued by a neo-judge.

The President of the Regional Court ordered the immediate suspension of the judge because of these two rulings, which applied the case law of the European Courts. Next, the Deputy Disciplinary Commissioner initiated disciplinary proceedings against the judge and brought charges against him for 'awarding himself the right to examine the legality of the appointment of two judges of the Regional Court in Kraków'. In a resolution of 16 November 2021, the Disciplinary Chamber suspended the judge and reduced his salary by 50% for the duration of the suspension.

Maciej Ferek of the Regional Court in Kraków was reinstated on 28 March 2023. The Professional Liability Chamber, which replaced the liquidated Disciplinary Chamber, overturned both the decision of the then President of the Regional Court in Kraków, Dagmara Pawełczyk-Woicka (now head of the neo-NCJ), regarding Judge Ferek's monthly suspension, and the subsequent decision of the Disciplinary Chamber of November 2021 suspending the judge indefinitely.





Despite the doubtless success of the judge, it should be remembered that the adjudicating bench of the Professional Liability Chamber contained a neo-judge. Furthermore, Lay Judge Joanna Lasko refused to adjudicate in the case in protest against the failure of the acting First President of the Supreme Court Małgorzata Manowska to admit some of the lay judges selected by the Senate to work. In addition, despite the Professional Liability Chamber finding that a judge cannot be suspended for his judgments and legal views, the Professional Liability Chamber did not find that Judge Ferek had been suspended illegally, and that the Disciplinary Chamber was not a court. Judge Maciej Ferek did not adjudicate for 522 days. Even so, he came to the court to adjudicate because he considered the Disciplinary Chamber to be illegal, and therefore its decisions are non-existent.

#### Just to reiterate:

The Disciplinary Chamber was liquidated, but a 'twin' Professional Liability Chamber was established in its place in September 2022. The CJEU ordered Poland to ensure that disciplinary cases of judges are only examined by an independent court which satisfies the conditions of Article 19 of the Treaty on European Union. In the case of the Professional Liability Chamber, the executive branch had excessive influence over its establishment and it contains 6 neo-judges. The establishment of the Professional Liability Chamber was discussed in detail in previous editions of our Newsletter.

## Further victories for independent judges and prosecutors who apply EU law

The Professional Liability Chamber acquitted Judge Kazimierz Wilczek of the Regional Court in Kraków on 27 April 2023. The judge has retired, but disciplinary proceedings had been initiated against him several years ago for attempting to examine the legality of the neo-NCJ.

In turn, two judges, Irena Piotrowska and Aleksandra Janas, of the Court of Appeal in Katowice will not be suspended for asking legal questions of the Supreme Court regarding the legality of the neo-NCJ. The motion for their suspension was to be considered by the Professional Liability Chamber, but Disciplinary Commissioner Przemysław

Radzik himself withdrew his motion for suspension.

Also in April 2023, the District Court for Warsaw's Praga-Północ awarded compensation to Lex Super Omnia leader Katarzyna Kwiatkowska, indicating that Ziobro's Prosecutor's Office, by omitting her from rewards, discriminated against her and treated her unequally at work. This ruling is important for all prosecutors, who are punished in various ways for defending the independence of the prosecutor's office for standing up to their superiors or for defending labor rights.

A few days ago, disciplinary ombudsman for prosecutors lost two show-cause cases at the Chamber of Professional Liability. The Chamber first finally acquitted prosecutor Katarzyna Gemblaczyk, a former member of the Lex Super Omnia board. She was prosecuted for defending Judge Agnieszka Pilarczyk of Krakow, who acquitted the doctors of Minister Zbigniew Ziobro's father.

Then the Chamber finally acquitted prosecutor Robert Kmiecik of the current Lex Super Omnia board. He was prosecuted for insisting on an independent prosecutor's office at a rally in defense of free courts.

However, this is not the end of the prosecution of independent judges and prosecutors. Motions to suspend further judges, to lift their immunity and to punish them for alleged disciplinary offences are still pending before the Professional Liability Chamber.

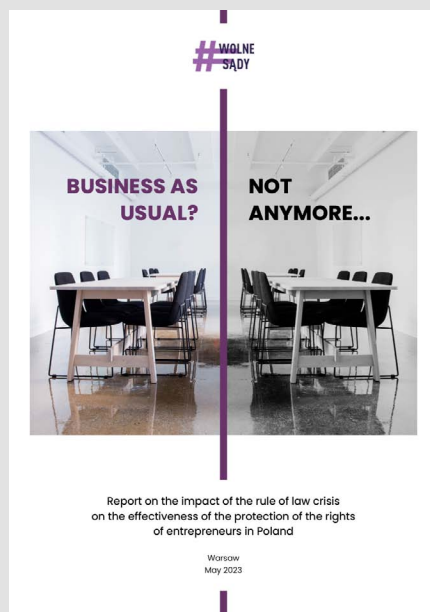


# Also on our channels:

- The Free Courts report named '2500 Days of Lawlessness', 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 legislative changes and other decisions taken by the executive and legislative authorities to politicise the judiciary. The report was originally issued in June 2021 under the name '2000 days of lawlessness'. The situation as of 5 November 2022 was 2500 days of lawlessness. The report also shows that none of the steps taken since 2015 were 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. We keep it updated on an ongoing basis.
- The Free Courts together with the International Commission of Jurists, aditus foundation & Forum for Human Rights in close cooperation with Helen Duffy from Human Rights in Practice and supported by the participation of the Romanian Institute for Human Rights launched the international project "Rule of Law in Europe for Lawyers (ROLL)." As part of the project we have prepared the Factsheet on the Rule of Law. The Factsheet is a general document providing basic information for lawyers across the EU, not necessarily expert in the rule of law or judicial independence. It includes introductory section on Judicial independence and the rule of law, a section on international law, and a section on judicial independence in EU law.
- The ICJ also launched the Judicial Independence Podcast (link) on Spotify. In Episode 2, Karolina Babická, Legal Adviser of the ICJ interviews the expert Michał Wawrykiewicz, the co-founder of the Free Courts Initiative. Their discussion puts under the microscope the rule of law situation in Poland, where judicial reforms have seriously endangered the independence of the judiciary since many years ago and a number of successful litigation took place with cases before the

European Court for Human Rights and the Court of Justice of the EU.

- Report "Business as usual? Not anymore..." – a report on the impact of the rule of law crisis on the security of doing business, which was produced in cooperation with the American Bar Association (ABA), an independent non-governmental organization representing several hundred thousand members of the legal profession.



## 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. Katarzyna Wiśniewska, PhD became a new member of the Free Courts in October 2022. 5 junior lawyers are also part of the Foundation's team. The Foundation's objective is to increase knowledge and strengthen the independence of the courts and judges, as well as to conduct activities in support of the rule of law and the broadly-understood protection of human rights, civil-

liberties and to counteract discrimination. #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.

## Worth reading:

- How independent judges are harassed in PiS's and Ziobro's Poland [Osiatyński's Archive's analysis]
- Prof. Laurent Pech "Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time"
- Rapid career progression of the judge who sentenced Justyna Wydrzyńska for assisting with an abortion. She was promoted straight after the verdict
- As many as 1759 judges and prosecutors are defending Judge Knobel, who is being attacked for her judgment regarding the protest in the church
- Changes in electoral system are intended to help PiS win the elections [interview with the former chairman of the National Electoral Commission]

The Free Courts newsletter is sent out several times a year, at least once every three months. If you do not want to receive it, please send an email to [kontakt@wolnesady.org](mailto:kontakt@wolnesady.org).

The newsletter is produced with the support of the Henryk Wujec Civic Fund and the Economic Freedom Foundation.



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