

# THE CASE OF JUDGE IGOR TULEYA: CONTINUED THREATS TO JUDICIAL INDEPENDENCE IN POLAND

---

NOVEMBER 2020





# THE CASE OF JUDGE IGOR TULEYA: CONTINUED THREATS TO JUDICIAL INDEPENDENCE IN POLAND

---

NOVEMBER 2020

American Bar Association Center for Human Rights



AMERICANBARASSOCIATION

Center for Human Rights

# ABOUT

The American Bar Association (ABA) is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The ABA Center for Human Rights has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries.

# ACKNOWLEDGMENTS

The Center would like to thank Kristie Bluett, an American-educated international lawyer and researcher, for drafting this report and Honorable Judge Michael Pietruszka (ret.) for his contributions to this report. It also would like to thank the monitor and local lawyers for their comments and support.

*Disclaimer: This report was prepared by staff attorneys and consultants of the American Bar Association, Center for Human Rights and reflects their views. It has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association as a whole. Further, nothing in this report should be considered as legal advice in a specific case. The Center would like to thank Kristie Bluett for drafting this report and acknowledge monitors and local experts for their assistance.*

Front Cover: Judge Igor Tuleya  
Photo credit: Dawid Żuchowicz / Agencja Gazeta

Copyright © 2020 by the American Bar Association. All rights reserved.  
1050 Connecticut Ave. N.W., Suite 450, Washington, D.C. 20036

# TABLE OF CONTENTS

- I. EXECUTIVE SUMMARY ..... 1
- II. BACKGROUND ..... 3
- III. THE CASE AGAINST JUDGE IGOR TULEYA ..... 6
  - DISCIPLINARY INQUIRIES INITIATED AGAINST JUDGE TULEYA IN 2018 ..... 8
  - PROCEEDINGS BEFORE THE DISCIPLINARY CHAMBER OF THE SUPREME COURT ..... 9
  - ANALYSIS ..... 11
    - Threats to Judicial Independence ..... 11
    - A “Chilling Effect” on Judge Tuleya’s Exercise of His Right to Freedom of Expression ..... 12
    - Obligations to Respect Judge Tuleya’s Right to a Fair Trial ..... 14
- IV. CONCLUSION ..... 15



# I. EXECUTIVE SUMMARY

The ABA Center for Human Rights monitored the disciplinary proceedings against Judge Igor Tuleya in Warsaw, Poland after serious concerns were raised by the international community that the case against him was politically motivated. It was one of the first and most high-profile disciplinary cases opened against a judge under Poland's new system for judicial discipline. Since regaining power in 2015, the Law and Justice Party (PiS) has passed numerous pieces of legislation affecting Poland's judicial system. These reforms impact the scope of disciplinary liability of judges, the structure of and appointments within the judicial disciplinary system, and the applicable disciplinary procedures. The reforms have faced widespread criticism from international organizations and the European Union as they generally increase opportunities for overt political influence over the judiciary. Unfortunately, these concerns have been borne out in the instant case.

Judge Igor Tuleya is a judge in the criminal division of the Regional Court in Warsaw. He has been publicly critical of the PiS government's reforms to the judiciary and has made numerous public statements calling for adherence to the rule of law and preservation of judicial independence. In December 2017, Judge Tuleya adjudicated a complaint concerning discontinuation of an investigation by the prosecutor's office in a high-profile, politically sensitive case involving the lawfulness of a vote convened by the Speaker of the lower house of Parliament, who was a member of the PiS party. Judge Tuleya allowed media representatives to attend the December 2017 hearing, where, in delivering the justifications for his ruling, he referred to evidence from the preparatory proceedings, including witness testimony.

The prosecutor present at the hearing did not object to the media presence at that time or to Judge Tuleya's reference to the evidence presented in his public decision. However, in 2018, the deputy disciplinary officer for common court judges launched an investigation into Judge Tuleya's decision to allow journalists access to the proceedings. It was one of seven investigations opened by the deputy disciplinary officer involving Judge Tuleya in 2018 alone. At the same time, he was being repeatedly named and publicly criticized for his decision by PiS party members.

In February 2020, the National Prosecutor's Office sought permission to lift Judge Tuleya's judicial immunity from criminal prosecution in relation to the December 2017 proceedings. The Prosecutor's office alleged that Judge Tuleya failed to fulfill his duties and overstepped his authority by allowing the media to record the December 2017 session. The Disciplinary Chamber considered the request, in a closed hearing, on June 9, 2020 and refused to lift Judge Tuleya's immunity. The Disciplinary Chamber found that Judge Tuleya's decision to permit media recordings "in no way" constituted overstepping the judge's authority as judicial discretion to admit media to such proceedings is explicitly authorized under statutory law. The Prosecutor's office appealed the June ruling.

On November 18, 2020, the Disciplinary Chamber overturned its first instance decision and granted the prosecutor's motion to waive Judge Tuleya's immunity. It also suspended him from professional duties for an indefinite period and reduced his pay for the duration of the suspension. There is no further appeal within the Polish court system and it appears that Judge Tuleya may now face criminal charges for exercising his judicial discretion during a proceeding in his courtroom.

The decision against Judge Tuleya poses a severe threat to the independence of the judiciary in Poland and undermines his individual rights. An independent judiciary is a core element of a democratic system of government that adheres to the rule of law. A key component of an independent judiciary is the immunity of judges from prosecution for judicial decisions. The National Prosecutor's quest to criminally charge Judge Tuleya - and the Disciplinary Chamber's revocation of his immunity - for a judicial decision made within the scope of his judicial discretion, goes against international and European standards on judicial independence. The numerous disciplinary inquiries and the Disciplinary Chamber's November 18 ruling also signal an escalation in the government's efforts to curb Polish judges' engagement in the public discourse surrounding the reforms and violate Judge Tuleya's freedom of speech. Furthermore, the proceedings before the Disciplinary Chamber concerning lifting Judge Tuleya's immunity do not meet international standards on the right to a fair hearing. The independence and impartiality of the Disciplinary Chamber has been called into question by the European Commission, and due to concerns about its impartiality and independence, the Court of Justice of the European Union suspended the Chamber's disciplinary jurisdiction on April 8, 2020.

The Government of Poland should take immediate action to change its course and comply with its obligations under regional and international law to ensure an independent judiciary and the rule of law.



Judge Igor Tuleya  
Photo credit: Sławomir Kamiński,  
Agencja Gazeta

## II. BACKGROUND

In 2015, the Law and Justice Party (PiS) gained majority control of the Polish legislature and presidency. Once in power, the government began enacting a number of laws in the name of judicial reform. In the past five years, numerous pieces of legislation concerning the functioning of the Polish judicial system have been adopted. The new laws and amendments have increased political oversight of the judiciary, including through the expansion of disciplinary liability of judges and new disciplinary procedures.<sup>1</sup>

Certain legal reforms under the PiS party have reduced the separation between the executive and the judiciary. For example, in 2016, the office of the Minister of Justice and the office of the Prosecutor General of Poland were combined into one entity.<sup>2</sup> The merged role of the Minister of Justice and Prosecutor General has been criticized as increasing the “vulnerability to political influence” of the overall justice system.<sup>3</sup> The Minister of Justice also has been given more expansive power over the discipline of judges.

Pursuant to the Act of 8 December 2017 on the Supreme Court, which entered into force on April 3, 2018 (“the 2017 Amending Act”), the Minister now appoints the disciplinary officers for the judges of the common courts.<sup>4</sup> Under the amended law, these disciplinary officers are themselves given significant authority over the discipline of judges. They may act as prosecutors before disciplinary courts,<sup>5</sup> take over a case being conducted by a deputy disciplinary officer at a regional court, or hand over a disciplinary case to a regional court disciplinary officer.<sup>6</sup> Under the amended law, the Minister of Justice also may appoint a special disciplinary officer to conduct a case against a particular judge.<sup>7</sup>

The 2017 Amending Act also created two new chambers within the Supreme Court: the Disciplinary Chamber (*Izba Dyscyplinarna*) and the Chamber of Extraordinary Control and Public Affairs.<sup>8</sup> The Disciplinary Chamber is composed entirely of judges appointed by the National Council of the Judiciary, which is now comprised

- 1 See Dunja Mijatović, Comm’r for Hum. Rts. of the Council of Europe, *Report Following Her Visit to Poland from 11 to 15 March 2019*, CommDH(2019)17, paras. 35 and 41, June 28, 2019, available at <https://rm.coe.int/report-on-the-visit-to-poland-from-11-to-15-march-2019-by-dunja-mijato/168094d848> [hereinafter Council of Eur. Comm’r for Hum. Rts. Report 2019]; Am. Bar Ass’n Ctr. for Hum. Rts., *The Case of Judge Alina Czubieniak: Threats to Judicial Independence in Poland Through the Use of Judicial Disciplinary Procedures* (2019) [hereinafter ABA Report on Judge Alina Czubieniak].
- 2 ABA Report on Judge Alina Czubieniak; Amnesty Int’l, *Poland: Free Courts, Free People: Judges Standing for Their Independence* (2019), p. 9, <https://www.amnesty.org/download/Documents/EUR3704182019ENGLISH.PDF> [hereinafter Amnesty Int’l, *Free Courts, Free People*].
- 3 See Eur. Comm’n, *2020 Rule of Law Report: The Rule of Law Situation in the European Union*, Commc’n from the Comm’n to the Eur. Parliament, the Council, the Eur. Economic and Social Comm. and the Comm. of the Regions, p. 10, Sept. 30, 2020, [https://ec.europa.eu/info/sites/info/files/communication\\_2020\\_rule\\_of\\_law\\_report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf) [hereinafter Eur. Comm’n 2020 Rule of Law Report].
- 4 See Common Courts Organisation Act of 27 July 2001, as amended, Art. 112(3) (Venice Commission’s English translation); Eur. Ct. of Hum. Rts., Appl. No. 21181/19 *Tuleya v. Poland*, First Section: Statement of Facts and Questions to the Parties (Sept. 21, 2020) [hereinafter ECtHR Statement of Facts and Questions to Parties]; Press Release, Ct. of Just. of the Eur. Union, *Poland Must Immediately Suspend the Application of the National Provisions on the Powers of the Disciplinary Chamber of the Supreme Court with Regard to Disciplinary Cases Concerning Judges*, Order of the Court in Case C-791/19 *R Comm’n v. Poland* (April 8, 2020), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf> [hereinafter CJEU Press Release, April 8, 2020]. Under the new structure, the Minister of Justice appoints one Disciplinary Commissioner for Common Court Judges and two Deputy Disciplinary Commissioners for Common Court Judges.
- 5 Common Courts Organisation Act of 27 July 2001, as amended, Art. 112(3).
- 6 *Id.* at Art. 112a(1).
- 7 *Id.* at Art. 112b(1).
- 8 See Act on the Supreme Court of 8 Dec. 2017, as amended, Art. 3 (Venice Commission’s English translation).

entirely of judges selected by the Sejm (the lower house of Poland's Parliament).<sup>9</sup> It acts as a court of appeal in disciplinary matters of judges of the common courts<sup>10</sup> and has jurisdiction where the State seeks criminal sanctions against a judge.<sup>11</sup> Since the entry into force of the 2017 Amending Act of the Supreme Court in April 2018, many disciplinary inquiries and proceedings have been instituted against Polish judges, including Judge Igor Tuleya.<sup>12</sup>

In January 2020, Poland's parliament approved additional amendments to both the Act on the Supreme Court and the Common Courts Organisation Act pertaining to the discipline of judges. The so-called "muzzle law," which went into effect on February 14, 2020, identifies new categories of "misconduct" for which judges can be disciplined<sup>13</sup> and assigns jurisdiction over cases concerning judges' criminal liability to the

Disciplinary Chamber.<sup>14</sup> In addition to the pre-existing forms of misconduct,<sup>15</sup> judges may now be disciplined for "acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary;" "actions questioning the existence of the official relationship of a judge, the effectiveness of the appointment of a judge, or the constitutional mandate of an organ of the Republic of Poland;" and for their public activities "that are incompatible with the principles of judicial independence and the impartiality of judges[.]"<sup>16</sup> According to the European Commission, these recent changes "increase the number of cases in which the content of judicial decisions can be qualified as a disciplinary offence."<sup>17</sup>

Some critics of the government's reforms claim that the overhaul of Poland's judicial system by the PiS party places the executive above the judiciary and represents an assault on the country's

- 
- 9 Amnesty Int'l, *Free Courts, Free People*, *supra* note 2; see also Press Release, Eur. Comm'n, *Rule of Law: European Commission Refers Poland to the Court of Justice to Protect Judges from Political Control*, Oct. 10, 2019, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6033](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6033). Prior to the recent reforms, the members of the National Council of the Judiciary were judge-appointed. Amnesty Int'l, *Poland 2019: The State of the Judiciary*, p. 11 (Nov. 2019), available at <https://www.amnesty.org/download/Documents/EUR3714032019ENGLISH.PDF>. [hereinafter Amnesty Int'l, *Poland 2019: State of the Judiciary*]. In December 2019, the Labour and Social Security Chamber of the Supreme Court concluded that "the National Council of the Judiciary in its current formation is neither impartial nor independent of the legislature or the executive[.]" Rep. of Poland Sup. Ct., Case III PO 7/18, Judgment, Dec. 5, 2019, para. 88.
- 10 ECtHR, Statement of Facts and Questions to Parties, *supra* note 4; Letter from Diego García-Sayán, Special Rapporteur on the Independence of Judges and Lawyers, to the President of Poland 6 (May 23, 2019), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24624> [hereinafter Special Rapporteur Letter to President of Poland, May 2019].
- 11 Act on the Supreme Court of 8 Dec. 2017, as amended, art. 27, sec. 1a. A judge's immunity in Poland does not preclude criminal liability; however, prosecution must first obtain consent from the competent authority to pursue criminal charges. See Resol. of the Disciplinary Chamber of the Sup. Ct. (Wygoda, J.), Case file no. I DO 8/20, June 9, 2020 (English Translation) [hereinafter Sup. Ct. Resol., Case file no. I DO 8/20].
- 12 Press Release, Eur. Ct. of Hum. Rts., *ECHR Gives Notification to Poland of Case Concerning Complaint by Well-Known Judge About Disciplinary Proceedings Brought Against Him* (Sept. 21, 2020) (noting that "[m]ost of the judges concerned have openly criticized legislative changes to the judiciary introduced from 2016-2018.") [hereinafter ECtHR Press Release, Sept. 21, 2020]; Amnesty Int'l, *Free Courts, Free People*, *supra* note 2, at 11 ("The number of judges targeted by disciplinary proceedings increased after the authorities began implementing the Law on the Supreme Court and National Council of the Judiciary in 2018, and in the fact of increased judicial criticism of the reforms.").
- 13 See Act of Law of 20 December 2019 on Amending the Act – Law on the System of Common Courts, the Act on the Supreme Court and Certain Other Acts (Venice Commission's English translation); see also Press Release, Eur. Comm'n, *Rule of Law: European Commission Launches Infringement Procedure to Safeguard the Independence of Judges in Poland*, April 29, 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_772](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772) [hereinafter Eur. Comm'n Press Release, April 29, 2020].
- 14 See Act on the Supreme Court of 8 Dec. 2017, as amended by the Act of Law of 20 December 2019 on Amending the Act – Law on the System of Common Courts, the Act on the Supreme Court and Certain Other Acts, Art. 27(1) (Venice Commission's English translation).
- 15 Common Courts Organisation Act of 27 July 2001, Art. 107.
- 16 Common Courts Organisation Act of 27 July 2001, as amended by the Act of Law of 20 December 2019 on Amending the Act – Law on the System of Common Courts, the Act on the Supreme Court and Certain Other Acts, Art. 107(1) (Venice Commission's English translation).
- 17 See Eur. Comm'n Press Release, April 29, 2020, *supra* note 13 (emphasis removed).

democracy.<sup>18</sup> Moreover, the Polish government's attempted reforms to the judiciary since 2015 have led to three separate proceedings against Poland at the Court of Justice of the European Union (CJEU),<sup>19</sup> four infringement proceedings by the European Commission,<sup>20</sup> and seven cases before the European Court of Human Rights, including one involving Judge Tuleya.<sup>21</sup> The Commission's fourth infringement procedure against Poland under the Rule of Law, instituted on April 29, 2020, pertains to the amendments that went into effect on February 14, 2020.<sup>22</sup>

On April 8, 2020, the CJEU granted the European Commission's request for interim relief and

ordered Poland to suspend the Disciplinary Chamber's jurisdiction in disciplinary cases relating to judges.<sup>23</sup> The Court reasoned that the independence of the Disciplinary Chamber "might not be guaranteed" and thus, the jurisdiction in disciplinary cases conferred upon it "is likely to cause serious and irreparable harm . . . to the EU legal order."<sup>24</sup> The CJEU's April 8 order specifically bound Poland "immediately and until the delivery of the [final] judgment" to "suspend the application of the provisions of Article 3, point 5, of Article 27 and of Article 73, paragraph 1, of the Law on the Supreme Court of 8 December 2017, as amended[.]"<sup>25</sup>

- 
- 18 Rob Schmitz, NPR, *Poland's Overhaul of Its Courts Leads to Confrontation with European Union*, Feb. 13, 2020 (quoting an interview with Malgorzata Gersdorf, former First President of Poland's Supreme Court, in which she says that Poland is no longer "a democracy based on the rule of law, as defined by our constitution[.]"); see also R. Daniel Kelemen, Foreign Affairs, *The Assault on Poland's Judiciary: The Danger is Not Gone, and the EU Must Step Up*, July 26, 2017, <https://www.foreignaffairs.com/articles/poland/2017-07-26/assault-polands-judiciary> ("The [Law and Justice] party began its assault on liberal democracy by neutering and seizing control of the Constitutional Tribunal, Poland's highest court, last year. This month, PiS lawmakers sought to complete their takeover of the judiciary with three controversial pieces of legislation. . . ."); Opinion by Murray Hung, *The Polish Government's Assault on Judicial Independence is Part of a Worldwide Trend*, July 2, 2018, <https://www.washingtonpost.com/news/democracy-post/wp/2018/07/02/the-polish-governments-assault-on-judicial-independence-is-part-of-a-worldwide-trend/> (claiming that in Poland "[t]he rule of law is under serious and systemic attack" in light of the Polish government's judicial reforms).
- 19 Amnesty Int'l, *Poland 2019: The State of the Judiciary*, *supra* note 9, p. 11.
- 20 See Eur. Comm'n Press Release, April 29, 2020, *supra* note 13.
- 21 Tuleya v. Poland (no. 21181/19), Grzęda v. Poland (no. 43572/18), Xero Flor w Polsce sp. z o.o. v. Poland (no. 4907/18), Broda v. Poland and Bojara v. Poland (nos. 26691/18 and 27367/18), Żurek v. Poland (no. 39650/18), Sobczyńska and Others v. Poland (nos. 62765/14, 62769/14, 62772/14, and 11708/18), and Reczkowicz and two Others v. Poland (nos. 43447/19, 49868/19, and 57511/19).
- 22 See Eur. Comm'n Press Release, April 29, 2020, *supra* note 13 (noting that "the new law on the judiciary undermines the judicial independence of Polish judges" and that "several elements of the new law violate EU law: First, the Commission notes that the new law broadens the notion of disciplinary offence and thereby increases the number of cases in which the content of the judicial decisions can be qualified as a disciplinary offence. As a result, the disciplinary regime can be used as a system of political control of the content of judicial decisions.") (emphasis in original). On October 30, 2020, the Commission announced that it is moving forward with the infringement procedure against Poland concerning the law on the judiciary which entered into force on February 14, 2020, after considering the Polish government's response and determining that it "does not address the concerns expressed in the letter of formal notice." European Commission, Press Release, *October infringements package: key decisions*, Oct. 30, 2020, [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_20\\_1687](https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687). The Commission's announcement warned that the government "has two months to take the necessary measures to comply with the reasoned opinion, otherwise the Commission may refer the case to the Court of Justice of the EU." *Id.*
- 23 CJEU, Case No. 791/19, Eur. Comm'n v. Rep. of Poland, Order of the Court (April 8, 2020). The CJEU's April 8 order specifically bound Poland "immediately and until the delivery of the [final] judgment" to "suspend the application of the provisions of Article 3, point 5, of Article 27 and of Article 73, paragraph 1, of the Law on the Supreme Court of 8 December 2017, as amended.
- 24 CJEU Press Release, April 8, 2020, *supra* note 4.
- 25 CJEU, Case No. 791/19, Eur. Comm'n v. Rep. of Poland, Order of the Court (April 8, 2020).

# III. THE CASE AGAINST JUDGE IGOR TULEYA

Judge Igor Tuleya is a Polish judge serving in the criminal division of the Regional Court (“Sąd Okręgowy”) in Warsaw.<sup>26</sup> Judge Tuleya studied law at the University of Warsaw and began his legal career in 1996.<sup>27</sup> He was appointed to the bench of the Regional Court in Warsaw in 2010.<sup>28</sup> Judge Tuleya also is involved with the independent association of Polish judges (IUSTITIA), a voluntary legal association with a self-declared mission of “defend[ing] freedom and civil rights.”<sup>29</sup> Judge Tuleya has spoken publicly on several occasions about the state of the rule of law in Poland and has openly criticized the judicial reforms instituted by the government since the Law and Justice party’s return to power in 2015.

During his time on the bench, Judge Tuleya has issued a number of decisions that have received widespread attention in the media and have drawn comments from politicians and representatives of government authorities.<sup>30</sup> One such case is the “Column Hall vote” case, which concerned a contested vote by the Sejm (the lower house of Poland’s Parliament) in December 2016. On December 16, 2016, the Speaker of the Sejm - and member of the ruling Law and Justice

party - Marek Kuchcinski, expelled an opposition MP from a House session<sup>31</sup> after opposition members occupied the parliamentary podium in protest against a draft law that sought to limit media access to the Parliament premises.<sup>32</sup> The session was ultimately moved from the plenary hall to another room in the building, the Column Hall. Several important laws, including the 2017 budget, were passed by voting that took place in the Column Hall without the participation of the opposition members.<sup>33</sup>

After the vote, some opposition MPs notified the Prosecutor’s office of the potentially unlawful voting that took place in Column Hall.<sup>34</sup> The public prosecutor opened an investigation into the Column Hall vote, but discontinued the investigation after concluding that no criminal offense had been committed.<sup>35</sup> A complaint was filed against the prosecutor’s decision to discontinue the investigation and the case came before the Regional Court in Warsaw.<sup>36</sup> The case was assigned to Judge Igor Tuleya.<sup>37</sup>

26 Sup. Ct. Resol., Case file no. I DO 8/20.

27 Joanna Berendt, *In Poland, a Stubborn Defender of Judicial Independence*, N.Y. TIMES, Jan. 10, 2020, <https://www.nytimes.com/2020/01/10/world/europe/poland-judges-tuleya.html>.

28 ECtHR Statement of Facts and Questions to Parties, *supra* note 4.

29 IUSTITIA Stowarzyszenie Sędziów Polskich, *About Us*, <https://www.iustitia.pl/en/about-us> (accessed Sept. 30, 2020).

30 ECtHR Statement of Facts and Questions to Parties, *supra* note 4.

31 Sup. Ct. Resol., Case file no. I DO 8/20.

32 Lidia Kelly and Marcin Goettig, *Opposition Protest Brings Polish Parliament to a Halt*, REUTERS, Dec. 16, 2016, <https://www.reuters.com/article/us-poland-media-idUSKBN1451OJ>.

33 Int’l Comm’n of Jurists, *Poland: Stop Arbitrary Proceedings Against Judge Igor Tuleya*, June 4, 2020, <https://www.icj.org/poland-stop-arbitrary-proceedings-against-judge-igor-tuleya/> [hereinafter ICJ, *Stop Arbitrary Proceedings*].

34 See Interlocutory Appeal by the National Prosecutor’s Office, Case file no. I DO 8/20, June 16, 2020 (noting that the Regional Prosecutor’s Office conducted an investigation into the alleged abuse of the Sejm Speaker’s powers and unjustified exclusion of an MP from the session, which allegedly constituted conduct detrimental to the public interest, a criminal offense under art. 231(1) of the Criminal Code).

35 Def. Motion to the Sup. Ct. in the Disciplinary Proceedings of Regional Court Judge Igor Tuleya, Case file no. I DO 8/20 (May 27, 2020); Sup. Ct. Resol., Case file no. I DO 8/20.

36 Sup. Ct. Resol., Case file no. I DO 8/20.

37 *Id.*

Judge Tuleya heard the case during a session on December 18, 2017, at which time he ordered the prosecution to re-open the investigation.<sup>38</sup> Judge Tuleya permitted media representatives to attend the December 18 hearing and to take sound and video recording of his pronouncement of the decision.<sup>39</sup> Judge Tuleya also gave an oral statement of his reasoning during which he quoted excerpts of contradictory witness testimony from preparatory proceedings.<sup>40</sup> The quoted witness testimony reportedly included statements made by PiS politicians that the entrance to the Column Hall was intentionally blocked for opposition members.<sup>41</sup>

The public prosecutor attending the hearing made no objection to the media presence and recordings at that time.<sup>42</sup> However, thereafter, the deputy disciplinary prosecutor initiated a preliminary investigation into Judge Tuleya's decision to open the December 18, 2017 proceedings to the press. This was one of seven disciplinary inquiries made by the deputy disciplinary prosecutor vis-à-vis Judge Tuleya in 2018.<sup>43</sup> The Internal Affairs Department of the National Prosecutor Office subsequently launched a criminal investigation into the matter and, in February 2020, applied to the Disciplinary Chamber to lift Judge Tuleya's judicial immunity so that he could face criminal

charges for his decision to allow media attendance at the December 2017 hearing.<sup>44</sup> According to the Act on the Public Prosecutor's Office, the Internal Affairs Department is in charge "of the matters relative to preparatory proceedings concerning the most grievous crimes committed by judges" and serves as the public prosecuting attorney in those cases.<sup>45</sup>

In addition to the formal disciplinary procedures instituted against Judge Tuleya, he has reportedly faced a number of physical threats and verbal attacks over the past few years.<sup>46</sup> He has been forced to evacuate his courtroom due to anthrax scares and been subject to other forms of apparent intimidation and disrespect, such as online harassment and the smearing of excrement on the door of his apartment, which led to his eviction.<sup>47</sup> Following his December 2017 ruling, some PiS politicians made public comments suggesting that Judge Tuleya was not suitable for the position of judge.<sup>48</sup> PiS party member Jasek Sasin allegedly called for the stigmatization of "this type" of judge and for their removal from office.<sup>49</sup> On another occasion, Sasin accused Judge Tuleya of acting like a politician rather than a judge.<sup>50</sup> Krystyna Pawłowicz, PiS party member and former member of the Sjem, allegedly expressed her wish for Judge Tuleya to be the first person subject to

38 Sup. Ct. Resol., Case file no. I DO 8/20; Decision of the Regional Court in Warsaw, case no. VIII Kp 1335/17.

39 Sup. Ct. Resol., Case file no. I DO 8/20.

40 Interlocutory Appeal by the National Prosecutor's Office, Case File No. I DO 8/20, June 16, 2020.

41 TVN24, "Power wants to break Igor Tuleya," Nov. 19, 2020, <https://tvn24.pl/polska/igor-tuleya-pozbawiony-immunitetu-prawa-do-orzekania-i-czesci-pensji-komentarze-sedziow-4754678> (translated from Polish). The Prosecutor claimed in its appeal that "the disclosure of the content of testimonies of the interviewed persons may have affected the proper course of the fact-finding process in a pending investigation." Interlocutory Appeal by the National Prosecutor's Office, Case file no. I DO 8/20, June 16, 2020.

42 *Id.*

43 See ECtHR Press Release, Sept. 21, 2020, *supra* note 12.

44 See Sup. Ct. Resol., Case file no. I DO 8/20; National Prosecutor Office Department of Internal Affairs, Proposal for adoption of a resolution on the permission to bring the Judge for criminal liability, PROPOSAL, Feb. 14, 2020.

45 Act on the Public Prosecutor's Office, 2016, as amended, Art. 19(4).

46 ECtHR Statement of Facts and Questions to Parties, *supra* note 4, para. 12; Amnesty Int'l, *Poland: The Judges Who Defend the Rule of Law* (2019), <https://www.amnesty.org/download/Documents/EUR3798002019ENGLISH.PDF>; See also Barbora Cernusakova, *Poland: When Judges Become Human Rights Defenders*, Amnesty Int'l, April 4, 2019, <https://www.amnesty.org/en/latest/news/2019/04/when-judges-become-human-rights-defenders/>.

47 Joanna Berendt, *In Poland, a Stubborn Defender of Judicial Independence*, N.Y. TIMES, Jan. 10, 2020, <https://www.nytimes.com/2020/01/10/world/europe/poland-judges-tuleya.html>; see also ECtHR Statement of Facts and Questions to Parties, *supra* note 4, para. 12; Rob Schmitz, NPR, *Poland's Overhaul of Its Courts Leads to Confrontation with European Union*, Feb. 13, 2020.

48 Amnesty, Int'l., *Poland: Free Courts, Free People*, *supra* note 2, fn. 20.

49 TVN24, "Resortowe dziecko", student Krystyny Pawłowicz. Kim jest Igor Tuleya, Jan 5, 2018, <https://tvn24.pl/polska/kim-jest-igor-tuleya-czarno-na-bialym-ra803767-2330706>.

50 TVP INFO 'Gość Wiadomości' broadcast of Sept. 7, 2018, <https://tvp.info/38894358/jacek-sasin-sedzia-tuleya-jest-politykiem>.

proceedings in the Disciplinary Chamber.<sup>51</sup> Many human rights organizations, judges, and lawyers have alleged that the disciplinary actions taken against Judge Tuleya since the enactment of the 2017 Amending Act of the Supreme Court are politically motivated and in response to his being openly critical of the government's legal reforms.<sup>52</sup>

### Disciplinary Inquiries Initiated Against Judge Tuleya in 2018

In the span of four months in 2018, Judge Tuleya was contacted by the deputy disciplinary prosecutor for judges of the common court on seven different occasions.<sup>53</sup> The deputy

disciplinary prosecutor summoned Judge Tuleya for questioning and to make written statements concerning his attendance at certain meetings and public statements made by the judge that were perceived as critical of the ongoing legal reforms.<sup>54</sup> Other inquiries by the deputy disciplinary prosecutor related to Judge Tuleya's judicial activities,<sup>55</sup> including his alleged "unauthorized" dissemination of confidential information at the December 18, 2017 hearing in his court and his submission to the CJEU requesting a preliminary ruling concerning the new disciplinary system for judges in Poland.<sup>56</sup>

The specific inquiries from the deputy disciplinary prosecutor between August and November 2018 were as follows:

- **August 9, 2018:**<sup>57</sup> Judge Tuleya was called upon to make a written statement concerning statements he made publicly on July 17, 2018 during a TV program "Facts after Facts" on TVN24. Judge Tuleya's comments were considered critical of the legislative changes concerning Poland's judicial system and the National Council of the Judiciary.<sup>58</sup>
- **August 14, 2018:** Judge Tuleya was called upon to make a written statement regarding the allegedly unauthorized public disclosure of information from preparatory proceedings in the case VIII Kp1335/17 (the "Column Hall vote" case).<sup>59</sup>
- **September 5, 2018:** Judge Tuleya was summoned for questioning as a witness in relation to "a violation of boundaries of freedom of public expression applicable to judges, concerning other judges and representatives of constitutional central government bodies."<sup>60</sup>
- **September 21, 2018:** Judge Tuleya was summoned for questioning as a witness in an investigation concerning the referral by the Regional Court in Łódź of a preliminary question to the Court of Justice of the European Union.<sup>61</sup>
- **October 8, 2018:** Judge Tuleya was called upon to submit a written statement concerning his participation in a meeting of the European Solidarity Centre in Gdańsk on September 28, 2018, including information about the organizer of the meeting, the nature of the judge's participation in the meeting and any participation in the meeting by politicians.<sup>62</sup>

51 TVN24, "Resortowe dziecko", student Krystyny Pawłowicz. Kim jest Igor Tuleya, Jan 5, 2018, <https://tvn24.pl/polska/kim-jest-igor-tuleya-czarno-na-bialym-ra803767-2330706>.

52 See, e.g., ICJ, *Stop Arbitrary Proceedings*, supra note 35; Amnesty Int'l, *Free Courts, Free People*, supra note 2, pp. 12-13.

53 See ECtHR Press Release, Sept. 21, 2020, supra note 12.

54 See *id.*

55 *Id.*

56 See *id.*

57 The dates stated in this list refer to the date of the Deputy Disciplinary Commissioner's letter, not the date that Judge Tuleya received the correspondence.

58 Letter from the Deputy Disciplinary Comm'r for Judges of Common Courts, RDSP 712-2/18, Aug. 8, 2018 (English translation).

59 *Id.*

60 Letter from the Deputy Disciplinary Comm'r for Judges of Common Courts, RDSP 714-61/18, Sept. 5, 2018 (English translation).

61 Letter from the Deputy Disciplinary Comm'r for Judges of Common Courts, RDSP 712-8/18, Sept. 21, 2018 (English translation).

62 Letter from the Deputy Disciplinary Comm'r for Judges of Common Courts, RDSP 712-12/18, Oct. 8, 2018 (English translation).

- **October 8, 2018:** Judge Tuleya was called upon to submit a written statement regarding his participation in a September 30, 2018 meeting with citizens in Lublin, Poland. The prosecutor again sought information on who organized the meeting, the nature of Judge Tuleya’s participation in the meeting, and whether politicians participated in the meeting.<sup>63</sup>
- **November 29, 2018:** Judge Tuleya was called upon to submit a written statement regarding “possible judicial excess” in relation to his referral of a preliminary question to the CJEU.<sup>64</sup> In the disciplinary officer’s opinion, the request to the CJEU for a preliminary ruling may constitute disciplinary offense.<sup>65</sup>

At the time of these inquiries, the Act on the Organisation of Common Courts, as amended by the Act of 8 December 2017 of the Supreme Court, regulated the rules of disciplinary liability applicable to Judge Tuleya.<sup>66</sup> Pursuant to Article 114 of that Act, if, after investigation, “the disciplinary officer does not find any grounds for initiating disciplinary proceedings” the disciplinary officer must “issue a decision refusing to initiate proceedings” and serve a copy of that decision on *inter alia* “the defendant.”<sup>67</sup> According to Judge Tuleya, he has not been informed by the deputy disciplinary officer of the conclusion of any of the investigations opened in 2018.<sup>68</sup>

On April 10, 2019, Judge Tuleya filed an application with the European Court of Human Rights (ECtHR) concerning the disciplinary actions taken against him in 2018.<sup>69</sup> Judge Tuleya claims that the disciplinary proceedings violate his rights under Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights.<sup>70</sup>

In September 2020, the ECtHR communicated the application *Tuleya v. Poland* (no. 21181/19)

to the Government of Poland and requested that the government submit observations.<sup>71</sup> In addition to its questions concerning Convention Articles 8 and 13, the Court asked whether “there [has] been an interference with the applicant’s freedom of expression, in particular his right to impart information and ideas, within the meaning of Article 10 § 1 of the Convention[,]” and, “[i]f so, was that interference prescribed by law and necessary in terms of Article 10 § 2?”<sup>72</sup>

### Proceedings Before the Disciplinary Chamber of the Supreme Court

On February 14, 2020, the National Prosecutor’s Office applied to the Disciplinary Chamber for permission to pursue criminal charges against Judge Tuleya in relation to the December 18, 2017 hearing in his court in case VIII Kp1335/17.<sup>73</sup> Notably, February 14, 2020 is the same day that the law granting the Disciplinary Chamber jurisdiction over questions of judges’ criminal liability went into effect.<sup>74</sup> In their application, the public prosecutor claimed that by allowing journalists to attend and record the proceedings, Judge Tuleya “disclose[d] to unauthorized persons”

63 Letter from the Deputy Disciplinary Comm’r for Judges of Common Courts, RDSP 712-13/18, Oct. 8, 2018 (English translation).

64 Letter from the Deputy Disciplinary Comm’r for Judges of Common Courts, RDSP 712-8/2-18, Nov. 29, 2018 (English translation); see also Opinion of Advocate General, Case Nos. C-558/18 and C-563/18, Sept. 24, 2019, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=218141&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=775715>.

65 Amnesty Int’l, Public Statement, *Poland: Judges Who Turned to EU’s Court of Justice Must Not Be Harassed*, Dec. 13, 2018, <https://www.amnesty.org/download/Documents/EUR3795642018ENGLISH.pdf>.

66 ECtHR, Statement of Facts and Questions to Parties, *supra* note 4.

67 Common Courts Organisation Act of 27 July 2001, as amended, Art. 114(9).

68 E-mail communication from I. Tuleya, Oct. 8, 2020.

69 ECtHR Press Release, Sept. 21, 2020, *supra* note 12.

70 *Id.*

71 *Id.*

72 ECtHR Statement of Facts and Questions to Parties, *supra* note 4.

73 Office of the Comm’r for Hum. Rts. of the Rep. of Poland, *Written Responses to Members of the European Parliament’s questions stated during the meeting of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) on April 23, 2020* (May 15, 2020), <https://www.rpo.gov.pl/sites/default/files/Odpowiedzi%20na%20pytania%20komisji%20LIBE%2C%2015.05.2020.pdf> [hereinafter Rep. of Poland Comm’r for Hum. Rts. Written Responses]; see also Def. Motion to Sup. Ct., Case file no. I DO 8/20.

74 Rep. of Poland Comm’r for Hum. Rts. Written Responses.

without permission “from a competent authority” information from preparatory proceedings.<sup>75</sup> The public prosecutor alleged that Judge Tuleya overstepped his authority and failed to fulfill his official duties while acting in his capacity as a public functionary.<sup>76</sup>

The matter of Judge Igor Tuleya’s immunity from criminal charges was scheduled to be decided on March 20, 2020 but was postponed due to the COVID-19 pandemic. Despite the Court of Justice’s order in April 2020 to suspend the Disciplinary Chamber’s jurisdiction, the Chamber considered the prosecutor’s application on June 9, 2020.<sup>77</sup> The disciplinary hearing was held *in camera*, with Judge Jacek Wygoda presiding.<sup>78</sup> Judge Wygoda refused entry to international trial monitors, including the American Bar Association, Center for Human Rights monitor.<sup>79</sup>

In the first instance, the Disciplinary Chamber denied the prosecutor’s application to lift Judge Tuleya’s immunity from criminal charges, finding that the evidence presented by the prosecutor did “not provide sufficient and legitimate grounds” that Judge Tuleya committed the prohibited act described in the application.<sup>80</sup> Judge Wygoda rejected the prosecutor’s allegation that by “allowing mass media representatives to record audio and video of the session” held in his court on December 18, 2017 and the announcement of his ruling, Judge Tuleya “failed to perform his official duties imposed upon him by the Criminal Procedure Code [k.p.k.] and Criminal Code.”<sup>81</sup> He similarly found that Judge Tuleya did not overstep his authority by allowing media representatives to participate in the session held on December 18, 2017.<sup>82</sup>

Rather, the Chamber held that Judge Tuleya’s grant of permission for recordings by the media “in no way constituted an overstepping of the judge’s authority vested in him under Article 95b para. 1” of the Criminal Procedure Code.<sup>83</sup> Judge Wygoda reasoned that although preparatory sessions do not fall within the category of sessions listed in Article 95b, “it unequivocally follows from Article 95b para. 1 k.p.k. that when the court judge conducting the given proceedings . . . orders the proceedings to be held in open session, there can be no talk of the judge . . . overstepping their authority or failing to perform their duties since decisions of this kind fall within the purview of their statutory powers.”<sup>84</sup>

Unsatisfied with this result, the prosecutor appealed the Disciplinary Chamber’s decision.<sup>85</sup> The appeal was scheduled to be heard on October 5, 2020 by a three-judge panel of the Disciplinary Chamber,<sup>86</sup> but was postponed to October 22 due to a last-minute replacement of one of the judges on the panel and the need for the new panel member (Konrad Wytrykowski) to have sufficient time to review the case materials.<sup>87</sup> The second instance hearing was further delayed due to one of the judges being in quarantine due to the COVID-19 pandemic on October 22nd.

On November 18, 2020, in an open hearing,<sup>88</sup> the Disciplinary Chamber rejected Judge Wygoda’s reasoning and lifted Judge Tuleya’s immunity. According to the Chamber, the possibility for a judge to decide that a session may be public pursuant to Article 95b of the Code of Criminal Procedure does not preclude their criminal liability for dissemination of information from preparatory proceedings.<sup>89</sup> The Chamber’s ruling has opened the

75 Sup. Ct. Resol., Case file no. I DO 8/20 (quoting the State Prosecutor’s application, dated Feb. 17, 2020, in Case no. I DO 8/20).

76 Sup. Ct. Resol., Case file no. I DO 8/20.

77 *Id.*

78 ABA Internal Notes from Trial Monitor, June 9, 2020.

79 *Id.*

80 Sup. Ct. Resol., Case file no. I DO 8/20.

81 *Id.*

82 *Id.*

83 *Id.* (noting that Article 95b para. 2 of the Criminal Procedure Code “provides that, ‘sessions shall be closed to the public, except if otherwise provided for in statutory law or if the president of the court or the court judge orders otherwise.’”).

84 Sup. Ct. Resol., Case file no. I DO 8/20.

85 Interlocutory Appeal by the National Prosecutor’s Office, Case File No. I DO 8/20, June 16, 2020.

86 ABA Trial Monitor notes from June 9, 2020 hearing.

87 Communication with ABA Trial Monitor, Oct. 5, 2020.

88 Disciplinary Chamber decided to open the hearing to media. ABA Trial Monitor notes from Nov. 18, 2020.

89 *Id.*

door for the prosecutor's office to pursue criminal charges against Judge Tuleya that carry a penalty of up to two years imprisonment.<sup>90</sup> The Chamber also suspended Judge Tuleya from his professional duties and cut his remuneration during the time of suspension.<sup>91</sup> Judge Jarosław Sobutka dissented.<sup>92</sup> There is no means for Judge Tuleya to appeal the Disciplinary Chamber's November 18 decision within the Polish court system.

## Analysis

The importance of an independent judiciary and the fundamental rights to freedom of expression and a fair trial are emphasized in a number of international and regional human rights treaties to which Poland is a State party, including the International Covenant on Civil and Political Rights (ICCPR)<sup>93</sup> and the European Convention on Human Rights (ECHR).<sup>94</sup> They are also recognized in Poland's national constitution.<sup>95</sup> In addition, Poland's Constitution recognizes the state's obligations to "respect international law binding upon it."<sup>96</sup> The elements of an independent judiciary are further laid out in the UN Basic Principles on the Independence of the Judiciary and the Bangalore Principles on Judicial Conduct. The Polish government's use of the judicial disciplinary system to interfere with Judge Tuleya's judicial decisions fails to meet these international standards and threatens the independence of

Poland's judiciary. It further undermines Judge Tuleya's fundamental rights and will likely have a chilling effect on other Polish judges' participation in the public discourse over judicial reforms and independence of the judiciary.

## Threats to Judicial Independence

An independent judiciary is a vital component in a democratic system of government that adheres to the rule of law.<sup>97</sup> It is also a fundamental requirement for Member States of the European Union.<sup>98</sup> Poland's status as a Member State of both the United Nations (UN) and the European Union (EU) and as a State party to the ICCPR and ECHR obliges the government to "guarantee the independence of the judiciary and protect judges from any form of political influence in their decision-making."<sup>99</sup>

The UN Basic Principles on the Independence of the Judiciary underscore the government's duty to "respect and observe the independence of the judiciary"<sup>100</sup> and prohibit "any inappropriate or unwarranted interference with the judicial process."<sup>101</sup> The Bangalore Principles on Judicial Conduct, adopted by a roundtable of Chief Justices at The Hague in 2002, similarly pronounce the necessity of judges to exercise their judicial function "independently on the basis of the judge's assessment of the facts and in accordance

90 See Penal Code of 1997, Art. 241. The Disciplinary Chamber lifted Judge Tuleya's immunity with respect to the prosecutor's allegations under Penal Code Articles 231 and 266 (both of which carry a penalty of up to 3 years imprisonment). ABA Trial Monitor notes from Nov. 18, 2020.

91 ABA Trial Monitor notes from Nov. 18, 2020.

92 *Id.*

93 See International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, U.N. Doc. a/6316, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), Arts. 14 and 19.

94 See European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, E.T.S. 5 (entered into force Sept. 3, 1954), Arts. 6 and 10.

95 POLAND CONST., arts. 45(1) and 54(1).

96 POLAND CONST., art. 9.

97 Philippe Boillat, Moderator's Speech, *Role of the Judiciary in a Democratic Society/Relations Between the Executive and the Judiciary, in Strengthening Judicial Independence and Impartiality as a pre-condition for the rule of law in Council of Europe Member States*, (April 2016), <https://rm.coe.int/proceedings-of-the-conference-on-strengthening-judicial-independence-/16808b64d4> ("It is also by ensuring the independence of the judiciary that we can safeguard the rule of law, without which there can be no respect for democracy or human rights."); The Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, Round Table Meeting of Chief Justices held at the Peace Palace, The Hague (2002), [https://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) [hereinafter Bangalore Principles on Judicial Conduct] ("Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. . .").

98 See Eur. Comm'n 2020 Rule of Law Report, *supra* note 3.

99 Special Rapporteur Letter to President of Poland, May 2019, *supra* note 10.

100 UN Basic Principles on the Independence of the Judiciary, adopted by the 7th U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, endorsed by G. A. Res. 40/32 (Nov. 29, 1985) and G.A. Res. 40/146 (Dec. 13, 1985), principle 1.

101 *Id.*, principle 4. The principle excludes from "revision" the legitimate process of judicial review.

with a conscientious understanding of the law” without “extraneous influences, inducements, pressures, threats or interference. . . .”<sup>102</sup> The Bangalore Principles of Judicial Conduct further establish that not only must a judge be free from “inappropriate connections with” or “influence by” the executive and legislative branches in fact, but he “must also appear to a reasonable observer to be free therefrom.”<sup>103</sup>

A key component of an independent judiciary is the immunity of judges from prosecution for judicial decisions. Indeed, international and European standards on the independence of the judiciary provide that unless there is “proof of malice,” “judges should have immunity from criminal prosecution for decisions taken in connection with their judicial functions.”<sup>104</sup> Any procedure for removing that immunity “must itself be independent.”<sup>105</sup>

Several aspects of the prosecutor’s actions against Judge Tuleya threaten judicial independence based on these standards. First, the prosecution has neither alleged nor offered any evidence that Judge Tuleya acted in malice to support their argument that his immunity from criminal prosecution should be lifted.<sup>106</sup> Second, Judge Tuleya’s decision to allow media representatives to attend and record the hearing in his courtroom on December 18, 2017 was an exercise of his judicial discretion based on his assessment of the facts and his understanding of the law. In particular, it was based on his understanding of his authority under Article 95b of Poland’s Criminal Procedure Code.<sup>107</sup>

As explained in the Disciplinary Chamber’s June 9, 2020 decision, Judge Tuleya’s decision to permit media to record the proceeding in his courtroom on December 18, 2017 fell within his judicial authority under Article 95b.<sup>108</sup> By calling into question the legitimacy of the judge’s decision to hold a hearing in his court open to the press

by seeking criminal charges against him for that decision, the prosecution inappropriately interfered with the judicial process. Further, a reasonable observer in this case may conclude that, in light of the new appointment structure within the disciplinary system for judges and the merger of the Prosecutor General and Minister of Justice positions, the seven disciplinary inquiries sent to Judge Tuleya in 2018 also constitute inappropriate influence and interference with his ability to fulfill his judicial functions in an independent manner. Each of the seven inquiries related, on their face, to otherwise protected activities that were adverse to stated PiS positions. For this reason, the clustered inquiries, with the threat of follow-up disciplinary action, appear solely aimed at intimidation of Judge Tuleya. The Disciplinary Chamber’s November 18 decision to lift Judge Tuleya’s immunity goes many steps further - not simply to intimidate Judge Tuleya, but to intimidate all judges in Poland who publicly oppose the government’s judicial reforms or rule in a manner unfavorable to the PiS party.

### ***A “Chilling Effect” on Judge Tuleya’s Exercise of His Right to Freedom of Expression***

The sheer volume of disciplinary measures initiated against Judge Tuleya - together with public statements by PiS members and the timing of the National Prosecutor’s move to seek criminal sanctions - suggest that the prosecutor’s office targeted Judge Tuleya for speaking out against the government’s judicial reforms. In addition, the prosecutor’s pursuit of criminal charges against Judge Tuleya and the Disciplinary Chamber’s permission to charge the judge criminally signal an escalation in the government’s efforts to curb Polish judges’ engagement in the public discourse surrounding the reforms and violate Judge Tuleya’s freedom of expression.

Judge Tuleya’s freedom of expression is protected

102 Bangalore Principles on Judicial Conduct, *supra* note 99, 1.1.

103 *Id.*, 1.3.

104 ICJ, *Stop Arbitrary Proceedings*, *supra* note 35 (internal citations omitted); see also Eur. Comm’n for Democracy through Law (Venice Comm’n), *European Standards of the Independence of the Judiciary: A Systematic Overview*, Study No. 494/2008 (2008), p.7 (“[C]riminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.”) (quoting Opinion No. 3 of the Consultative Council of European Judges (2002), <https://rm.coe.int/16807475bb>).

105 ICJ, *Stop Arbitrary Proceedings*, *supra* note 35.

106 Sup. Ct. Resol., Case file no. I DO 8/20; see also Interlocutory Appeal by the National Prosecutor’s Office, Case file no. I DO 8/20, June 16, 2020.

107 Def. Motion to Sup. Ct., Case file no. I DO 8/20.

108 See Sup. Ct. Resol., Case file no. I DO 8/20.

under the ICCPR and the ECHR, with limited exceptions.<sup>109</sup> It is also guaranteed by Poland's Constitution.<sup>110</sup> The UN Basic Principles on the Independence of the Judiciary stress that judges, "like other citizens," are entitled to freedom of expression, with the limitation in their exercise of this right being simply that "judges shall always conduct themselves in such a manner as to preserve the dignity of their offices and the impartiality and independence of the judiciary."<sup>111</sup> A judge's expression that falls outside of this standard may be the basis for disciplinary action.<sup>112</sup> Furthermore, the Official Commentary to the Bangalore Principles suggests that a judge should not involve himself in "public controversies" - by expressing opinions on controversial subjects or publicly criticizing the government - because it may impact how he is perceived when presiding as a judge in court.<sup>113</sup> The government's reforms to the judiciary in Poland could be characterized as a public controversy<sup>114</sup> and Judge Tuleya's expressions about the reforms could be perceived as entering the public debate and being critical of the government. However, the Commentary also identifies certain situations where judges should *not* be so restricted, including in speaking out on "matters that affect the judiciary."<sup>115</sup> The Commentary recognizes that judges "may properly speak out about a matter that is politically controversial" when that matter "directly affects the operations of the courts, the

independence of the judiciary[,] ... fundamental aspects of the administration of justice[,] or the personal integrity of the judge."<sup>116</sup>

Judge Tuleya's public statements about the government's reforms to the judiciary and the threat they pose to judicial independence in Poland fall squarely within permissible speech, even for judges. There is no question that Judge Tuleya's public statements directly affect the independence of the judiciary, operation of the courts, and the administration of justice in Poland. Thus, even with his unique status as a judge and the resulting limitations on freedom of expression recognized by international standards, Judge Tuleya's public statements should not subject him to disciplinary actions.

Notably, although Judge Tuleya did not allege a violation under ECHR Article 10 (freedom of expression) in his complaint, the European Court of Human Rights announced that it will consider *sua sponte* the 2018 disciplinary measures under Article 10.<sup>117</sup> The ECtHR has recognized the potential "chilling effect" that "the fear of sanction" may have on the exercise of freedom of expression in past cases.<sup>118</sup>

109 See ICCPR, Art. 19(1)-(2); Eur. Convention on Hum. Rts., Art. 10(1); EU Charter, Art. 11(1). ECHR Article 10(2) permits certain limitations to the exercise of freedom of expression, including those necessary "for maintaining the authority and impartiality of the judiciary." Eur. Conv. H.R., Art. 10(2).

110 POLAND CONST., 1997, Art. 54(1) ("The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.")

111 UN Basic Principles on the Independence of the Judiciary, *supra* note 102, principle 8.

112 Int'l Comm'n of Jurists, *Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly (Submission to the United Nations Special Rapporteur on Independence of Judges and Lawyers for his upcoming report to the Human Rights Council)* 2 (Feb. 2019) [hereinafter ICJ Submission to UN Special Rapporteur] ("[E]xercises by a judge . . . of his or her freedom of expression . . . incompatible with his or her professional role, could be the basis for disciplinary action or even removal from office.") The Commission notes that "any disciplinary action would itself have to comply with respect for judicial independence, including in relation to fair process and thresholds of seriousness" and that any disciplinary consequences must "satisfy the requirements of necessity and proportionality." *Id.*

113 *Id.* at 5-6 (citing Commentary on the Bangalore Principles of Judicial Conduct (UNODC/Judicial Integrity Group, 2007).

114 See Eur. Comm'n Rule of Law Report 2020, p. 10 ("Poland's justice reforms since 2015 have seen a major source of controversy, both domestically and at [the] EU level[.]").

115 ICJ Submission to UN Special Rapporteur, *supra* note 114, p. 6.

116 *Id.* (citing Commentary on the Bangalore Principles, p. 96); see also ABA Report on Judge Alina Czubieniak, *supra* note 1, at 8 (noting that judges have "a right to speak publicly about threats to judicial independence."); Council of Eur. Comm'r for Hum. Rts. Report 2019, *supra* note 1, para. 49 ("The Commissioner recalls that judges and prosecutors have the right to express their views on matters of public interest, including on reforms of the judiciary and the prosecution service, in a proportionate way, and their freedom to do so must be safeguarded.")

117 ECtHR Press Release, Sept. 21, 2020, *supra* note 12.

118 Eur. Ct. H.R., *Kudeshkina v. Russia*, App. No. 29492/05 (Sept. 2009), para. 99 (internal citations to other cases omitted); see also *id.* at para. 100, 102.

### *Obligations to Respect Judge Tuleya’s Right to a Fair Process*

According to Principle 17 of the UN Basic Principles on the Independence of the Judiciary, a judge “shall have the right to a fair hearing[.]” when a charge or complaint has been made against the judge in his judicial capacity.<sup>119</sup> This includes the right to a fair hearing in all disciplinary proceedings.<sup>120</sup> For that hearing to be fair, “the decision-maker must be independent and impartial.”<sup>121</sup>

The proceedings before the Disciplinary Chamber concerning lifting his immunity do not meet these standards. As briefly discussed above, both the Polish Supreme Court and the Court of Justice of the EU have called into question the impartiality and independence of this decision-making body. The Supreme Court has concluded that the National

Council of the Judiciary, which is responsible for the appointment of judges to the Disciplinary Chamber, is not an impartial or independent body in its current composition.<sup>122</sup> Furthermore, the European Court of Justice concluded that there are doubts as to the independence and impartiality of the Disciplinary Chamber itself.<sup>123</sup> Because of these doubts, it ordered the immediate suspension of the Disciplinary Chamber’s jurisdiction,<sup>124</sup> which the government of Poland has failed to observe.<sup>125</sup>

With the independence and impartiality of the Disciplinary Chamber in doubt, it cannot be said that Judge Tuleya received a fair hearing. Indeed, the Disciplinary Chamber’s November 18 decision to reverse itself in order to allow the executive to pursue a criminal prosecution against Judge Tuleya appears to bear out the CJEU’s concerns.<sup>126</sup>

---

119 UN Basic Principles on the Independence of the Judiciary, *supra* note 102, principle 17.

120 ICJ, *Stop Arbitrary Proceedings*, *supra* note 35.

121 *Id.*

122 Rep. of Poland Sup. Ct., Case III PO 7/18, Judgment, Dec. 5, 2019, para. 88.

123 CJEU, Case No. 791/19, *Eur. Comm’n v. Rep. of Poland*, Order of the Court (April 8, 2020).

124 *Id.*

125 As a Member State of the EU, the government of Poland has a legal obligation to comply with CJEU’s ruling. See Treaty on the Functioning of the European Union, Art. 260 (1) (“If the Court of Justice of the European Union finds that a Member State has failed to fulfill an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the court.”). Article 260 permits the Court of Justice to impose a lump sum or penalty payment on a Member State that does not comply with its judgment. *Id.* at Art. 260. See also *id.* at Art. 279 (“The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.”).

126 Judge Tuleya was the first judge for which the prosecutor’s office sought authorization to bring criminal charges following the legal change that brought such cases under the competence of the Disciplinary Chamber. However, in October 2020, the Disciplinary Chamber heard at least two other applications by the prosecutor seeking to revoke a judge’s immunity. The ABA Center for Human Rights staff have not reviewed those cases but note that it is an ominous sign that the government may intend to increasingly rely on this power.

## IV. CONCLUSION

Taken together, the volume, timing, and subject matter of the disciplinary actions initiated against Judge Tuleya suggest that the judicial disciplinary process in Poland is being used in a politicized manner in retaliation for public statements and positions taken against the sitting government. The Disciplinary Chamber's authorization for Judge Tuleya to be criminally charged for a decision made under his judicial authority sets a dangerous precedent and may be just the beginning of heightened interference with judicial independence in light of the recently enacted "muzzle law." The Disciplinary Chamber's failure to safeguard the independence of the judiciary and ensure judges are not improperly targeted appears to bear out concerns that have been consistently raised about whether so-called reforms to the judiciary in Poland are, as enacted and as applied to individual judges, a means to ensure political control of the courts. The Government of Poland should take immediate action to change its course and comply with its obligations under regional and international law to ensure an independent judiciary and the rule of law.



Judge Igor Tuleya during a demonstration of support for him in connection with the request for waiver of his immunity by the Disciplinary Chamber of the Supreme Court.  
Photo Credit: Dawid Zuchowicz, Agencja Gazeta



AMERICAN **BAR** ASSOCIATION

---

## Center for Human Rights

The Center for Human Rights promotes and protects human rights worldwide — mobilizing lawyers to help threatened advocates; rallying thought leaders on vital issues; and holding abusive governments accountable.

### JOIN THE CONVERSATION



[humanrights@americanbar.org](mailto:humanrights@americanbar.org)



[abachr](https://www.facebook.com/abachr)



[@chr\\_aba](https://twitter.com/chr_aba)

### STAY CONNECTED

[www.americanbar.org/groups/human\\_rights](http://www.americanbar.org/groups/human_rights)

