The Case of Judge Alina CzubieńiaK

Threats to Judicial Independence in Poland Through the Use of Judicial Disciplinary Procedures

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ABOUT

THE AMERICAN BAR ASSOCIATION'S CENTER FOR HUMAN RIGHTS

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Since 2015, the Polish government has enacted a series of so-called judicial reforms—including the creation of new disciplinary procedures and oversight body for judges—that have dramatically increased political oversight of the judiciary. The first judge to be disciplined under the newly created judicial disciplinary body was Judge Alina Czubieniak. The ABA Center for Human Rights sent monitors to Judge Czubieniak’s disciplinary hearings to ascertain whether they complied with international standards for maintaining the independence of the judiciary. Its monitors found several indicia that the new judicial disciplinary procedures fail to properly protect judges against improper influence and are subject to potential arbitrary application, which has since been confirmed by decisions at the European Court of Justice and the Polish Supreme Court.

Judge Alina Czubieniak is an appellate judge and has been the president of the criminal appeals department of her court since 2007. In 2016, she wrote an appellate opinion stating that a mentally ill defendant, charged with inappropriate sexual behavior against a minor, had his right to legal counsel violated when defense counsel did not participate in preliminary investigative proceedings in the prosecutor’s office nor in the pretrial detention hearing. Judge Czubieniak reasoned that given the defendant’s obvious diminished mental capacity—and thus his inability to understand the charges against him or to effectively represent himself—the defendant should have been given a publicly provided defense counsel in order to meaningfully exercise his statutory right to a defense. She remanded to the lower court to conduct a second pretrial detention hearing with defense counsel present. As a result of this opinion, the judge faced some backlash and at least one inflammatory article that alleged her decision put the rights of defendants over those of ordinary Polish people and that she subjected innocent people to “pedophiles.”

Shortly thereafter, disciplinary proceedings against Judge Czubieniak were initiated: the Ministry of Justice alleged that her reasoning in the appellate order constituted an “obvious and gross violation” of statutory law. Judge Czubieniak defended herself by arguing that a judge has the right to interpret the law in its totality and not just to mechanically apply various articles of the Criminal Code. She also maintained that her decision was justified by the need to guarantee the defendant’s fair trial rights, citing constitutional and statutory provisions. Ultimately, the disciplinary review body formally admonished her.

After the Disciplinary Chamber issued its decision and after the close of the underlying criminal case that spurred the hearings, Judge Czubieniak gave a public statement criticizing her disciplinary case. In response, the disciplinary officer publicly characterized the remarks as having “undermined the dignity of the judicial office” in violation of the mandated Judicial Code of Ethics and hinted at a possible second disciplinary proceeding. It is unclear at this time whether a second set of disciplinary procedures will be officially initiated.
Arbitrary subjection to disciplinary proceedings based solely on the legal reasoning of judicial opinions—instead of on behavior, conflicts of interest, or some other material ethical violation—encroaches upon the very essence of a judge’s function: independent adjudication. The mere threat of bringing disciplinary charges against Polish judges is being used as a way to punish their work and chill their legitimate speech. International legal standards recognize that members of the judiciary are entitled to freedom of expression, belief, association, and assembly. Using the judicial disciplinary system in a politically expedient manner undermines the impartiality of the judiciary in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations Basic Principles on the Independence of the Judiciary.

If left unaddressed, the current Polish regime will undermine both the legitimate judicial process in individual cases and risk a chilling effect on the judiciary more broadly. For these and other reasons, the Polish Supreme Court has recently ruled that the reforms violated the Polish constitution and related requirements for judicial independence under EU law. It is not yet clear how the government will react to its decision. In the interim, it is important to note that the regime has already had consequences for judges, such as Judge Czubieniak.
BACKGROUND

THREATS TO JUDICIAL INDEPENDENCE IN POLAND THROUGH THE USE OF JUDICIAL DISCIPLINARY PROCEDURES

Over the last several years, the Polish government has enacted several new laws that increase political oversight of the courts, judges, and prosecution services. In 2015 and 2016, the legislature enacted a new law and amended existing legislation in a manner that offered additional opportunities for political influence in the appointment of judges to the Constitutional Tribunal. In 2016, the government enacted legislation restructuring the prosecution services and merging the office of the Minister of Justice and the Office of the Prosecutor General of Poland.1 Similarly, the Minister of Justice appoints all disciplinary officers—the “prosecutors” in judicial disciplinary hearings—and has the power to request proceedings against particular judges be launched or discontinued.2

In 2017, the government enacted extensive legislative changes to the operations of the Common Courts, the National Council of the Judiciary (NCJ), and the Supreme Court (the final appellate court for non-constitutional matters). These enactments were opposed by many lawyers and judges, among others,3 as undermining the independence of the judiciary. Among the changes, these laws created a Disciplinary Chamber of the Supreme Court, a new institution tasked with handling disciplinary proceedings against judges of the Supreme Court as well as serving as a court of appeals in disciplinary cases of lawyers, prosecutors, and Common Court judges.4 The Chamber was to be composed of judges appointed by the National Council of the Judiciary—which itself is primarily politically appointed by the Polish Parliament5—and the NCJ was to be restructured: existing NCJ judges were forced to resign and new appointment procedures were introduced.6 Despite domestic and international concerns over the threats to judicial independence, the Polish President signed the amendments to the National Judiciary Council Act, the Supreme Court Act, and the Law on Common Courts.

In 2016, the European Commission—the executive arm of the European Union—began a consultation process of Poland under the Rule of Law Framework,7 which is triggered by the Commission to

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“prevent emerging threats to the rule of law.” The Framework consists of a three-stage process: i) Commission assessment; ii) Commission recommendation; and iii) monitoring of the EU country’s follow-up to the Commission’s recommendation. If no solution is found within the Framework, the Commission may provide special mechanisms with sanctions through Article 7 of the Treaty on European Union (TEU) for an “EU country [that] does not respect the fundamental values . . . [in the TEU] including the rule of law.” These special mechanisms may include a referral to the Court of Justice of the European Union (CJEU).

On April 3, 2019, the European Commission announced an infringement procedure related to the judicial disciplinary reforms and concluded that the current disciplinary regime undermines judicial independence and did not meet EU standards. In October 2019, the European Commission referred Poland to the CJEU in relation to judicial disciplinary procedures. Although this referral is still pending before the CJEU, on November 19, the Court released an unrelated preliminary procedure decision regarding the independence—and thus the legitimacy—of the NCJ and the Disciplinary Chamber of the Supreme Court. Although it made no authoritative conclusion on the independence of either of these bodies—instead choosing to send it to the Polish Supreme Court to decide—it stressed that cases that fall within the exclusive jurisdiction of a “court which is not an independent and impartial tribunal” are precluded under the Charter of Fundamental Rights of the European Union. On December 5, the Polish Supreme Court found that the NCJ and the Disciplinary Chamber of the Supreme Court were not sufficiently independent. It is unclear how the government will implement this ruling, particularly in light of the fact that the Minister of Justice announced disciplinary actions against two judges who referred to the CJEU decision in proceedings against them.

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9 Id.
10 Id.
14 Id.
Judge Alina Czubieniak is a Polish judge with over 30 years of judicial experience.\textsuperscript{17} She presides over a circuit court (in Polish, \textit{Sąd Okręgowy}) and has been the president of that court’s criminal appeals department since 2007.\textsuperscript{18} In August 2016, Judge Czubieniak heard an appeal of a lower court’s pretrial detention order; at issue was whether the trial court erred in ordering pretrial detention for an illiterate defendant with a known history of mental disability when he had not been given timely access to legal counsel.\textsuperscript{19}

The 19-year-old defendant was charged with “sexual assault of a minor” and, as a preventive safety measure, the local prosecutor petitioned the common court of first instance (in Polish, \textit{Sąd Rejonowy}) for pretrial detention of the defendant.\textsuperscript{20} The trial court held the pretrial hearing, observed the defendant’s mental state, and appointed an attorney to represent the defendant in subsequent stages of the case.\textsuperscript{21} However, the court concurrently agreed to pretrial detention for two months, despite the absence of defense counsel. The defendant’s court-appointed attorney appealed this pretrial detention ruling.\textsuperscript{22}

The presiding appeals judge, Judge Czubieniak, ruled that the pretrial detention order was improper because the defendant was mentally challenged and could not understand the charges against him or effectively represent himself.\textsuperscript{23} Judge Czubieniak reasoned that as the defendant’s mental condition was plainly visible, Polish law\textsuperscript{24} required the defendant to be aided by an attorney, even at preliminary proceedings in the prosecutor’s office and during a pretrial hearing before the trial court.\textsuperscript{25} She remanded the case to the trial court for further proceedings with defense counsel present.\textsuperscript{26} The trial court held a second pretrial detention hearing and granted the prosecutor’s motion.\textsuperscript{27} The defendant was placed in a pretrial detention facility with a specialized psychiatric ward, where he spent several months until his case was tried.\textsuperscript{28}

This seemingly minor local matter became national news, however, when at least one sensationalized media report raised alarms about judges who let “pedophiles” run free and endanger the population.\textsuperscript{29}

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\textsuperscript{17} Garcia-Sayán, \textit{supra} note 4, at 1; Zechenter, \textit{supra} note 3, at 5.
\textsuperscript{18} Garcia-Sayán, \textit{supra} note 4, at 1.
\textsuperscript{19} Id.
\textsuperscript{20} Zechenter, \textit{supra} note 3, at 6.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Specifically article 439(1)(10) of the Criminal Code of Procedure regulating the invalidity of court proceedings in cases where a defendant who is entitled to defense counsel was not assisted. See Garcia-Sayán, \textit{supra} note 4, at 1.
\textsuperscript{25} Zechenter, \textit{supra} note 3, at 6.
\textsuperscript{26} Ruling of Circuit Court in Gorzów Wielkopolski of 29 August 2016, case file IV Kz 225/16. See also Zechenter, \textit{supra} note 3, at 7.
\textsuperscript{27} Zechenter, \textit{supra} note 3, at 7.
\textsuperscript{28} Garcia-Sayán, \textit{supra} note 4, at 1.
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The local prosecutor called the defendant a “pedophile and a danger to the community” and publicly spoke out against Judge Czubieniak’s decision. Judge Czubieniak’s appellate opinion subsequently lead to disciplinary proceedings against her.

**THE FIRST DISCIPLINARY PROCEEDING**

The Minister of Justice made a strategic decision to intervene, formally asking that Judge Czubieniak be placed under disciplinary proceedings for her decision. The matter was initially taken up by the deputy disciplinary officer of the Appellate Court, alleging that Judge Czubieniak made an “obvious and gross violation” of the Code of Criminal Procedure based on her legal interpretation of that law. Judge Czubieniak’s case was sent for deliberation before the Appellate Court which acts as the disciplinary court of first instance. In January of 2018, the Court acquitted Judge Czubieniak and found her not guilty of the alleged disciplinary offenses and ruled that the cost of the proceedings against her should be borne by the Polish Treasury.

Thereafter, the deputy disciplinary officer of the Appellate Court and the Minister of Justice appealed the decision to the newly created Disciplinary Chamber of the Supreme Court (the Chamber). The Chamber acts as an appellate body for disciplinary procedures against judges, other than Supreme Court justices, and decides cases by panel. A decision by a Chamber panel may be “appealed” within the Chamber to a different panel.

The Chamber deliberated two charges against Judge Czubieniak: failure to properly interpret the Criminal Code and failure to protect the minor victim of the defendant. While the Chamber is composed of professional lawyers and “lay judges,” the adjudicating judges in Judge Czubieniak's first Chamber hearing had “no previous experience in criminal law or criminal procedure.” They ruled in March 2019, in the Chamber’s very first ruling, that Judge Czubieniak was guilty of committing a disciplinary offense for having made an “obvious and gross violation” of the Code of Criminal Procedure in her ruling. The Chamber issued formal admonishment as a sanction.

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34 Disciplinary Court of Appeals, Wrocław, Judgment of Jan. 23, 2018 (on file with the ABA Center for Human Rights).
35 García-Sayán, *supra* note 4, at 2. The disciplinary panel consisted of: i) Paweł Czubik (Spokesman for the Panel); ii) Tomasz Przesławski (President of the Panel); and iii) Hanna Wisniarska (“jury” member). Although there were two legal professionals on the Panel (Czubik and Przesławski), neither had judicial experience. The third (Wisniarska) was a lay member. Zechenter, *supra* note 3, at 20 n. xxxiv.
36 Zechenter, *supra* note 3, at 8.
While delivering the verdict, the spokesman for the Chamber orally stated\(^\text{37}\) that he understood Judge Czubieniak meant well and that she had “unwittingly” made a mistake and could have achieved her stated purpose—repealing the first instance ruling and returning the case to the lower court, thus ensuring the presence of a court-appointed defender for a mentally challenged defendant—through other measures.\(^\text{38}\) The spokesman also stated that Judge Czubieniak’s admonition is to be seen as a “preventive measure” to shape proper attitudes among the judiciary.\(^\text{39}\)

Throughout the proceedings, Judge Czubieniak defended herself by arguing that, as a judge, she has the right to interpret the law in its totality and not just to mechanically apply various provisions of the Criminal Code.\(^\text{40}\) She further maintained that protecting a mentally disabled defendant is a just and legally required action under Polish law and that she did not fail to protect the rights of the child as the alleged victim was arguably not in danger—as evidenced by the trial court’s final decision to close the case and release the defendant. Judge Czubieniak appealed the Chamber’s decision, but the second panel also found her guilty and formally admonished her.\(^\text{41}\)

## A SECOND DISCIPLINARY PROCEEDING

After the publication of the Chamber’s first disciplinary judgment, Judge Czubieniak criticized the opinion in press interviews, stating that the proceedings were a “tragicomedy” and the decision was a “hoax.”\(^\text{42}\) The disciplinary officer issued a public statement characterizing Judge Czubieniak’s public remarks as possibly having “undermined the dignity of the judicial office,” showing Judge Czubieniak’s failure to live up to the mandated Judicial Code of Ethics, and saying that the statements should be reviewed.\(^\text{43}\) However, other judges from the Court of Appeal disagreed and issued a statement to that effect.\(^\text{44}\) It is unclear at this time whether a second set of disciplinary procedures will be officially initiated.

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\(^{38}\) Jalamowski, *supra* note 37, Zechenter, *supra* note 3, at 8. According to Zechenter, the Disciplinary Chamber based their decision on articles 249 and 439 of the Code of Criminal Procedure (CCP), which the Chamber argued only applied to the invalidity of court proceedings and did not require defense counsel at preliminary hearings during the investigative stage. Judge Czubieniak countered that the CCP provisions must be read in conjunction with article 42 of the Polish Constitution (providing for a right to counsel at all stages of the legal process), and article 79 of the CCP (providing that any suspect with a reasonable doubt of their mental state must be provided the opportunity for counsel). The Chamber further argued that Judge Czubieniak’s actions were a “blatant” violation of the law because she did not consider the rights of the child victim when the defendant was temporarily released. In the view of the Disciplinary Chamber, the rights of the child were more important than remedying a lack of defense at preliminary proceedings for a mentally ill defendant. Zechenter, *supra* note 3, at 21 n. xxxviii.

\(^{39}\) Jalamowski, *supra* note 37.

\(^{40}\) Id.


\(^{42}\) García-Sayán, *supra* note 4, at 3.

\(^{43}\) See Zechenter, *supra* note 3, at 10.

THE FIRST DISCIPLINARY PROCEEDING AGAINST JUDGE CZUBIENIAK WAS ARBITRARY

On its face, the ruling of the Disciplinary Chamber is fraught with problems. Judge Czubieniak was disciplined for committing an “obvious and gross violation” of the Code of Criminal Procedure in her legal opinion and the Disciplinary Chamber’s opinion signaled that it disagreed with the legal justification Judge Czubieniak provided in her ruling. Bizarrely, they found her guilty of having “unwittingly” committed an “obvious and gross violation” of the law. It is entirely normal that judges may vary in their legal reasoning. However, it is not a proper use of disciplinary proceedings to “correct” or “rectify” a judge’s legal reasoning in a given case. Such decisions should only be reviewed through an appellate system or re-opening of the proceedings as provided for by law.46

In addition, the Chamber explicitly stated that the reprimand was appropriate in order to set the tone and to shape proper attitudes among the judiciary. This use of disciplinary procedures violates Principle 18 of the U.N. Basic Principles on the Independence of the Judiciary, which states that “ Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.”47

As a general rule, a judge is not liable for the legal reasoning behind their ruling. In a similar case, the Venice Commission—the Council of Europe’s advisory body on constitutional matters—issued an opinion concerning disciplinary proceedings that had been brought against Georgian judges for “misinterpretation” of the domestic criminal code. In its decision, the Commission found that disciplinary proceedings that apply to the judicial process itself—that is, to a judge’s interpretation of the law—are an encroachment on the “extremely delicate sphere of a judge’s independent decision-making.”48 As legal interpretation is the essence of a judge’s duties, and interpretation is always necessary, disciplinary proceedings that permit sanctions for mere legal reasoning encroach upon the independence of the judiciary.49 As the Special Rapporteur on the independence of judges and lawyers has repeatedly emphasized, “the interpretation of the law, assessment of facts or weighing of evidence carried out by judges” should not give rise to disciplinary liability. The only remedy for “incorrect” judicial decisions is “the overruling or modification of their decisions through the appeals process.”50

45 Zechenter, supra note 3, at 8.
49 Id. at ¶¶ 18–19.
50 García-Sayán, supra note 4, at 6.
Under the Polish Law on the Organization of Common Courts, a judge may be disciplined for an "obvious and gross violation" of law and certain defined misconduct.\(^5\) In practice, this law has mostly been used in disciplinary cases against judges when they have failed to comply with procedural requirements or a material regulation in an especially egregious way.\(^5\) And, according to the Polish Supreme Court, it is very unusual to discipline a judge for legal decisions or how proceedings are handled.\(^5\) The apparently selective application of the law to the case at hand raises concerns that the disciplinary proceedings were arbitrarily brought to fit a political agenda.

**ANY ADDITIONAL DISCIPLINARY PROCEEDINGS AGAINST JUDGE CZUBIENIAK MAY CHILL OR PUNISH LEGITIMATE SPEECH**

Principle 8 of the U.N. Basics Principles on the Independence of the Judiciary establishes that “members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”\(^5\)

In line with this principle, the Polish Code of Judicial Ethics requires judges to preserve the impartial and impeccable image of the judiciary while in public.\(^5\)

The European Court of Human Rights (ECHR) has noted that issues surrounding the “functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10 [freedom of expression].”\(^6\) While the ECHR has recognized that civil servants and judges have a duty to the government to protect confidentiality and not to impugn the fairness or impartiality of the judicial system without cause, the Court has also recognized a robust protection of free expression.\(^7\) In other words, judges who level unfounded accusations of bias against the judiciary may not be protected, but discussions of legal concerns and undue political influence or interference in judicial processes are protected, particularly when part of a larger public debate.\(^8\)

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\(^5\) Law on the Organization of Common Courts, supra note 32, at art. 107(1).
\(^6\) See Supreme Court of Poland’s judgement of 29 October 2003, SNO 48/03.
\(^7\) Supreme Court of Poland on 11 October 2002, SNO 29/02.
Given the high publicity surrounding her case, Judge Czubieniak had a right to express her views on the nearly three-year long disciplinary process to which she had been arbitrarily subjected. All Polish citizens, including judges, have the right to defend their reputation and their innocence, yet the first disciplinary proceedings against Judge Czubieniak—which were widely discussed in the press—were closed.59 Furthermore, as a judge, she had a right to speak publicly about threats to judicial independence.60 Therefore, any disciplinary case against her would violate her right to freedom of expression and undermine judicial independence in Poland.

CONCLUSION

The judicial reforms of the last four years have made it possible for disciplinary procedures to be used as a tool to intimidate judges whose decisions are unpopular with the executive branch. The independence of the judiciary is threatened when disciplinary procedures are applied arbitrarily. Judge Czubieniak’s case was one of the first in a series of disciplinary proceedings61 brought by the Ministry of Justice against judges for legitimate judicial activities and the first to be decided by the newly created Disciplinary Chamber.

While governments may reform judicial disciplinary proceedings to reduce overall delays, ethic violations, conflicts of interest, and other inefficiencies in the judicial system, disciplinary proceedings should not be used to discipline judges for issuing valid legal opinions that are deemed unpopular by the executive. Arbitrary application of disciplinary proceedings endangers the fair and impartial administration of justice. This and other recent cases against judges are part of a growing evidence that, in addition to the threat to judicial independence posed by the Disciplinary Chamber’s creation and process, the Ministry of Justice has used the new process to target judges whose rulings are inconvenient and to chill legitimate and protected free speech.

59 The European Court of Human Rights has concluded that the regulation of speech criticizing political interference in the judicial process may serve a legitimate purpose but must be proportional. The Court noted that the fear of sanctions could have a “chilling effect” on the exercise of freedom of expression and that this effect, “which works to the detriment of society as a whole, is likewise a factor which concerns the proportionality of, and thus the justification for the sanctions imposed on the applicant.” Kudeshkina v. Russia, supra note 56, at ¶ 99.
60 Id.
61 See Helsinki Found. For Human Rights, supra note 2; Amnesty International, Poland: Free Courts, Free People (Judges Standing for Their Independence) (2019); Darius Mazur, supra note 33.