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Vice-President of the European Commission

European Commission

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Dear Madam Commissioner,

I would like to take the liberty of troubling you in my capacity as the lawyer representing two Polish and European judges, namely Paweł Juszczyszyn and Igor Tuleya, who are being repressed in Poland for expressing legal views while invoking European Union law that are not in line with the expectations of the Polish executive branch. I would like to present you with some of the facts in the cases in which Counselor Katarzyna Zarzycka and I are representing Judges Juszczyszyn and Tuleya. These facts prove that the independence of the Polish and European judiciary is being ferociously assailed by the executive branch in Poland.

In the case of Judge Paweł Juszczyszyn, on April 14, 2021 the District Court in Bydgoszcz, composed of Katarzyna Błazejowska, Anetta Marciniak, and Iwona Wiśniewska, issued a precedent-setting ruling that may be of landmark significance when it comes to Poland's rule of law and abiding by European Union law in Poland. This ruling orders the president of the Olsztyn District Court, Maciej Nawacki, to permit Judge Paweł Juszczyszyn to resume adjudicating cases immediately. The president of the court is obliged to implement this rule from the moment it is issued. Meanwhile:

- President Nawacki has refused to perform the order handed down by the District Court in Bydgoszcz,
- President Nawacki has filed a notice with the Prosecutor's Office accusing the judges from Bydgoszcz of committing a crime by issuing a decision ordering that Judge Juszczyszyn be allowed to adjudicate, and he has done so without even having any knowledge of the motives underlying the decision handed down by the Court in Bydgoszcz!!! President Nawacki is demanding that the judges sitting on the District Court in Bydgoszcz be punished with a penalty of imprisonment for up to 10 years!!!,
- In his capacity as the President of the District Court in Olsztyn President Nawacki has filed a notice with the Prosecutor's Office accusing Judge Juszczyszyn of committing a crime by disseminating information that the President of the District Court in Olsztyn is obliged to implement the decision of the Court in Bydgoszcz. President Nawacki is

demanding that Judge Juszczyzyn be punished with a penalty of imprisonment for up to 2 years. The media has also reported that President Nawacki has filed an analogous notice against me as a lawyer representing Judge Juszczyzyn demanding that I be punished with a penalty of imprisonment for up to 2 years;

- President Nawacki has filed a notice to the prosecutor's office against 49 judges sitting on the district and regional court in Olsztyn demanding that Mr. Nawacki implement the decision rendered by the court in Bydgoszcz. The crime committed by these judges from Olsztyn is supposed to involve the dissemination of information that the rulings of independent courts should be enforced in Poland. Mr Nawacki is demanding that each one of the 49 judges from Olsztyn be punished with a penalty of imprisonment for up to two years;
- Judge Przemysław Radzik, Deputy Disciplinary Ombudsman of the Common Courts, has demanded that the District Court in Bydgoszcz immediately hand over the files concerning Judge Juszczyzyn's case in which a decision was made ordering his reinstatement. Mr. Radzik has (successfully) demanded the suspension of Judge Juszczyzyn in the so-called Disciplinary Chamber of the Polish Supreme Court for "*declaring war against his State*", which is supposed to lead to leveling criminal charges against Judge Juszczyzyn.

On April 13, 2021, the Internal Affairs Division of the Polish National Prosecutor's Office joined the civil action in a similar case against Judge Igor Tuleya I am trying in the District Court for Warsaw Praga-North. This Division's prosecutors are conducting criminal proceedings against Judge Igor Tuleya and have demanded that the so-called Disciplinary Chamber of the Polish Supreme Court consent to use force to compel Judge Tuleya to appear in the prosecutor's office. Prosecutor Edyta Tawrel has accused Judge Tuleya of engaging in polemics with the Polish legal order. This polemic consists of Judge Tuleya invoking European Union law, the Polish Constitution and the case-law of the Court of Justice of the European Union. On April 15, 2021, or the day after the public prosecutor joined Igor Tuleya's case, the District Court for Warsaw-Praga-North, composed of Judge Monika Garstka, refused to render a ruling to reinstate Judge Tuleya to resume adjudication. Judge Monika Garstka remanded the case to the District Court in Warsaw for examination in clear violation of the Polish Code of Civil Procedure by employing a procedure that makes it impossible to launch an appeal against the court's decision to remand the case for examination to another court. What is significant is the fact that even the prosecutor who joined Igor Tuleya's case had no doubts that the District Court for Warsaw Praga-North, namely Judge Monika Garstka, was obliged to issue a ruling to reinstate Judge Igor Tuleya to resume adjudication.

These facts demonstrate that if a Polish and European judge expresses a legal view inconsistent with the expectations of Poland's executive branch, there is a risk that disciplinary and criminal proceedings will be launched against that person. In the cases of Judges Juszczyzyn and Tuleya, these actions are being taken during the course of court proceedings. These practices are characteristic of an authoritarian state.

Judge Paweł Juszczyzyn is the first Polish judge to cite a judgment of the Court of Justice of the EU to demand that the Polish Parliament verify the validity of the appointment of members

of the National Council of the Judiciary, the body that decides who can become a judge in Poland, and thereby a European judge. These questions are of fundamental significance to Poland's rule of law and the separation of power into three branches of government, and will go down in history as part of the struggle for the rule of law in Poland and Europe. Judge Juszczyszyn has been suspended from serving as a Polish and European judge by the so-called Disciplinary Chamber of the Polish Supreme Court, which reduced his salary by 40%.

Judge Igor Tuleya is the first Polish judge against whom Polish prosecutors want to use force to compel him to appear to be questioned in relation to decisions he made contrary to the expectations of Poland's executive branch. Judge Tuleya has been suspended from serving as a Polish and European judge by the so-called Disciplinary Chamber of the Polish Supreme Court along with a 25% pay cut. In December 2017, Judge Igor Tuleya ordered the prosecutor's office to resume its investigation into the circumstances under which Opposition Members of Parliament were not allowed to participate in a session of Poland's lower chamber – the Sejm. In the summer of 2018, Judge Tuleya referred a preliminary question to the Court of Justice of the European Union on whether Polish laws on the Constitutional Court, the Supreme Court, and the National Council of the Judiciary are compatible with the European principles of judicial independence. On September 24, 2019, the Advocate General of the CJEU assessed that the preliminary questions posed by Judge Tuleya, among others, concerning the disciplinary system applicable to judges in Poland should be declared inadmissible arguing that the Polish courts have only subjective fears that have not materialized in the form of launching disciplinary proceedings. **The examples of Judges Juszczyszyn and Tuleya demonstrate how dramatically mistaken the Advocate General of the European Court of Justice was in his opinion.**

The dignity of Judges Juszczyszyn and Tuleya has been trampled in public. They are accused of undermining the legal order of the Republic of Poland by invoking European Union law. All this is happening before our eyes in 2021 in a member state of the European Union. This is not transpiring in Turkey, Russia or Belarus. This is happening in the home country of the former President of the European Union, Donald Tusk. This is happening in the country that is home to the Solidarity freedom movement, which under Lech Wałęsa's leadership brought down communism in Poland. This is happening in a country that prides itself on having adopted the world's second constitution on May 3, 1791.

I am also writing this letter to you as a professor of law at the University of Warsaw who teaches students that unlawful laws are not law because the law means the rule of law, which must reside in each one of us and form part of our DNA. Judges have a duty to uphold the rule of law, not unlawful laws. This is my understanding of Professor Gustav Radbruch's thought as expressed in a 1945 broadcast entitled "Five Minutes on the Philosophy of Law". He proclaimed that if a legal norm drastically violates basic moral norms, it is not valid. Such a norm does not accede to the dignity of becoming law. The rule of law is a moral norm.

In his book entitled *The Constitution of Liberty*, Friedrich August von Hayek aptly observed that: "[...] today the conception of the rule of law is sometimes confused with the requirement of mere legality in all government action. The rule of law, of course, presupposes complete legality, but this is not enough: for if a law gave the government unlimited power to act as it

pleased, all its actions would be legal, but it would certainly not be under the rule of law." The rule of law is a meta-law, something that transcends the Constitution, which can be changed or deactivated by taking over the Constitutional Court, as has happened in Poland.

Pawel Juszcyszyn and Igor Tuleya are examples of the judges Nelson Mandela was referring to when he wrote "*The independence of the judiciary is one of the pillars of our democracy and equally fundamental is the commitment to abide by the decisions of the courts, whether they are in one's favour or not*" (address at the opening of the president's budget debate, Parliament, Cape Town, South Africa, April 21, 1998).

Nelson Mandela recalled:

"I always recall how one of the first judgements in the Constitutional Courts was around a matter in which I was involved as president of the country, and the president of the Constitutional Court, regardless of the fact he once was my lawyer, ruled against me. It was then clear to me that South Africa was in safe hands with that Court standing and operating at the apex of our democracy (Special dinner to celebrate the official opening of the constitutional court building, constitutional court in Johannesburg, South Africa, March 19, 2004)".

I firmly believe that the law sometimes slumbers but it never dies, and that one does not go to the court to obtain a verdict but to seek justice.

On behalf of Pawel Juszcyszyn and Igor Tuleya I beg you, Commissioner, for the European Commission to take up the fight in the Court of Justice of the European Union to seek justice for the citizens of the European Union so that judges like Pawel Juszcyszyn and Igor Tuleya and judges like the judges sitting on the Bydgoszcz District Court, namely Katarzyna Blazejowska, Anetta Marciniak and Iwona Wiśniewska will adjudicate their cases.



Professor Michał Romanowski, Ph.D.

Advocate