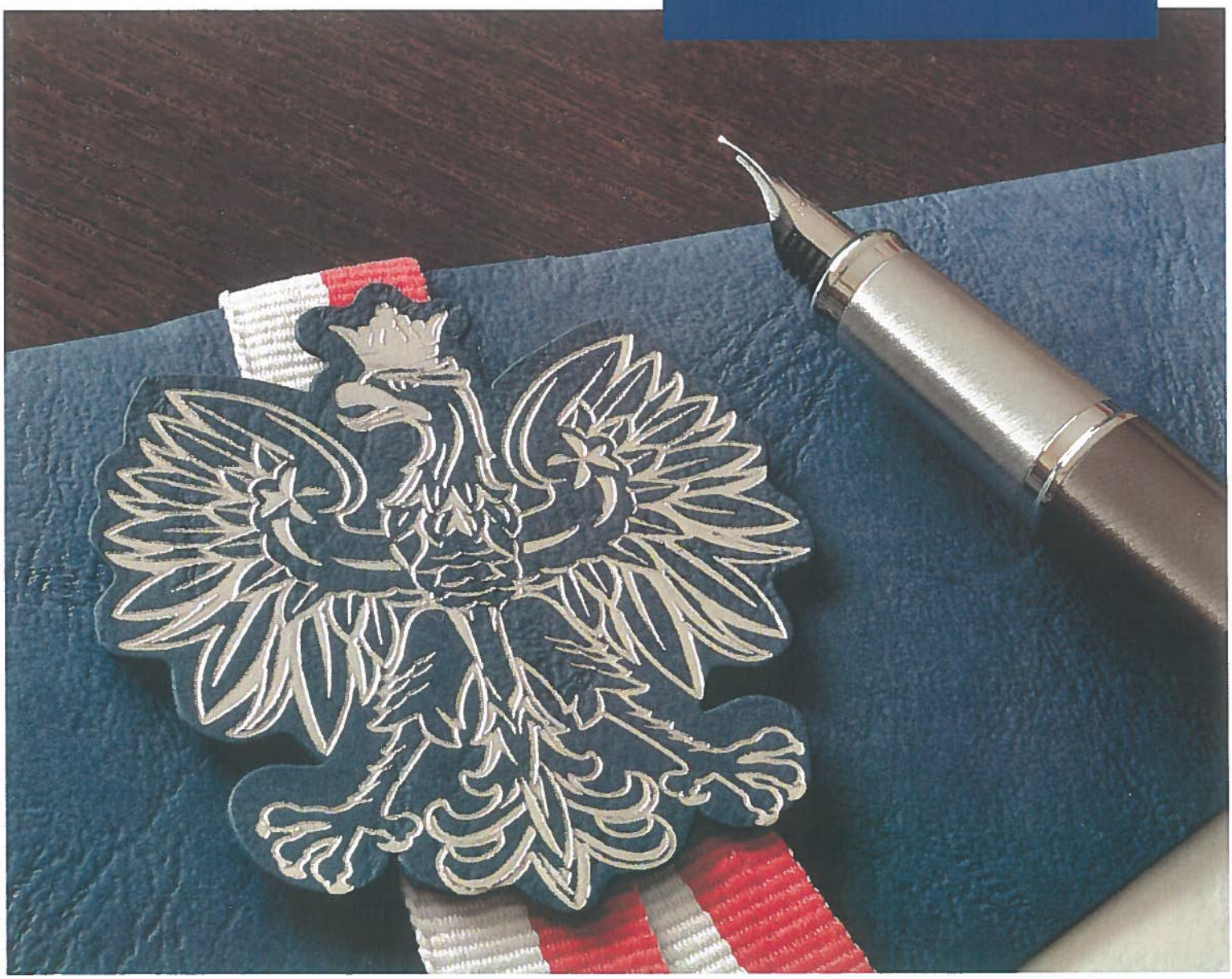
THE REFORMS OF THE JUDICIARY IN POLAND: A NEED FOR AN IMPARTIAL ACCOUNT



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WARSAW 2018

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Typesetting
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Warsaw 2018

SPIS TREŚCI

INTRODUCTION
THE REFORMS OF THE JUDICIARY IN POLAND: A NEED FOR AN IMPARTIAL ACCOUNT

The reforms of the system of the judiciary in Poland have recently become one of the most debated topics in European politics. Media reports covering the content of the reforms very often mix solid information with political observations loosely associated with the situation of the judiciary. Additionally, in many reports, the account of major problems regarding the situation of the judicial system shows a fragmentary understanding of the major problems.

Therefore, it lacks an unbiased account of the events that would be accessible for an international audience. The study we put forward fills this gap, offering an impartial analysis of the bills reforming the judiciary which were subject to the parliamentary works and of the acts which actually entered into force, presenting arguments of all parties involved.

The provisions of the Constitution of the Republic of Poland create the basic framework regarding the structure of the judiciary in Poland, serving as an obvious point of reference for all legislative actions in this field. Nevertheless, the constitutional discussion too often concentrates on singular provisions, without a comprehensive analysis of the interconnected norms that are in force. It should be emphasized that the careful reading of the basic law should include the comprehensive context of the constitutional doctrine.

While the basic problems of the system of the judiciary have been identified by all parties of the dispute, the assessment of the remedies which have been enacted is diverse. The discussion concentrates on evaluation of bills regarding general structure of the system of common courts, to composition and the mode of proceedings of the National Council of Judiciary and the composition and functioning of the Supreme Court. Therefore, the present study includes an analysis of two bills vetoed by President Andrzej Duda in July 2018, which has only historical nature, but serves as an important background for the current discussion. It is followed by an account of the laws currently in force, enacted in 2017.

We hope that the study which we put forward will be helpful in creating a better, more informed debate.

Tymoteusz Zych, Phd

CHAPTER I.
CHANGES IN THE SYSTEM OF COMMON COURTS: ASSUMPTIONS AND PRACTICE OF COURTS AFTER THE INTRODUCTION OF CHANGES IN THE YEARS 2016-2018

1. INTRODUCTION - COMMON COURTS IN THE POLISH LEGAL SYSTEM

The selected provisions of Chapter VIII of the Constitution of the Republic of Poland[1] of 2 April 1997, entitled „Courts and Tribunals", create the constitutional basis for the functioning of common courts in the territory of the Republic of Poland and their activities in the field of justice.

The Polish constitutional legislator incorporated into the Polish legal system the principle of the triple division of power, under which common courts are separate and independent from other authorities, and it is their competence to issue judgments on behalf of the Republic of Poland. The internal division of competences within the judiciary was made in such a way that the Polish legislator accepted the presumption of competence of common courts in the administration of justice. This means that *a contrario* to Article 177 of the Constitution, the statutory reservation of jurisdiction of the Supreme Court, administrative courts or military courts excludes the presumption of jurisdiction of common courts in the perform of justice. The system and organisation of the Supreme Court, administrative courts and military courts are regulated by separate acts[2], while of the common courts - the Act of 27 July 2001 on the system of common courts[3]. The Constitution RP also provides (only during the war) for the possibility of functioning of an extraordinary court or an *ad hoc* procedure[4].

The Polish Basic Law provides for a number of regulations aimed at independence of the judiciary, safeguarding the right to a fair trial, as well as ensuring citizens the right to defence, including:

(i) the principle of judicial independence and the exclusive subordination of judges to the Constitution and to laws[5];

(ii) the principle of appointing judges for an indefinite period of time[6];

(iii) principle of non-removability of judges[7];

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1 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws from 1997 no. 78 item 483 as amended), http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf (access: 15.11.2018), hereinafter refered as: Constitution RP

2 Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2018, items 5, as amended); Act of 25 July 2002. Law on the system of administrative courts (consolidated text: Journal of Laws 2018 item 2107, as amended); Act of 21 August 1997 - Law on the system of military courts (i.e. Journal of Laws 2018, item 1921, as amended).

3 I.e. Journal of Laws 2018 item 23, as amended; hereinafter referred to as: „the „Act of 27 July 2001" or the „Law on the system of common courts". http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf (access: 19.11.2018).

4 Article 175 section 2 of the Constitution RP

5 Article 178 of the Constitution RP;

6 Article 179 of the Constitution RP;

7 Article 180 of the Constitution RP;

(iv) immunity from legal proceedings[8];

(v) a ban on judges' membership in political parties, trade unions and public activities incompatible with the principles of judicial independence[9].

The above mentioned regulations should be the source of legal norms of general character, which were specified by the legislator in the Act of 27 July 2001 - Law on the system of common courts[10]. The Constitution RP clearly indicates that this concerns, among others, the following:

(i) the system and jurisdiction of common courts and proceedings before them[11];

(ii) clarification of the prerequisites for making the following possible:

(a) resignation of a judge from the position held;

(b) suspension from office,

(c) transfer to another seat or position against the will of a judge on the basis of a final court decision[12];

(iii) the procedure and manner of appealing to the court in the event of retiring a judge;

(iv) determination of the age limit after which judges retire[13].

In the years 2017-2018, the Polish authorities carried out a series of legislative actions aimed at reforming the Supreme Court, the National Council of the Judiciary and common courts. This part of the study is devoted to the reform of common courts, which has received much less criticism than in the case of the adoption of the new Supreme Court Act of 8 December 2017 and its subsequent amendments or Acts amending the Act of 12 May 2011 on the National Council of the Judiciary.

The President of the Republic of Poland had no doubts about compliance of the Act of 27 July 2017 on changing the Act - Law on the system of common courts and certain other acts[14], and this act was the only one of three acts which were not vetoed by the President of the Republic of Poland after social protests that took place in the summer of 2017[15]. This elaboration discusses the most important amendments to the Act - Law on the system of common courts adopted in

8 Article 181 of the Constitution RP;

9 Article 178 section 3 of the Constitution RP;

10 This Act replaced the Act of 20 June 1985 on the system of common courts (Journal of Laws of 1985, No. 31 ite 137, as amended), which was enacted during the communist period.

11 Article 176 section 2 of the Constitution RP

12 Article 180 section 2 of the Constitution RP;

13 Article 180 section 3 of the Constitution RP;

14 Journal of Laws of 2017 item 1452, Access: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170001452 accessed: 16.11.2018 r.

15 Weta Andrzeja Dudy do ustaw o KRS i SN, Dziennik Rzeczpospolita: https://www.rp.pl/Sedziowie-i-sady/ 308039945-Weta-Andrzeja-Dudy-do-ustaw-o-KRS-i-SN---uzasadnienia.html accessed 16.11.2018.

the acts of 30.11.2016[16], of 23.03.2017[17], of 11.05.2017[18], of 12.07.2017[19], of 08.12.2017[20], of 12.04.2018[21], of 10.05.2018[22], of 20.07.2018[23].

The axis of the dispute over the reform of the common judiciary in Poland boils down to the formulation of different opinions concerning it – supporters of reforms stress that the Polish Parliament, when amending the Act on the system of common courts, acted within the limits of constitutional powers, while opponents of reforms – that the new regulations violate constitutional guarantees, as well as the principles of separateness and independence of the judiciary from the legislative and executive powers.

2. BASIC ASSUMPTIONS FOR REFORM OF THE COMMON JUDICIARY IN THE YEARS 2016-2018

BASIC ASSUMPTIONS OF REFORMS OF THE COMMON JUDICIARY IN POLAND:

- extending the system of random selection of judges for individual cases to greater number of categories of cases;
- introduction of a general ban on transferring a judge to another judicial department without his or her consent and the premises excluding this principle;
- 6 months from the date of entry into force of the amendment to the law on the system of common courts, for dismissal by the Minister of Justice of presidents or vice-presidents of district, circuit or appellate courts;
- implementation of the institution of a judge coordinator who is responsible in the judicial district for cooperation within the European Judicial Network and for determining the content of foreign law;
- introduction of new rules of division of activities and allocation of judges, trainee judges and legal secretaries to court departments;
- entrusting certain judicial activities to trainee judges;
- changes in the rules on the retirement of judges.

16 Act of 30 November 2016 amending the Act - Law on the system of common courts and certain other acts (Journal of Laws 2016 item 2103);

17 Act of 23 March 2017 amending the Act - Law on the system of common courts (Journal of Laws 2017 item 803);

18 Act of 11 May 2017 r. amending the Act on the National School of Judiciary and Public Prosecution, Act - Law on the System of Common Courts and Certain Other Acts (Journal of Laws 2017 item 1139);

19 Act of 12 July 2017 amending the Act - Law on the system of common courts and certain other acts (Journal of Laws 2017 item 1452), access: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170001452 (date of access: 16.11.2018), hereinafter referred to as: „the „Act of 12 July 2017" or the „Amendment of 12 July 2017".

20 Act of 8 December 2017 on changing the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 222018 item.

21 Act of 12 April 2018 on changing the Act – Law on the system of common courts, the Act on the National Council of the Judiciary and the Act on the Supreme Court (Journal of Laws of 2018 item 848).

22 Act of 10 May 2018 on changing the Act – Law on the system of common courts, the Act on the Supreme Court and certain other acts (Journal of Laws from 2018, item 1045).

23 Act of 20 July 2018 r. on changing the Act – Law on the system of common courts and certain other acts (Journal of Laws from 2018, item 1443).

2.1. SORTITION OF THE COMPOSITION OF THE PANEL OF JUDGES

The motives behind the changes introduced by the legislator include, first of all: a more even workload of judges and thus acceleration of court proceedings, as well as reduction of the possibility of "manual" control over the composition of the judiciary, in selected cases, by heads of departments and presidents of courts[24]. As indicated in the Opinion to the deputies' bill amending the Act - Law on the system of common courts and certain other acts, prepared by the Office of Studies and Analyses of the Supreme Court: "A particular form of breach of duties connected with the principle of independence is a violation of the judge's obligation to maintain impartiality, which may consist, inter alia, in adjusting the content of issued decisions to suggestions or instructions given to the judge from outside[25]".

Conversely, opponents of the reform of the judiciary indicate that a move away from the specialization of individual judges in certain types of cases sent to the departments will lead to an increase in the processing time of cases[26].

Before the amendment of 12 July 2017, the system of case sortition functioned in the Polish legal system in the penal trials. Detailed rules of appointing and sortition of composition of the adjudicating panel in penal divisions of the courts of first instance and appeal courts was regulated by the Regulation of the Minister of Justice of 2 June 2003 on definition of detailed rules for determining and sortition of the composition of the adjudicating panel, repealed on 12.08.2003[27].

By the Act of 12 July 2017, the Polish legislator introduced to the Act - Law on the system of common courts an authorization to issue for the minister competent for justice, after consultation with the National Council of the Judiciary, to pass a regulation defining the internal regulations of common courts, specifying, among others, detailed rules of case allocation, including:

- the way of case sortation,
- the rules for determining multi-person panels of judges,
- the principles of reducing the allocation of cases due to functions performed and justified absences, as well as the grounds for temporary suspension of the allocation of cases,
- the conditions for participating in the allocation of only certain categories of cases to be examined by the department.

Motives for the legislator to extend the system of drawing of judges' configurations to other than criminal cases can be read from the wording of Article 41 of the Act on the system of common

24 See: https://www.premier.gov.pl/files/files/biala_ksiega_ en_full.pdf , date of access: 14.11.2018; in particular, the case of the President of the Regional Court in Gdańsk, who was ready to determine by phone the composition of the court convenient for the executive authority and the date of the hearing, should be taken into account.

25 „Opinia do poselskiego projektu ustawy o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw", access: http://kirp.pl/wp-content/uploads/2017/07/021-161-17-opinia-sn-do-projektu-ustawy-o-zmianie-usp.pdf; Cf. Judgment of 24 June 1998, ref. K 3/98, OTK ZU 1998, no. 4, item 52;

26 „Co z tym losowaniem sędziów? Sądolotek Ziobry do poprawki. „Niestety, algorytm nie obejmuje kwestii poczucia sprawiedliwości", Gazeta Wyborcza on-line, dostęp: http://wyborcza.pl/7,75398,23442933,co-z-tym-losowaniem-sedziow-sadolotek-ziobry-do-poprawki-niestety.html

27 Journal of Laws 2003, nr 107, item 23.

courts after the amendment. The *principles of efficiency, rationality, economic and quick action and the need to ensure reliable performance of the tasks entrusted to courts, as well as the need to ensure a balanced and objective burden of duties on judges, trainee judges and court clerks, and to ensure a similar probability of participation in a multi-person team*[28] are to speak in favor of the introduction of a system of case sortation.

It is rightly pointed out that the system of random selection of cases deprives the head of the department in a court (and indirectly also the president of the court and the Minister of Justice) of any possibility of manipulating the panel of judges in order to not have possibility to influence which judge will issue a judgment in a particular case. According to the assurances of the Ministry of Justice, the algorithms of the system allow for taking into account the specialization of judges, as well as for comparing assigned cases through the prism of their complexity, which should prevent burdening judges with unequal workload and, as a consequence, should speed up the handling of cases by common courts.

There are also reservations concerning the institution of sortation, and they concern mainly the fact that system of sortation is based on algorithms that have been programmed by IT specialists - human factor[29], and the source code of the system is not available to the general public.

On the other hand, experts from the Office of Studies and Analyses of the Supreme Court point to potential irregularities in the functioning of algorithms during random allocation of cases in the case of collective composition of the panel of judges in the second instance courts[30].

2.2. NEW RULES FOR THE DIVISION OF ACTIVITIES

Another institution which, in the intention of the Polish legislator, should lead to reduction of the unequal workload of judges and speed up the examination of cases by Polish courts was the introduction of the Act of 12 July 2017 with the new wording of Article 22a § 1 of the Law on the system of common courts. This provision imposes on the presidents of appeal courts and regional courts[31] the obligation to determine, by the end of November each year, after consultation with the relevant court college, the division of activities, which determines:

1) assignment of judges, court trainee judges and court clerks to court departments,

2) the scope of duties of judges, court trainee judges and court clerks and the manner in which they participate in the allocation of cases,

3) roster of duties and call-on times of judges, trainee judges and court clerks

28 Article 41 § 1 of the Act of 27 July 2001.

29 "How the system of random allocation of cases to judges works", tvn24.pl: https://www.tvn24.pl/wiadomosci-z-kraju,3/as-dziala-system-random-as-allocation-as-you-sedziom,803034.html.

30 „Opinia do poselskiego projektu ustawy o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw", p. 9

31 The presidents of district courts are also responsible for assigning cases in District Courts within their respective areas of competence.

- taking into account the specialization of judges, trainee judges and court clerks in dealing with particular types of cases, the need to ensure proper distribution of judges, trainee judges and court clerks in court departments, and a balanced distribution of their responsibilities and the need to ensure smooth judicial process.

The obligation to plan and strategically define objectives is the foundation of efficient and rapid operation of any organization, and its introduction to the common judiciary was one of the conditions for improving the Polish judiciary. With regard to this regulation, it should be emphasized that they have not met with criticisms of this institution.

Reform critics do not see the main issues related to introduction of the mechanism - (i) the review of functions will take place on a regular basis until the end of November each year at the latest and is not a one-off mechanism; (ii) the review takes place with participation of the judiciary represented by the court board. Only the paradigm of the approach to the supervision of court presidents over judges performing certain functions is changing: the new mechanism imposes an obligation to conduct an annual review. However, only its findings may contribute to drawing consequences for a given functionary judge in the form of dismissal from office. Significantly, procedure of dismissal from the function of the head of division, as defined in Article 11 § 3a of the Law on the system of common courts, has not been changed by the legislator

2.3. OBTAINING A JUDGE'S CONSENT TO TRANSFER HIM/HER TO ANOTHER DEPARTMENT

The amendment of 12 July 2017 introduced a rule according to which the transfer of a judge to another department requires the consent of the judge[32]. The exceptions to this rule apply to marginal situations, specified in Article 22a § 4b, according to which the transfer of a judge to another department, if any, does not require the consent of the judge if:

1) the transfer shall be made to a department in which cases falling within the same scope are heard;

2) no other judge in the department from which the transfer takes place has given his consent to the transfer;

3) the transferred judge is assigned to land and mortgage division or economic division of pledge registry register of pledges.

The *ratio legis* of the new regulations is primarily to strengthen the judicial independence of ordinary judges, who, before the amendment, could be transferred by the President of the court to another department with greater freedom and without their consent.

32 Article 22a § 4a. Law on the system of common courts; in its current wording.

At the stage of work on the Act, critical voices concerning new regulations focused mainly on the scope of "exceptions" indicated in Article 22a § 4b of the Law on the system of common courts[33]. In the original wording of the draft act, there was no reservation that one of the prerequisites was the transfer of a judge to a department in which "cases from the same scope are heard", and the lack of consent for the transfer of all other judges from the department from which the transfer was to take place was sufficient[34].

Referring to the third of the premises listed in Article 22a § 4b of the Law on the system of common courts, its connection with Article 22a § 2 of this Act should be pointed out. In the Law on the system of common courts, the legislator provided an exception to the rule regarding the appointment of judges to departments. The new-basic rule is appointing court clerks, not judges, to the court registrars to the land and mortgage register departments or the commercial department for the register of pledges.

In view of the above, the legislator adopted as justified the gradual transfer of judges from the above mentioned departments to units in which more complex and complicated cases are considered. The implementation of this assumption is the possibility of transferring a judge, without his or her consent, to another department, if he or she was previously assigned to the land and mortgage register department or to the economic department for the register of pledges. When assessing the regulation in question, one may try to attribute to it the quality of a tool whose purpose is to influence the independence of individual judges of the land and mortgage register department or economic department for the register of pledges. It should be pointed out, however, that repetitiveness and low level of complexity of cases examined in these departments, as well as the non-contentious procedure applied in proceedings before these departments, diminish the importance of arguments of opponents of the reform in this respect.

2.4. AMENDMENT OF THE REGULATIONS CONCERNING THE PARTICIPATION OF THE REPUBLIC OF POLAND IN THE EUROPEAN JUDICIAL NETWORK

The introduction to the Act on the system of common courts of regulations ensuring efficient functioning of the Polish judiciary within the European Judicial Network should be read positively. The new provisions streamline proceedings in which the adjudicating panel deals with the so-called foreign law element. In accordance with Article 16b of the Act of 12 July 2017, in a judicial district operates the coordinator for international cooperation and human rights issues in civil matters, who has competences in a number of activities concerning international cooperation, European law and human rights in civil matters, in particular the rights of the child and family rights.

For example, we should indicate here the competence of the coordinator to provide information to judges, trainee judges, court clerks and assistants to judges, at their request information concerning:

33 „Opinia do poselskiego projektu ustawy o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw", Office of Studies and Analyses of the Supreme Court, access online: http://kirp.pl/wp-content/uploads/2017/07/021-161-17-opinia-sn-do-projektu-ustawy-o-zmianie-usp.pdf

34 Ibidem

a) the principles and procedure for obtaining information on the law and practice of a foreign country,

b) work techniques and the performance of judicial administration activities essential for the proper preparation of a request for legal aid and judgments subject to mutual recognition,

c) the rules and procedures for cooperation within the European Judicial Network in civil and commercial matters,

d) the principles and procedure for determining the authority competent in a foreign country to execute a request for legal aid or information concerning the status of execution of that request.

In addition, the Coordinator's responsibilities include a number of other tasks, such as informing judges, trainee judges, court clerks and judges' assistants on the relevant current case-law of the Supreme Court and international bodies.

Moreover, the Act added into the Law on the system of common courts a new Article 16d, introducing to the Polish legal system the institution of the Coordinator for International Cooperation and Human Rights in Criminal Matters. The amendment of 12 July 2017 also introduced into the Act on the system of common courts the obligation for the court to determine *ex officio* and apply the applicable foreign law[35]. The court may also request the Minister of Justice to provide a text of this law and to clarify foreign judicial practice.

These changes, although they concern only a fraction of court proceedings in which there is a foreign factor in the factual state of the case, certainly lead to acceleration of proceedings in this category of cases. The authors of this study did not meet any critical comments concerning the introduction of the regulations in question[36].

While discussing the institution of coordinators specializing in foreign law, it is worth noting that at the stage of work on the parliamentary draft law amending the Law on the system of common courts, the Helsinki Foundation for Human Rights (hereinafter: „HFHR") criticized the proposed wording of Article 53c § 3 of the Law. This regulation, finally adopted in Article 53c § 2, provided the Minister of Justice with the power to request submission of case files or necessary information in order to perform tasks related to representing the Republic of Poland before international courts, treaty committees, international organizations and international arbitration courts. In its comments on the draft law amending the Law on the system of common courts, the HFHR pointed to potential violation of the constitutional right to privacy (of participants in proceedings) by this institution, in connection with alleged unlimited access of the Minister of Justice to case files. However, this view should be approached with skepticism in the light of explicit limitation of the statutory right only to a per mil of situations, when the request for transfer of case files is made in order to perform tasks related to the representation of the Republic of Poland (...).

35 Article 51a. § 1 of the Law on the system of common courts.

36 „Opinia do poselskiego projektu ustawy o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw", Office of Studies and Analyses of the Supreme Court, access online: http://kirp.pl/wp-content/uploads/2017/07/021-161-17-opinia-sn-do-projektu-ustawy-o-zmianie-usp.pdf

2.5. REVIEW OF THE FUNCTIONING OF COURT UNITS AFTER THE AMENDMENT OF 12 JULY 2017.

The Act of 12 July 2017 introduced another regulation aimed at improving the functioning of common courts in Poland. Pursuant to Article 17 of the Act, the presidents of appellate courts and district courts are obliged to review the functions of heads of departments, deputy heads of departments, heads of sections, as well as visiting judges in their courts within 6 months from the date of entry into force of the Act, and the presidents of appellate courts and circuit courts appointed after its entry into force - within 6 months from the date of appointment, and may dismiss them from performing these functions during that period.

The review of the correctness, speed and efficiency of the functioning of courts and individual judges, as well as corrective measures are also to be achieved through:

a. the reformed institution of a visitation by judges of appellate courts and judges of district courts[37];

b. the rules on the evaluation of annual information on the activities of the courts[38].

The mechanism described above has also been criticized in publications critical of the judicial reforms being implemented. This mechanism was most often discussed together with the regulation giving the Minister of Justice the power to dismiss presidents and vice-presidents of courts within 6 months from the date of entry into force of the Act of 12 July 2017.

In the position presented by the Batory Foundation's Legal Experts Group[39], , the thesis was put forward that the legislator's motivation was to achieve the so-called „individual freezing effect". It would consist in the fact that presidents of specific courts would review functions acting under alleged pressure from the Minister of Justice, who was equipped with considerable freedom to dismiss presidents and vice-presidents of courts from their functions.

In assessing such a position, it should be pointed out that critics of reforms have fallen into the trap of their own arguments. This is a moment of reiteration of the question about legitimacy of holding the position of the president of a court by judges who, in fear of dismissal from office, after the Minister of Justice had allegedly formulated specific instructions in a mode that is nowhere else regulated, without being strong enough psychologically, would succumb to such pressure and obediently perform the task.

2.6. CHANGES IN THE CONDUCT OF VISITATIONS AND THE SELECTION OF VISITING JUDGES

As regards the changes in the rules of conducting visitations to court divisions, it should be pointed out that some legal milieus in Poland have negatively assessed solu-

37 Article 37c-37d of the Law on the system of common courts.

38 Article 37h - 37g of the Law on the system of common courts.

39 See: "Position of the Stefan Batory Foundation Group of Legal Experts on the proposed changes in the system of common courts" of 03.07.2017 r.

tions in the case of which the quality of judges' work can be assessed at any time and not at a predetermined date (every 4 years)[40]. This view may be agreed or disagreed with, depending on the appropriate starting point - the answer to the question whether efficiency and quality of judicial work is higher when his or her work is evaluated once every 4 years, or perhaps when the judge is aware that a visitation to his or her division may take place "as needed", at any time. The authors of this elaboration do not share critical opinions, pointing out the need to introduce internal supervision tools in the form of the possibility to order an "*ad hoc*" visitation, e.g. after revealing irregularities in the course of annual review of work in courts.

Current legislation should be criticized for reasons other than those indicated above. The current wording of the Act does not contain a minimum time limit within which such "ad hoc" visitations should take place. In the opinion of the Authors of this monograph, amending the Act in such a way that the visitation would take place "according to the needs, but not less frequently than once every 4 years" might be the right solution.

As a final point, it should be noted that the authors of this monograph share the criticism[41] that the Polish legislator has removed the provisions on the system for evaluating work and planning professional development of judges.

2.7. OPENNESS OF DECLARATIONS OF FINANCIAL INTERESTS OF JUDGES AND THE NEW NATURE OF DISCIPLINARY PROCEEDINGS

Both the introduction of openness of declarations of financial interests of judges, as well as the extension of the statute of limitations of disciplinary tort, introduced by the Act of 30 November 2016 amending the Act on the system of common courts and certain other acts[42], were confronted with the same argumentation of opponents of justice system reforms – lack of sufficient motivation and justification of the need to introduce new solutions [43].

It seems that apart from potential violation by the Polish legislator of the principles of sound legislation, there are no grounds for deeming the introduced solutions unconstitutional. Firstly, extension of the catalogue of entities obliged to submit declarations of financial interests subject to disclosure should contribute to increase of public trust in the justice system, and secondly - it should not have a negative impact on the level of verification of declarations of financial interests of judges carried out until now by the relevant state services.

The extension of the limitation period for disciplinary tort from three to five years and, if proceedings are instituted within this period, from five to eight years after the act was committed, should also be assessed as irrelevant in terms of impact on the administration of justice by judges who, in their professional and private lives, act in accordance with the law, ethical standards and standards of conduct adopted in the judicial community. Opponents of judicial reform argue that

40 Report of the Stefan Batory Foundation Group of Legal Experts on consequences of legislative actions concerning the judiciary in Poland in the years 2015-2018, p.13

41 Ibid, p.13

42 Journal of Laws of 2016 item 2103

43 See: REPORT of the Stefan Batory Foundation Group of Legal Experts on consequences of legislative actions concerning the judiciary in Poland in the years 2015-2018, p. 9-10

the extension of the limitation period may indirectly lead to interference in the independence of individual judges by instituting disciplinary proceedings[44]. However, they do not see the possible, positive effects of the new solutions, i.e. strengthening the preventive effect of potential disciplinary proceedings on daily conduct of judges.

2.8. GROUNDS FOR DISMISSAL OF THE PRESIDENT OR VICE-PRESIDENT OF THE COURT DURING THE TERM OF OFFICE WITHIN 6 MONTHS FROM THE ENTRY INTO FORCE OF THE ACT OF 12 JULY 2017

The Polish government was criticized by opponents of the reform of the judiciary for, among other things, the provision provided for in Article 17 section 1 of the Act of 12 July 2017, which allows, within 6 months from the date of entry into force of the Act, to dismiss the current presidents of courts, without the need to meet the conditions provided for in Article 27 of the Act of 27 July 2001 on the system of common courts.

Referring to the argumentation of the Polish Government, presented in the so-called White Paper[45], it should be recalled that in the Polish legal system judges of common courts do not perform any extraordinary functions in the field of administration of justice, and their role is limited to performing administrative functions.

Opponents of the reform, in turn, point to the case law of the Constitutional Tribunal, from which it follows that the legislative and executive bodies "may not interfere in matters of the structure, composition or operation of the judiciary, unless the exceptions concern cases specified in the Constitution[46]". It is also pointed out that "if the position of president is combined with the exercise of jurisdictional activities, the delegation of the power to appoint and dismiss the president to an administrative body violates the principle of judicial independence[47]".

It should also be noted that appeals of court presidents concerned about 18% of courts and were justified by the Minister of Justice, first of all, by the existence of various irregularities in the supervision of the functioning of selected courts and, in extreme cases, by gross mismanagement or even actions resulting in the presentation of criminal charges.

2.9. EXTENSION OF THE LIST OF PREREQUISITES FOR DISMISSAL OF COURT PRESIDENTS AND VICE-PRESIDENTS

The mechanism of discretionary decision on the possibility of dismissal of court presidents and vice-presidents described above was in force within 6 months from the date of entry into force of the Act of 12 July 2017. In the same amendment, the legislator extended the catalogue of prerequisites for dismissal of court presidents and vice-presidents in the future.

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44 Ibid, p. 10;

45 „Biała księga w sprawie reform polskiego wymiaru sprawiedliwości", access online: https://www.premier.gov.pl/files/files/biala_ksiega_pl_full.pdf

46 Cf. Ruing of the Constitutional Tribunal of 19 July 2005, ref. K 28/04, OTK-A 2005, no. 7, item 81;

47 Cf. Ruing of the Constitutional Tribunal of 9 November 1993, K. 11/93, OTK 1993, part II, item 37.

In accordance with the wording of Article 27 § 1 of the Act – Law on the system of common courts, in the wording introduced by the Act of 12 July 2017, the president and v-president of the court may be dismissed by the Minister of Justice during the term of office in the case of:

1) gross or persistent failure to perform official duties;

2) when the continued performance of the function is incompatible with the interests of justice for other reasons;

3) particularly low effectiveness of actions in the field of administrative supervision or work organization in court or lower courts;

4) resignation from the performed function.

It is important that representatives of the judiciary - the board of the competent court - play an important role in the dismissal of the president or vice-president of the court. Importantly, the fact that the above mentioned conditions are met is also assessed by the National Council of the Judiciary, which is informed by the Minister of Justice of the intention of dismissal together with a written justification[48]. The fact that the negative opinion of the National Council of the Judiciary on the dismissal of the president of a court was binding on the Minister of Justice, if a resolution on the matter was adopted by a two-thirds majority, argues in favor of reducing the importance of the objections raised against the competence of the Minister of Justice to dismiss the presidents of courts[49].

The mechanism of two-stage consultations with representatives of the judiciary on the intention of the Minister of Justice to dismiss the president or vice-president of a court is a kind of compromise, introduced by the Act of 12 April 2018 amending the Act on the system of common courts, the Act on the National Council of the Judiciary and the Act on the Supreme Court[50], which entered into force on 8 May 2018. The provisions introduced by the Act of 12 April 2018 allow, on the one hand, for the Minister of Justice to perform statutory functions of administrative supervision over common courts and, on the other hand, provide for appropriate participation of the judiciary in this process. It seems that the Polish legislator listened to the comments of the legal milieus[51] focusing on excessive competences of the Minister of Justice after the amendment of 12 July 2017 of the Act on the system of common courts. It took into account the views expressed in the past by the Polish Constitutional Tribunal, which indicated that the Minister of Justice "as the administrator of all courts, must have a significant share"[52].

Despite the fact that the legislator prevented the dismissal of the president or vice-president of the court in a situation where at least two thirds of the members of the National Council of the

48 Article 27 § 2 of the Law on the system of common courts.

49 Article 27 § 4 of the Law on the system of common courts.

50 Journal of Laws of 2018, item 848

51 See: Uwagi Helsińskiej Fundacji Praw Człowieka do sprawozdania Podkomisji Nadzwyczajnej o poselskim projekcie ustawy o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (druk nr 1491), p. 2, document date: 02.06.2017.

52 Decision of the Constitutional Tribunal of 9 November 1993, K 11/93;

Judiciary express a negative opinion on the dismissal, critics of the reform of the judiciary indicate that introduction of the premises of "persistent failure to perform official duties" or "particularly low effectiveness of actions in the exercise of administrative supervision (...)" is a source of "interference in the independence of the judiciary and the independence of judges"[53].

2.10. ENTRUSTING JUDICIAL FUNCTIONS TO TRAINEE JUDGES

The dispute over the institution of trainee judges performing judicial functions in Poland has been going on for several years. This institution was the subject of analyses of the Constitutional Tribunal in 2006[54]. In the ruling of the Constitutional Tribunal of 30 January 2006, ref. no. SK 7/06[55] the Tribunal found that the granting of judicial powers to trainee judges by the Minister of Justice was unconstitutional because trainee judges did not have the appropriate guarantees of independence that were required of judges.

The possibility of entrusting the performance of duties of a judge for a period of 4 years is also intended to speed up the performance of activities in the field of justice by common courts. Pursuant to Article 106i § 8 of the Law on the system of common courts, the list and the request to entrust a trainee judge with the performance of duties of a judge may be objected to by the National Council of the Judiciary. Critics of the reform of the Polish judiciary derisively call this institution a „trial judge".

A number of changes concerning trainee judges are contained primarily in the Act of 20 July 2018 amending the Act - Law on the system of common courts and certain other acts[56].

The basic assumption is to entrust judicial tasks in district courts to court trainees (assessors) as well. However, this does not apply to adjudication in cases concerning:

(i) The use of pre-trial detention in pre-trial proceedings;

(ii) recognizing complaints against decisions to refuse to initiate investigations or inquiries, decisions to discontinue investigations or investigations and decisions to discontinue an investigation and enter a case in the register of offenses;

(iii) matters relating to family and guardianship law, matters relating to demoralization and juvenile offenses.

It also enables, among other things, trainee judges (assesors) to be entrusted with the chairmanship in the land and mortgage register departments and the economic departments of pledge registers. Such action should also be assessed objectively as ensuring that in more complex cases the professional potential of judges previously sitting in the land and mortgage register depart-

53 "Report of the Stefan Batory Foundation Group of Legal Experts on consequences of legislative actions concerning the judiciary in Poland in the years 2015-2018", p. 12

54 See: decision of the Constitutional Tribunal of 30.10.2006, ref. no. S3/06; ruling of the Constitutional Tribunal of 24.10.2006, SK 7/06, OTK ZU 2007, no. 9A, item 108

55 ruling of the Constitutional Tribunal of 24.10.2006, SK 7/06, OTK ZU 2007, no. 9A, item 108

56 Journal of Laws 2018 item 1443.

ments or economic departments of pledge registers is used. The changes also allow relieving the workload of the most strained group of Polish judges - district court judges.

When considering the issue of entrusting the administration of justice also to trainee judges, one should bear in mind justification of the above mentioned ruling of the Constitutional Tribunal. Comparing the wording of the provision declared unconstitutional by the Constitutional Tribunal in 2006 with the wording of the Act on the system of common courts in its current wording, it should be pointed out independence of trainee judges is supported by fact that in the light of the new regulations there are no grounds for discretionary depriving the trainee judge of the judicial functions entrusted to him or her[57,58].

Some doubts in the assessment of restoration of the institution of trainee judges are caused by the procedure of appointing trainee judges by the Minister of Justice and not the President of the Republic of Poland (as in the case of judges). A specific safety feature of the procedure for appointing trainee judges is the possibility of objecting to the appointment of a given person to the position of trainee judge by the NCJ. In this respect, the view presented by some legal milieus[59] that "this solution is of a purely façade nature", "given that the majority of the members will soon be elected by a parliamentary majority, from the Minister of Justice is also a part of" is utterly subjective.

The authors of this monograph are also skeptical about the arguments of some legal milieus[60] that "the new system of returning scholarships by trainee judges could be an element of effective pressure". It should be pointed out that payment of a scholarship during training at the National School of the Judiciary and Public Prosecution (hereinafter referred to as the "NSJPP") takes place at the request of the student and is a privilege, not an obligation, and the student deciding to submit an application for a scholarship is aware of negative consequences of not taking up the appointed position of a trainee judge after completing the NSJPP. Significantly, the new scholarship repayment rules do not apply to existing students of the NSJPP, to whom the previous provisions apply.

2.11. RETIREMENT OF JUDGE - NEW REGULATIONS

2.11.1. THE ACT OF 12 JULY 2017

As mentioned earlier, Article 180 of the Constitution RP stipulates that the rules of retiring judges, as well as the age limit for retired judges, should be regulated in an act.

The principles of a judges' transition to retirement were regulated in Article 69 of the Act of 27 July 2001 – Law on the system of common courts, which indicated the general principle of judges' transition to retirement at the age of 65.

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57 See: Campbell and Fell v. UK, no. 28488/95, ECHR 2000-II;

58 See: "Opinion of Amnesty International on the threat to independence of judges", p. 20, date of publication: 05.07.2017.;

59 "Report of the Stefan Batory Foundation Group of Legal Experts on consequences of legislative actions concerning the judiciary in Poland in the years 2015-2018", p. 11

60 Opinion of Amnesty International on the threat to independence of judges

As far as the above mentioned institution is concerned, the reform of the common judiciary of 2017-2018 refers primarily to the new regulation of prerequisites enabling the judge to continue to perform his or her functions until the day when he or she reaches the age of 70. These premises refer to the need to confirm that the judge's state of health allows him or her to continue to adjudicate.

Importantly, the Act of 12 July 2017 also introduced a provision according to which a retired judge who has been retired at his own request due to illness or loss of strength has the right to return to the position held previously or an equivalent position held previously, if he or she presents a certificate stating that he or she is able, due to the state of health, to perform the duties of a judge, issued by a ruling doctor of the Social Insurance Institution.

2.11.2. CHANGES IN RETIREMENT AGE OF JUDGES

It is worth mentioning that changes in the regulations concerning the retirement of judges resulted not only from acts which can be classified to the group of acts on the reform of the judiciary in the Republic of Poland, but also from the key and comprehensive acts on the reform of the Polish social security system. An example of this is the Act of 16 November 2016 amending the Act on pensions from the Social Insurance Fund and certain other acts [61]. The above mentioned act introduced differentiation in the age of retirement of employees employed in the territory of the Republic of Poland. The Act also set the age limit for retired judges at 60 in the case of women and 65 in the case of men. Judges were given the possibility, existing since 10 May 2007[62] in the Act on the system of common courts and not criticized earlier, to declare to the Minister of Justice the willingness to continue to occupy a position on condition that a medical certificate is submitted.

In connection with the reservations of the European Commission concerning the alleged violation of equality before the law and discrimination on the grounds of sex, a situation resulted in which the legislator's return to the system functioning in Poland for decades, in which women were entitled to early retirement met with a lot of criticism. One of the postulates of opponents of the reform of judiciary was to equalize the retirement age of judges - women with the age of judges - men, by returning to the age of 65 as the retirement age of female judges.

By the Act of 12 April 2018 amending the Act - Law on the system of common courts, the Act on the National Council of the Judiciary and the Act on the Supreme Court [63], the Polish legislator implemented the above mentioned postulate, however, leaving the possibility for female judges to retire at the explicit request of such a judge, after the age of 60. This solution should also be seen positively as counterbalancing, on the one hand, the reservations about excessive influence of the legislative and executive authorities on reduction of the independence of female judges and discrimination against male judges and, on the other hand, the violation of the principle of acquired rights of female judges.

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61 Journal of Laws 2017.38

62 Cf. Article 2 of the Act of 16 March 2007 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws 2007.73.484)

63 Journal of Laws 2018.848

In the context of analyses concerning changes in the law on the system of common courts, it is also necessary to recall the reservations concerning the reform of judiciary, and relating to the requirement for a judge who has reached the age of retirement and held a medical certificate to obtain the consent of the Minister of Justice to further adjudication[64]. These provisions were criticized because of excessive arbitrariness of the decision issued by the Minister of Justice[65]. Critical remarks concerning unacceptable interference of the executive in the judiciary were taken into account by the Polish legislator, who introduced into Article 69 of the Law on the system of common courts, the Act on the National Council of the Judiciary and the Act on the Supreme Court an obligation to obtain such consent expressed by the National Council of the Judiciary and not by the Minister of Justice.

2.11.3. THE ACT OF 20 JULY 2018

Supplementation of the regulations resulting from the Act of 12 July 2017 are the changes introduced to the Act on the system of common courts by the Act of 20 July 2018 amending the Act - Law on the system of common courts and certain other acts[66]:

a) change in the wording of Article 100 § 1 of the Act ensuring that a retired judge, in the event of a change in the system of courts or a change in the boundaries of court districts, is entitled to remuneration in the amount of remuneration collected at the last position held until he or she reaches the age of 65;

b) ensuring that these judges are entitled to a one-off severance grant at reaching the age of 65;

c) introduction of a regulation providing for an *ex officio* reduction by 25% to 50% of the remuneration of a retired judge for the duration of disciplinary proceedings in the event of a resolution allowing him or her to be held criminally liable for an intentional offence prosecuted by public indictment. This provision is supplemented by the regulation providing for equalization of emoluments up to the full amount in cases of discontinuance of criminal proceedings or acquittal of a judge from the alleged acts.

With regard to the mentioned regulation, the first two of the above mentioned changes should be assessed positively, whereas the regulation providing for obligatory reduction of a retired judge's remuneration, even before a final decision on a judge's guilt, should be assessed from the perspective of its compliance with the constitutional principle of the presumption of innocence.

64 Office of Studies and Analyses of the Supreme Court, „Opinia z 28.04.2017 r. do poselskiego projektu ustawy o zmianie ustawy - Prawo o ustroju sądów powszechnych", p. 9 oraz niektórych innych ustaw"

65 Report of the Stefan Batory Foundation Group of Legal Experts on the consequences of legislative activities within the judiciary in Poland in 2015-2018, p.14.

66 Journal of Laws 2018, item 1443;

2.11.4. SUMMARY

It should be noted here that the institution of judge's retirement serves not only to safeguard the interests of the judge, whose excessive workload could result in deterioration of his or her state of health. It also serves to safeguard the interests of the judiciary by entrusting the handling of court cases to judges whose age and psycho-physical condition allow them to properly perform their judicial activities.

Supporters of changes in the justice system stress that the changes concerning transition of common court judges introduced by the Polish legislator are motivated by the abovementioned premises. In contrast, in the opinion of opponents of reforms, the changes are motivated primarily by the will to quickly exchange representatives of the judiciary.

3. OVERVIEW OF THE MOST RECENT (PLANNED OR INTRODUCED) AMENDMENTS TO POLISH CIVIL PROCEDURE LAW

3.1. GENERAL ISSUES

As regards the administration of justice by Polish common courts, the most important procedural regulations applied in the course of court proceedings include:

(i) The Act of 17 November 1964 – Code of Civil Procedure[67];

(ii) The Act of 6 June 1997 – Code of Criminal Procedure[68].

In recent years, the Polish legislator, guided by the *rationale* of accelerating proceedings before Polish courts, undertook not only reforms of acts regulating the system of courts, but also the aforementioned acts regulating the procedures before common courts in civil cases. The final part of this study presents some of the new regulations included in the broad context of implementation of the basic postulate of the reform of judiciary in the Republic of Poland - acceleration of court proceedings.

3.2. CHANGES IN THE ACT – CODE OF CIVIL PROCEDURE

In the context of acceleration of activities related to the administration of justice by Polish courts, first of all the scope of use of ICT systems and technologies in everyday court activities should be pointed out, as well as improvements of organizational nature

Examples of such improvements are significant extension of the case catalogue and improvement of the functioning of the ICT system through which it is possible to apply for entry into the National Court Register. The other functionality is extension of electronic identity certification methods with the so-called trusted ePUAP profile which, since 2017, revolutionized and made

67 Consolidated text: Journal of Law 2018 item 1360;

68 Consolidated text: Journal of Law 2018 item 1987

the establishment of capital companies more common[69]. The aim of a wider use of ICT system functionalities, instead of the traditional "paper route", is to streamline and accelerate registration proceedings conducted by commercial courts. The Act of 26 January 2018 amending the Act on the National Court Register and certain other acts[70], the individual provisions of which entered into force or will enter into force on 1 March 2020 at the latest[71], provides for significant changes in the above mentioned scope.

The Ministry of Justice is also the initiator of the proposed further amendments to the Code of Civil Procedure. As of 22.11.2018, work on the draft was at the stage of the so-called Legal Commission[72]. As the draft authors write: "the aim of the new provisions is to significantly improve regulations concerning civil proceedings pending before courts. The solutions contained in it concern, among others, jurisdiction of the court, planning a hearing, elimination of the abuse of procedural law by the parties, introduction of the so-called Horizontal Complaints, reinstatement of separate commercial proceedings in the Polish civil proceedings. These regulations are part of the broadly understood reform of the judiciary carried out by the legislative and executive authorities in Poland. At this stage, due to lack of certainty as to the final wording of the draft act amending the Code of Civil Procedure, it is not possible to present unambiguous opinions on potential doubts as to the compliance of these regulations with the Constitution or supranational law norms".

4. EXECUTIVE SUMMARY

The present of the study concerns the reforms of the Polish judiciary introduced by Polish authorities in the years 2016-2018, through subsequent amendments to the Act of 27 July 2001 on the system of common courts. The system of the Republic of Poland is based on the principle of division of power, therefore any legislative changes in the scope of laws regulating the functioning of any of the powers become the subject of numerous studies proving constitutionality or unconstitutionality of individual proposed solutions.

The Polish Constitution RP contains a basic set of principles on which, in the opinion of the legislator, the functioning of the judiciary in Poland should be based. These principles serve to ensure independence of the judiciary and independence of judges, to safeguard the right to a fair trial, as well as to ensure the rights of defense of citizens.

The Polish Basic Law directly indicates that particular regulations concerning the functioning of the common judiciary should be included in the act regulating its system. This concerns, *inter alia*, the system and jurisdiction of common courts and proceedings before them[73], the procedure and the manner of appealing to court in the event of a judge being retired, determination of the age limit after which judges retire.

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69 Cf. Act of 21 April 2017 amending the Act – Code of Commercial Companies, the Act – Code of Civil Procedure and the Act on the National Court Register (Journal of Laws of 2017, item 1133)

70 Journal of Laws of 2018 item 398

71 Cf. Article 55 of the aforementioned Act

72 Cf. Draft Act amending the Code of Civil Procedure and certain other acts (UD309), access on-line: https://legislacja.rcl.gov.pl/docs//2/12305652/12474265/dokument367241.pdf

73 Article 176 section 2 of the Constitution RP;

Disputes concerning the potential unconstitutionality of laws reforming the Polish judiciary concern differences of opinion on the assessment of constitutionality or unconstitutionality of new regulations. Among the changes in the regulations concerning the judiciary in Poland, the changes concerning the National Council of the Judiciary and the Supreme Court, and not the common judiciary, met with much greater social opposition, as well as the presidential veto in the summer of 2017.

Limiting the scope of changes introduced to the Act of 27 July 2001 on the system of common courts to one denominator, it should be noted that the purpose of the regulation is to accelerate and improve the functioning of common courts, as well as to increase the independence of individual judges from external pressures.

A flagship change is, for example, introduction of the principle of random allocation of judges to individual cases to the Polish civil procedure. The aim of this regulation is to make the workload of all judges more even, as well as to limit the influence of the heads of the judicial departments on the selection of judges for a particular case. The new solutions use an ICT system based on algorithms using random number generators, and although they successfully operate in other countries, they are criticized, e.g. regarding the possible influence of programmers on the content of algorithms.

Negative reactions of the reform opponents resulted from legislative changes concerning: retirement of judges, the possibility of dismissal of presidents and vice-presidents of courts by the Minister of Justice within 6 months from the entry into force of the amendment to the Law on the system of common courts, as well as clarification of situations in which it is possible to transfer a judge to another judicial department without his or her consent. Some of the changes, after presentation of the remarks of EU institutions and opponents of reforms, have been withdrawn.

Finally, it should be pointed out that a number of regulations concerning the reform of common courts met with a neutral or positive reaction of the judiciary in Poland. Apart from random allocation of cases, these include the introduction of new rules for allocating activities in divisions to judges, trainee judges and legal clerks, entrusting certain activities in the field of justice to trainee judges, introduction of improvements and the institution of foreign law coordinators in each district of the court, etc. It should also be pointed out that the changes in the system and functioning of courts do not only concern the so-called system acts, but also court procedures. The Ministry of Justice has prepared, among other things, a draft act amending the Code of Civil Procedure, in which the legislator, guided by the need to speed up the functioning of courts, plans to introduce a number of improvements.

CHAPTER 2.
THE REFORM OF THE SUPREME COURT

I. INTRODUCTORY REMARKS

On 12 July 2017, a group of MPs from Law and Justice submitted a draft law on the Supreme Court to the Sejm. It was a subject to media speculation that the actual author of the draft law was the Ministry of Justice, which, like other ministries, sometimes bypasses the process of public consultations related to the procedure of government draft laws by submitting its own draft laws through members of parliament who are not subject to such obligation. This thesis, however, has never been formally confirmed.

The MPs' draft law on the Supreme Court provided for the dissolution of all four chambers of the Supreme Court (Civil; Criminal; Labour, Social Security and Public Affairs; Military) and the creation of three new chambers in their place: the Public Law Chamber, the Private Law Chamber and the Disciplinary Chamber. On the date of entry into force of this law, **all** judges of the Supreme Court (including the incumbent First President of the Supreme Court) were to be retired, with the exception of those appointed by the Minister of Justice. The regulations authorised the Minister of Justice to appoint a temporary successor to the First President of the Supreme Court and to present candidates for new judges to the National Council of the Judiciary. In the justification of the project, Article 180 section 5 of the Constitution of the Republic of Poland was invoked as the legal basis for the exchange of personnel in the Supreme Court - in accordance with this provision, the judge may be retired „in the event of a change in the court system". The draft law also provided for lowering the retirement age of a judge from 70 to 65 years. Future judges of the Supreme Court aged 65 and over would be able to adjudicate longer, subject to the consent of the Minister of Justice, which could be granted three times for a fixed period of 5 years - and thus the judge of the Supreme Court could adjudicate up to a maximum of 80 years of age[1].

In the course of parliamentary work, under the influence of criticism from the Chancellery of the President of the Republic of Poland, amendments were introduced to the draft, providing for an increase in the competence of the President of the Republic of Poland in the process of staff exchange. Retirement could be avoided by judges of the Supreme Court appointed by the Minister of Justice and approved jointly by the National Council of the Judiciary and the President of the Republic of Poland. The interim successor of the First President of the Supreme Court was to be appointed not by the Minister of Justice, but by the President. The provision authorising the Minister of Justice to identify his own candidates for new judges of the Supreme Court and submit them to the National Council of the Judiciary, as well as the rules on the retirement age,[2] remained unchanged.

1 Poselski projekt ustawy o Sądzie Najwyższym, druk sejmowy nr 1727, http://orka.sejm.gov.pl/Druki8ka.nsf/0/FB-35352357349239C125815B00714AAA/%24File/1727.pdf.

2 Ustawa z 20 lipca 2017 roku o Sądzie Najwyższym (nie weszła w życie z powodu weta Prezydenta RP), http://orka.sejm.gov.pl/proc8.nsf/ustawy/1727_u.htm.

On 31 July 2017, the President of the Republic of Poland vetoed the act described above, motivating his decision through the fact that the Minister of Justice, who is both the Prosecutor General and a party to court proceedings, would have too much influence on the Supreme Court.

On 26 September 2017, the President of the Republic of Poland submitted his own draft law on the Supreme Court in the Sejm. The draft contained milder solutions than those contained in the MPs' draft, and introduced completely new elements:

- one chamber instead of four (Military Chamber) was to be liquidated;

- two new chambers would be created (the Chamber of appealnary Control and Public Affairs and the Disciplinary Chamber);

- only those judges of the Supreme Court who were 65 years of age were to retire;

- the President, not the Minister of Justice, was to give permission for longer service of a judge over 65 years of age;

- a new specific remedy against final judgments of common and military courts was introduced: an extraordinary appeal;

- participation of jurors in adjudicating panels of the Supreme Court in the handling of an extraordinary appeal and disciplinary cases was provided for.

On 20 December 2017, the President of the Republic of Poland signed the Act of 8 December 2017 on the Supreme Court (hereinafter also referred to as the „new Act on the Supreme Court")[3]. The Act was published in the Journal of Laws on 2 January 2018 and entered into force on 3 April 2018.

The law has become a subject of controversy at national and international level. In the Polish public debate, a significant part of the legal community - advocates', legal advisers' and judges' self-governments, legal faculty councils - subjected the new Act on the Supreme Court to strong criticism, accusing it of violating the principle of judicial independence and the principle of non-removability of judges[4]. On 2 August 2018, the Supreme Court has asked the Court of Justice of European Union, hereinafter reffered to as: "CJEU", for a preliminary ruling on the compatibility of lowering the age at which judges retire and retiring 65-year-old judges against their will with Article 19 of the Treaty on the European Union, Article 47 of the Charter of Fundamental Rights and Articles 2, 9 and 11 of Directive 2000/78 (which prohibits age discrimination). In the same decision, the Supreme Court suspended the application of the provisions of the new Act on the Supreme Court as regards retirement on grounds of age, citing the case-law of the CJEU granting the courts of the Member States the right to freeze national provisions incompatible

3 Act of 8 December 2017 on the Supreme Court (Journal of Laws, item 5, as amended).

4 See e.g. resolution of the Council of the Faculty of Law and Administration of the University of Łódź No. 39/2018 of 21 September 2018, resolution of the Council of the Faculty of Law and Administration of the Jagiellonian University of 18 December 2017, resolution of the Council of the Faculty of Law and Administration of the University of Silesia of 3 July 2018, resolution of the General Assembly of Judges of the Supreme Court of 28 June 2018, resolution of the Supreme Bar Council No. 45/2018 of 29 August 2018, position of the Presidium of the National Council of Lzegal Advisers of 3 July 2018.

with EU law[5]. The very decision of the Supreme Court aroused controversy on the government side - firstly because the question referred for a preliminary ruling had no connection with the case pending before the Court (which concerned the obligation of a Czech or Slovak company to pay social security contributions), and secondly because 2 of the 7 judges sitting in the panel were, according to the Act, retired judges at the time of the ruling.[6]In September 2018, the Social Insurance Institution (an institution subordinate to the Minister of Labor), a party to a case in which the Supreme Court ruled, withdrew the complaint being examined, which should usually result in the obligatory discontinuance of proceedings and, as a result, the withdrawal of questions referred for a preliminary ruling. On 16 October 2018, the Supreme Court found the withdrawal of the complaint to be contrary to good morals and thus inadmissible, so the questions for a preliminary ruling are still pending before the CJEU.[7]

Questions referred for a preliminary ruling to the CJEU were also raised by other adjudicating panels of the Supreme Court and the Supreme Administrative Court.[8] In the new questions the courts questioned not only the retirement of judges against their will, but also the independence of the new Disciplinary Chamber, which was elected by the National Council of the Judiciary, selected in majority by the Sejm.

In the international arena, the new Act on the Supreme Court has been criticised by the European Parliament[9] and the European Commission.[10]

On 2 October 2018, the European Commission, acting on the basis of Article 258 of the Treaty on the Functioning of the European Union, submitted a complaint to the Court of Justice of the European Union seeking a declaration that, by lowering the retirement age of Supreme Court judges and applying it to judges appointed to the Supreme Court before 3 April 2018, and by granting the President of the Republic of Poland the discretionary right to extend the active service of judges of the Supreme Court, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19 section 1 of the Treaty on European Union in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union.

Both in response to the questions referred for a preliminary ruling by the Supreme Court and to the Commission's complaint, the government took the view that the complaint is unfounded because the contested provisions of national law form part of the reform of the judiciary and the organization of the judiciary falls within the exclusive competence of the Member States. The Government invoked, inter alia, Articles 3 and 4 of the Treaty on the Functioning of the European Union, pointing out that the catalogue of EU competences contained in those provi-

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5 Decision of the Supreme Court (7) of 2 August 2018, POA III 4/18, http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty_o_sprawach/EditForm/III-UZP-0004-18_pytanie_prejudycjalne.pdf. (23.11.2018) .

6 See more: Analysis of the Ordo Iuris Institute - T. Chudziński, *Ocena postanowień Sadu Najwyższego z 18.07.2018 r. oraz z 02.08.2018 r.* , 10.8.2018, https://ordoiuris.pl/dzialalnosc-instytutu/ocena-postanowien-sadu-najwyzszego-z-18072018-r-oraz-z-02082018-r (10.8.2018).

7 Decision of the Supreme Court of 16 October 2018, III UZ 10/18

8 Decision of the Supreme Administrative Court of 21 November 2018, II GOK 2/18, http://orzeczenia.nsa.gov.pl/doc/E3FAD68B4C (23.11.2018).

9 European Parliament resolution of 1 March 2018 on the Commission decision to apply Article 7 section 1 TEU in view of the situation in Poland.

10 European Commission - Press release of 14 August 2018, Rule of Law: European Commission takes next step in infringement procedure to protect the independence of the Polish Supreme Court, http://europa.eu/rapid/press-release_IP-18-4987_en.htm (26.11.2018).

sions says nothing about the judiciary. Consequently, in accordance with the principle of conferral expressed in Articles 3 and 4 of the Treaty on the Functioning of the European Union, it should be presumed that regulation of the judiciary falls within the competence of the Member States. The government also referred to the judgment of the German Constitutional Court of 30 June 2009, 2 BvE 2/08, in which it stated that *[t] the competences of a Member State to exercise judicial power is one of the areas which are in principle allocated to a Member State in the framework of the federal association of the European Union.*

Consequently, according to the government, the institutions of the European Union, including the Court of Justice, cannot assess the legality of changes made in the Supreme Court or in other spheres of the judiciary[11].

The government's reply was received at the Court of Justice on 18 October 2018. Already on 19 October 2018, at the request of the Commission, the Vice-President of the Court of Justice issued a decision ordering Poland to refrain from filling the vacancies dismissed by the judges of the Civil, Criminal and Labour and Social Security Chamber who had retired due to the age of 65, until the final judgment is delivered[12]. Representatives of the authorities publicly expressed doubts as to the impartiality and independence of the Court, pointing out that the ruling was made on the eve of local government elections, and most likely without becoming familiar with the position of Poland[13]. On 22 October, Professor Małgorzata Gersdorf - according to the government a retired judge, according to the other party the First President of the Supreme Court still in office - acting directly on the basis of the provisional decision of the CJEU called on the judges who were forced into retirement to appear at the Supreme Court[14].

On 21 November 2018 - the Sejm and on 23 November 2018 – the Senate passed an act amending the Act on the Supreme Court, which:

- ex lege restores all judges retired against their will to adjudicate;

- recognizes Małgorzata Gersdorf as First President of the Supreme Court;

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11 Position of Prime Minister Mateusz Morawiecki - *Morawiecki: nie ma czegoś takiego jak bezpośrednia władza UE nad prawodawstwem Polski*, TVP Parlament portal, of 2 November 2018, http://www.tvpparlament.pl/aktualnosci/morawiecki-nie-ma-czegos-takiego-jak-bezposrednia-wladza-ue-nad-prawodawstwem-polski/39762883 (23.11.2018); position of the Deputy Minister of Justice Marcin Warchoł - *„Prawo unijne nie reguluje względem krajów Wspólnoty organizacji wymiaru sprawiedliwości"*, portal TVP info of 17 October 2918, https://www.tvp.info/39506147/prawo-unijne-nie-reguluje-wzgledem-krajow-wspolnoty-organizacji-wymiaru-sprawiedliwosci (23.11.2018); position of the deputy head of the Chancellery of the President of the Republic of Poland Paweł Mucha - *Mucha: Organizacja wymiaru sprawiedliwości jest kompetencją państw członkowskich UE*, w: „Dziennik Gazeta Prawna" of 15 Seoptember 2018https://www.gazetaprawna.pl/artykuly/1260001,organizacja-wymiaru-sprawiedliwosci-jest-kompetencja-panstw-czlonkowskich-ue.html (23.11.2018).

12 Order of the Vice-President of the CJEU of .19 October 2018 in case C-619/18 (Commission v Poland) http://curia.europa.eu/juris/document/document.jsf;jsessionid=CD 4C75503D683900D7A73D0EDC525195?text=&docid=206927&pageIndex=0&doclang=PL&mode=req&dir=&occ=first&part=1&cid=1283213 (23.11.2018).

13 Position of the President of the Republic of Poland Andrzej Duda - *Prezydent o decyzji TSUE: Tuż przed wyborami. Znamienne*, https://www.rp.pl/Sadownictwo/181029721-Prezydent-o-decyzji-TSUE-Tuz-przed-wyborami-Znamienne.html (23.11.2018); position of the head of the Chancellery of the President of the Republic of Poland Michał Dworczyk - *Dworczyk: Trwa analiza, czy TSUE miał prawo zająć się tą sprawą*, portal „Do Rzeczy" z 23 października 2018 r., https://dorzeczy.pl/obserwator-mediow/81438/Dworczyk-Trwa-analiza-czy-TSUE-mial-prawo-zajac-sie-ta-sprawa.html (23.11.2018).

14 Letter of Prof. Małgorzata Gersdorf of 22 October 2018, http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2018.10.22%20-%20PPSN%20-%20Wezwanie%20do%20sędziów.pdf (26.11.2018). .

- provides that the new retirement age of 65 will only apply to new judges of the Supreme Court, while the old judges of the Supreme Court will retire at the former age of 70;

- waives the possibility of further judgement by a judge after the age of 65 after obtaining the consent of the President of the Republic of Poland. As a result, each judge of the Supreme Court after reaching the age of 65 will be retired without the possibility of extending the mandate to adjudicate[15].

On 17th December, the President signed this Act into law[16]. The Act goes further than the above mentioned decision of the Vice President of the CJEU of 19 October 2018, which only ordered the suspension (and not the repeal) of the application of the provisions of the act concerning forced retirement until the Court of Justice issued a judgment in a case brought by the European Commission. According to press reports, in connection with the adoption of a law that addresses all the Commission's concerns, the Polish government counts on withdrawal of the complaint by the Commission even before the CJEU judgment is delivered[17].

On 17 December 2018, the Grand Chamber of CJEU has unanimously upheld the Vice President's order of 19 October 2018[18]. The case is still awaiting Court's final judgment.

Bearing in mind that the situation concerning the Supreme Court is dynamic and at the time of drafting this text it is difficult to predict whether the last concessions will continue, all legal and factual problems arising from the provisions adopted in December 2017 will be discussed.

II. MAIN PROBLEMS RELATED TO THE NEW ACT ON THE SUPREME COURT

1. LOWERING THE RETIREMENT AGE OF JUDGES OF THE SUPREME COURT

1.1. DESCRIPTION OF THE LEGAL AND FACTUAL SITUATION

Before 3 April 2018, previous Act on the Supreme Court of 23 November 2002[19] stated that the Supreme Court judges retired at the age of 70. They also had the opportunity, not later than 6 months before that age, to submit to the First President of the Supreme Court a declaration of willingness to continue to occupy their position and to present a certificate stating that the given judge is able to perform the duties of a judge due to his or her state of health. If such a declaration was made and the relevant certificate was presented, the judge could hold the position not longer than until 72 years of age. The right to continue to hold the position resulted directly from the

15 Act of 21 November 2018 amending the Act on the Supreme Court, parliamentary print No. 3013, passed by the Sejm and Senate and, as of 22 November 2018, pending signature by the President of the Republic of Poland. - http://orka.sejm.gov.pl/proc8.nsf/ustawy/3013_u.htm.

16 Chancellery of President of the Republic of Poland communiqué: *President signs bill amending law on Supreme Court*, http://www.president.pl/en/news/art,926,president-signs-bill-amending-law-on-supreme-court.html (7.1.2019).

17 P. Sobczak, *Po nowelizacji ustawy o SN będzie nacisk na wycofanie przez KE skargi*, depesza prasowa z 22.11.2018, https://www.prawo.pl/prawnicy-sady/ustawa-o-sadzie-najwyzszym-po-nowelizacji-ke-wycofa-skarge,333411.html (22.11.2018).

18 Order of the Grand Chamber of CJEU of 17 December 2018, C-619/18 R, http://curia.europa.eu/juris/document/document.jsf?text=&docid=209302&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=6545894.

19 Act on the Supreme Court of 23 November 2002 (Journal of Laws from 2016, item 1254).

provision of the Act, which did not provide for the discretionary power of the First President of the Supreme Court. As of 3 April 2018, pursuant to Article 37 § 1 of the Supreme Court Act, the retirement age of the Supreme Court judges was reduced to 65 years. The reduced retirement age also applies to judges appointed to the Supreme Court before 3 April 2018 (in active service on the date of entry into force of the Act).

According to Article 111 § 1 of the Act on the Supreme Court, incumbent judges of the Supreme Court who are 65 years old before the Act enters into force or who turn 65 by 3 July 2018 retire as of 4 July 2018. According to Article 111 § 1a of the Act on the Supreme Court, judges of the Supreme Court who turn 65 years between 4 July 2018 and 3 April 2019 retire as of 3 April 2019. With respect to Supreme Court judges appointed to the Supreme Court before 3 April 2018 who reach the age of 65 after 3 April 2019, the provision lowering their retirement age is the provision of Article 37 § 1 of the Act on the Supreme Court.[20]

By virtue of the Act (regardless of age), 4 judges of the Military Chamber, which was dissolved, were retired, and their cases transferred to the Criminal Chamber.

On the other hand, 27 out of 72 judges were retired due to their age, with 5 of them having obtained the consent of the President of the Republic of Poland for further adjudication - which will be discussed in a separate item below.

On 5 July 2018, 15 of the aforementioned 27 Supreme Court judges, including the First President, were informed of their retirement as of 4 July 2018. On 12 September 2018, 7 more judges were informed of their retirement by the President of the Republic of Poland. In total, 22 judges of the Supreme Court, including the President of the Criminal Chamber and the President of the Chamber of Labour and Social Security, were retired in the light of the provisions of the Act.

One of the reasons for lowering the age of retirement was the so-called decommunization. It should be noted, however, that among the 72 judges of the Supreme Court, judges adjudicating in political trials against oppositionists in the period of the People's Republic of Poland constitute a significant minority - at the time of the adoption of the new Act on the Supreme Court there were 7 such judges: Józef Iwulski (President of the Labour Chamber), Dorota Rysińska, Waldemar Płóciennik, Andrzej Siuchniński (judges of the Criminal Chamber), Jerzy Steckiewicz, Jan Rychlicki, Marian Buliński (judges of the Military Chamber)[21]. There were 2 judges connected with the communist secret police: Wiesław Błuś (President of the Military Chamber) and Eugeniusz Wildowicz (Criminal Chamber). No judge of the Civil Chamber of the Supreme Court ruled under martial law, nor was affiliated with the communist services. To sum up, 9 out of 72 judges of the Supreme Court had in the light of the available information disgraceful elements in their past.

Admittedly, in the public debate other judges, who during the communist period belonged to the communist party, communist youth party or performed functions in the state administration,

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20 § 1a was added by Act of 20 July 2018 amending the Act - Law on the system of common courts and certain other acts (Journal of Laws, item 1443).

21 Press article: *Premier o „haniebnych wyrokach". Ilu sędziów Sądu Najwyższego orzekało w stanie wojennym?*, on: TVN24 portal of 9 July 2018, https://www.tvn24.pl/wiadomosci-z-kraju,3/ktorzy-sedziowie-sadu-najwyzszego-orzekali-w-stanie-wojennym,851747.html (26.11.2018)..

were also pointed out. In most cases, these are either judges who had retired before the new law came into force, or judges with little connection to the communist authorities. For example, one of the judges was charged with sitting on the Legislative Council, which was responsible for issuing opinions on government draft laws during the communist period, another with the fact that he was appointed a judge at the end of the 1980s by the Council of the People's Republic of Poland (the only charge), a judge who started to rule only in 1990 was accused of being a man who was a member of the communist party[22].

1.2. ANALYSIS OF THE MOST IMPORTANT LEGAL PROBLEMS

The new Act on Supreme Court lowered the retirement age of judges from 70 to 65 years.

The very competence of the parliament to reduce the age of retirement of judges is beyond doubt - the Constitution of the Republic of Poland explicitly empowers the legislator to determine the age of retirement of judges in Article 180 section 4. The age of retirement of judges has changed many times over the last century, oscillating between 65 and 70 years of age.

It is worth noting that the presidential draft law adjusts the retirement age of judges to the general retirement age of men, which from 1 October 2017 is 65 years. Similar solutions exist abroad, where the transition to retirement is also linked to the achievement of the general retirement age. In Germany, Austria and Switzerland, judges retire after reaching the general retirement age. In Germany, judges at all levels retire at the age of 67, but if they were born before 1 January 1947, they retire when they reach the age of 65. Judges born between 1947 and 1963 are also retired when they reach the age of 65-66[23]. In Austria, too, judges at all levels retire at the age of 65[24]. In Switzerland, judges of the Federal Court retire at the age of 68[25]. The admissibility of lowering the retirement age of judges to 65 years of age is also supported by historical arguments, which testifies to the legislator's flexible approach to this issue. During the last century, the rules of retirirement for judges were changed four times - in 1929-1950 all judges of common courts, as well as judges of the Supreme Court, retired after reaching the age of 70[26]; in the years 1950-1962, judges were not obliged, but only had the right to retire at the age of 60[27]; in the years 1962-1989, the institution of state of retirement was resigned in favour of retirement and the removal of a judge from his or her post when he or she reached the age of 70[28]; in the years 1990-2002, the

22 Press article: *Pupile bezpieki i entuzjaści partii komunistycznej. Zobacz LISTĘ SĘDZIÓW Sądu Najwyższego*, on: Niezależna portal, of 2 October 2018, https://niezalezna.pl/238603-pupile-bezpieki-i-entuzjasci-partii-komunistycznej-zobacz-liste-sedziow-sadu-najwyzszego (26.11.2018).

23 § 48 sections 1 and 3 of the Act of 19 April 1972 on Judges in the consolidated version of 8 June 2017. (*Deutsches Richtergesetz*, announced text: Bundesgesetzblatt I S. 713 as amended).

24 § 99 of the Act of 20 December 1961 on the employment relationship of judges in unified version from 16 October 2017 (*Bundesgesetz über das Dienstverhältnis der Richterinnen und Richter, Staatsanwältinnen und Staatsanwälte und Richteramtsanwärterinnen und Richteramtsanwärter*, announced text: Bundesgesetzblatt No. 305/1961 as amended).

25 Article 9 section 2 of the Law of 17 June 2007 on the Federal Court in the consolidated version of 1 June 2017 (*Bundesgesetz* über *das Bundesgericht*).

26 Article 109 §1(a) of the Regulation of the President of the Republic of Poland of 6 February 1928. - Law on the system of common courts in the wording from 1928 to 1950.

27 Article 70 of the Regulation of the President of the Republic of Poland of 6 February 1928. - Law on the system of common courts in the wording from 1950 to 1962.

28 Article 20 section 1 item b of the Act of 15 February 1962 on the Supreme Court in the wording from 1962 to 1984, then Article 38 section 1 item 5 of the Act of 20 September 1984 on the Supreme Court in the wording from 1984 to 1989.

judge was removed from his or her post when he or she reached the age of 65[29]; at the end of 2002, retirement at the age of 70 was introduced again[30].

DIAGRAM 1. JUDGES RETIREMENT AGE IN GERMANY, AUSTRIA, SWITZERLAND AND POLAND

In Germany, Austria and Switzerland, judges retire after reaching the general retirement age.

GERMANY	AUSTRIA	SWITZERLAND	POLAND
67	**65**	**68**	**65**
Judges at all levels retire at the age of 67, but if they were born before 1 January 1947, they retire when they reach the age of 65. Judges born between 1947 and 1963 are also retired when they reach the age of 65-66.	Judges at all levels retire at the age of 65.	Judges of the Federal Court retire at the age of 68.	New retirement age of 65 will only apply to new judges of the Supreme Court, while the old judges of the Supreme Court will retire at the former age of 70.

There are, however, two issues that raise doubts.

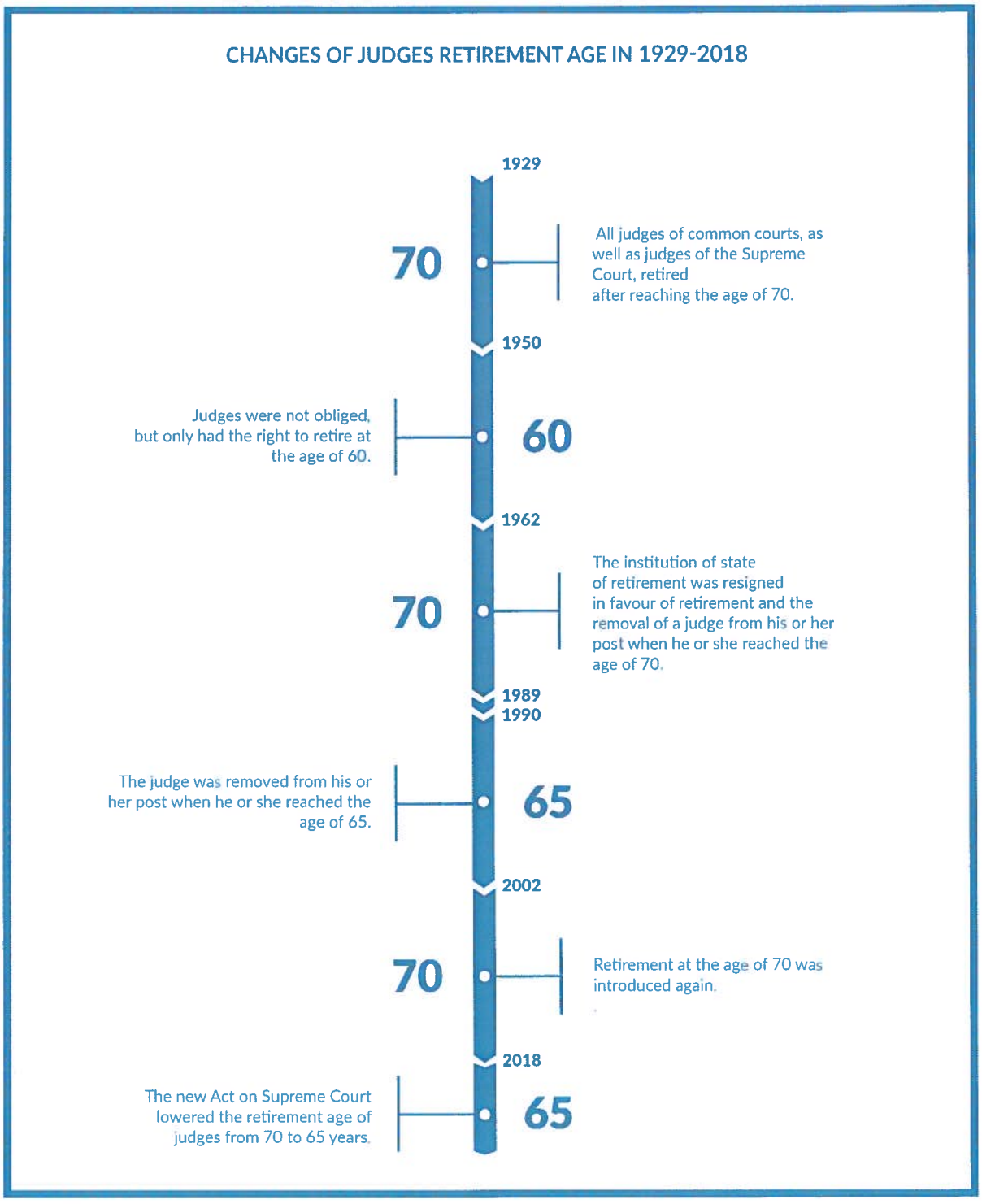
Firstly, it is not clear whether the Constitution requires a transitional period for judges who reached the age of 65 in the year of entry into force of the new law, enabling them to adjudicate on the basis of the existing rules, and thus until they reach the age of 70. According to the prevailing view, compulsory retirement of judges who did not reach age of 70 constitutes "de facto" removal from office, which is prohibited under Article 180 (1) of Constitution. On the other hand, statute shall establish an age limit beyond which a judge shall proceed to retirement, as set out in Article 180 (4) of Constitution – which could be understood as an exemption from irremovability principle.

Secondly, it is not clear whether the Parliament has unlimited freedom to determine the retirement age of judges, i.e. whether it can determine the retirement age solely on the basis of health criteria (i.e. the mental and physical fitness of judges to work from a medical point of view) or

29 Article 33 section 1 item 3 of the Act of 20 September 1984 on the Supreme Court in the wording from 1990 to 2001, and then Article 33 section 1 of the Act in the wording from 2001 to 2002.

30 Article 30 § 1 of the Act of 23 November 2002 on the Supreme Court in the wording from 2002 to 2017.

also on the basis of political criteria (e.g. to carry out so-called decommunisation). An affirmative answer to this question, based on a literal interpretation of Article 180 section 4 of the Constitution, which does not impose any restrictions on the legislator, would open the way for the use of the competence to determine the age of retirement in order to exchange staff in courts - not only at the age of 65, but also at the age of 50 or even 40. In practice so far, the competence to determine retirement age has only been used to remove judges who, because of their advanced age, were no longer mentally able to continue to perform their functions.



2. SHORTENING OF THE CONSTITUTIONAL TERM OF THE FIRST PRESIDENT OF THE SUPREME COURT

2.1. DESCRIPTION OF THE LEGAL AND FACTUAL SITUATION

The First President of the Supreme Court is the body of the Supreme Court which manages the work of the court administration (non-judicial part of the Supreme Court's employees), fills functional vacancies within the Supreme Court (heads of departments in chambers) and represents the Supreme Court externally.

The procedure for the appointment of the First President of the Supreme Court is regulated by the Constitution and the Act on the Supreme Court.

In accordance with Article 183 section 3 of the Constitution of the Republic of Poland, the First President of the Supreme Court is appointed by the President of the Republic of Poland for a 6-year term of office from among the candidates indicated by the General Assembly of Judges of the Supreme Court.

Professor Małgorzata Gersdorf was appointed the First President of the Supreme Court in 2014, and her 6-year term was supposed to last until 30 April 2020. In addition, according to statutory norms in force on the day of her appointment as a judge of the Supreme Court, her active service in the Supreme Court should end on November 22, 2022. As Judge Gersdorf reached age of 65 on November 22, 2017, which is even before the Act on the Supreme Court of December 2017 came into effect, according to its wording, she should retire from July 3, 2018.

2.2. ANALYSIS OF THE MOST IMPORTANT LEGAL PROBLEMS

As a result of lowering the retirement age of the judges of the Supreme Court, the term of office of the First President of the Supreme Court, Professor Małgorzata Gersdorf, who was appointed to office in 2014, has been shortened. Although no provision of the new law on the Supreme Court speaks directly about shortening the term of office, the lowering of the retirement age also applies to Małgorzata Gersdorf as a judge of the Supreme Court. In the light of the government's position, only an active judge of the Supreme Court can be the First President of the Supreme Court.

The essence of the legal problem concerns interpretation of two provisions of the Constitution of the Republic of Poland: Article 183 section 3 on the 6-year term of office of the first President of the Supreme Court and Article 180 section 4 authorising the legislator to determine the age of retirement of judges. According to the position of the President and the government, Article 180 section 4 is an exception to Article 183 section 3, and it is therefore permissible to shorten the constitutional term of the First President by an act, if it results from a lowering of the age of retirement. According to the position of most legal circles, interruption of the term of office of a constitutional body by way of an act is unacceptable, in particular when it comes to the judiciary, which should be separate and independent from other powers, including the parliament (Article 173 of the Constitution of the Republic of Poland).

3. INTRODUCTION OF THE REQUIREMENT TO OBTAIN THE CONSENT OF THE PRESIDENT OF THE REPUBLIC OF POLAND FOR FURTHER ADJUDICATION AFTER THE AGE OF 65

3.1. DESCRIPTION OF THE LEGAL AND FACTUAL SITUATION

The new Act on the Supreme Court introduced the requirement to obtain the consent of the President of the Republic of Poland for further adjudication after the age of 65, for a period from 3 to 6 years. Earlier, a judge of the Supreme Court after turning 70 years of age could rule until the age of 72 only on the basis of a medical certificate confirming the ability to work, which was submitted to the First President of the Supreme Court.

The procedure for granting permission to continue to adjudicate is two-stage. In the first stage, the President of the Republic of Poland consults the National Council of the Judiciary on a given judge. The NCJ issues its opinion taking into account the interests of the judiciary or an important social interest, in particular the rational use of Supreme Court staff or the needs arising from the workload of individual Supreme Court chambers. In the second stage, the President of the Republic of Poland gives or refuses to give a consent after receiving the opinion of the NCJ, which is non-binding.

As mentioned above, the retirement provisions have had an effect on 27 out of 72 judges. 15 out of the 27 judges were informed that they had been retired. 5 positive and 7 negative opinions were issued by the National Council of the Judiciary for the remaining 12 judges of the Supreme Court who made a declaration of willingness to continue to hold the position of judge or a general declaration of willingness to continue adjudicating (without referring to the disputed legislation). On 11 September 2018, the President of the Republic of Poland decided to grant permission for five judges of the Supreme Court to continue to occupy the position for a period of three years, and at the same time informed that the remaining seven judges of the Supreme Court, including two Presidents of the Supreme Court Chambers, retired on 12 September 2018.

3.2. ANALYSIS OF THE MOST IMPORTANT LEGAL PROBLEMS

The requirement to obtain the consent of the President of the Republic of Poland to continue adjudicating after the age of 65 raises doubts from the point of view of the constitutional principle of independence and separation of powers (Article 173 of the Constitution) and the principle of judicial independence (Article 178 section 1 of the Constitution). As regards the first plea, the full panel of the Constitutional Tribunal in its judgment of 24 June 1998, K 3/98 explicitly ruled out the possibility of entrusting a political body (citing the example of the Minister of Justice) with the power to decide on further adjudication by a judge reaching retirement age. Entrusting such competence to the President of the Republic of Poland, who is also a political body, is therefore contrary to Article 173 of the Constitution, interpreted in the spirit of judgment K 3/98.

As regards the second charge, the Polish Constitution does not preclude the introduction of a requirement for a judge to obtain consent to continue adjudicating after reaching retirement age. The procedure for granting such consent should, however, be designed in such a way as to exclude the risk of influencing the judge's judicial activity - the decision of the authority should not be discretionary, but should be linked to the fulfilment of strict and objective conditions, in order

to avoid a situation in which the granting of consent could be made dependent on the judge's judicial line. Objective reasons should be understood as obstacles that clearly prevent further performance of the judge's duties, such as serious illness, loss of strength, loss of qualifications required by the act to hold the office of judge (e.g. acquisition of citizenship of a foreign country).

The procedure for granting consent for further adjudication provided for in the new Act on the Supreme Court does not meet these requirements. The President of the Republic of Poland decides whether or not to give consent to further adjudication by way of a decision. The decision in this case is fully discretionary, because the President of the Republic of Poland is guided by generally defined criteria, which may be interpreted in different ways. In the public statements of the representatives of the Chancellery of the President of the Republic of Poland, it was clearly suggested that when making personal decisions while appointing judges, the head of state is guided not only by objective criteria such as health, but also assesses media information about a given judge[31]. The decision does not have to be grounded, which further enhances its discretionary character. What is more, consent for further adjudication is granted for a definite period of time (3 years), and may be granted twice – a judge aged 65 and over has to prepare twice for the assessment of his or her jurisprudence line by a political body which decides whether or not to grant consent for further adjudication.

4. CREATION OF AN AUTONOMOUS CHAMBER WITHIN THE SUPREME COURT

4.1. DESCRIPTION OF THE LEGAL AND FACTUAL SITUATION

The Supreme Court Act of 2017 provides for the creation of a new chamber - the Disciplinary Chamber, competent to deal with disciplinary cases concerning legal professions of public trust: judges, prosecutors, notaries, advocates and legal advisers.

Disciplinary Chamber, unlike the other four chambers:

- adops its own budget, which is included by the College in the overall budget. The College adopts the budget for the other four chambers, while the budget of the Disciplinary Chamber is included in the draft budget of the Court as a whole (Article 7 section 2 of the Act);

- has its own Chancellery with a separate human resources office, a commercial office and a financial office (Article 99 section 1 of the Act);

The President of the Supreme Court in charge of the Disciplinary Chamber, unlike the Presidents of the other four chambers, exercises in relation to the Chamber a significant part of the competences of the First President of the Supreme Court (Article 20):

- appoints and dismisses the Heads of Unit;

31 Wywiad z Andrzejem Derą, ministrem w Kancelarii Prezydenta RP: *Prezydent nie musi akceptować propozycji KRS [WYWIAD]*, w: „Dziennik Gazeta Prawna" z 30 sierpnia 2018 r.,https://prawo.gazetaprawna.pl/artykuly/1237114,dera-o-decyzji-prezydenta-ws-sedziow-sn.html (26.11.2018). .

- gives opinions on declarations of willingness to continue to hold the position of a judge of *the Supreme Court* by persons over 65 years of age;

- carries out activities specified in the Act related to the selection of the *Supreme Court* jurors;

- gives its opinion on the announcement of the President of the Republic of Poland on the number of vacancies in the Disciplinary Chamber;

- reassign the judges of the Disciplinary Chamber - with their consent - to work in another Chamber;

- applies to the President of the Institute of National Remembrance to verify the truthfulness of the vetting statement of a judge of the Disciplinary Chamber;

- applies to the Minister of Justice for delegating a judge of a common court to perform activities in the Disciplinary Chamber, as well as for delegating an assistant judge for an indefinite period of time;

- directing a judge of the Disciplinary Chamber for examination to the Social Insurance Institution's ruling doctor.

In addition, the First President of the Supreme Court is obliged to exercise some of his or her own competences in agreement with the President of the Disciplinary Chamber:

- with regard to the representation of the Supreme Court before the Constitutional Tribunal or in the work of parliamentary and senate committees;

- with regard to issuing an order to release a judge detained in the act of committing an offence.

4.2. ANALYSIS OF THE MOST IMPORTANT LEGAL PROBLEMS

The very creation of a Disciplinary Chamber within the Supreme Court does not raise any legal questions. The legislator is free to define the powers of the Supreme Court (Article 183 section 2 of the Constitution), and may therefore decide to entrust it with the consideration of disciplinary matters of the legal professions of public trust.

On the other hand, the legal and organisational status of the Disciplinary Chamber within the Supreme Court raises doubts. The Act shapes the status of the Disciplinary Chamber as a separate body not only in terms of competence (which is obvious), but also in terms of administration, personnel and finances, excluding it from the authority of the First President of the Supreme Court (which may give rise to doubts).

Although the Constitution of the Republic of Poland defines the competences of the First President of the Supreme Court to a residual degree, it is assumed in the doctrine of constitutional law that the act defining the organisation and tasks of the Supreme Court must take into account the special position of the First President as the traditional president of the court.

Therefore, the legislator is not entirely free to determine the competences of the First President of the Supreme Court[32]. In this context, debatable, at the very least, are the rules that separate the powers traditionally vested in the President of the court (in this case the First President of the Supreme Court) and transfer them to the President of one chamber, placing this person above the Presidents of the other chambers - such powers certainly include managing the work of the office handling administrative, personnel and financial matters, coordinating the work on the budget of the Court (in the capacity of President of the Supreme Court College), transferring judges with their consent between chambers and representing the Supreme Court outside the chamber.

5. EXTRAORDINARY APPEAL

5.1. DESCRIPTION OF THE LEGAL AND FACTUAL SITUATION

The Act on the Supreme Court introduces a new remedy of judicial supervision in civil and criminal proceedings - extraordinary appeal to the Supreme Court, considered by judges of the newly established Chamber of Extraordinary Control and Public Affairs (regulated in Articles 1, 26, 89-95 and 115 of the Act).

Subject-matter of the extraordinary appeal

The subject of an extraordinary appeal may be any final judgment of a common court or military court terminating the proceedings in a case, provided that the judgment cannot be reversed or changed by extraordinary means of appeal: cassation or complaint concerning the resumption of the proceedings. An extraordinary appeal may be brought if:

1) it is necessary to ensure compliance with the principle of a democratic state governed by the rule of law, making the principles of social justice a reality, **and**

2) if the judgment:

   c) violates the principles or freedoms and human and civil rights set out in the Constitution, or

   d) is manifestly vitiated by a misinterpretation or misapplication of the law, or

   e) there is a clear contradiction between the essential findings of the court and the evidence gathered in the case.

Entities entitled to lodge an extraordinary appeal

The Act introduces two groups of entities entitled to lodge an extraordinary appeal. They have a general right to lodge an extraordinary appeal:

1) Prosecutor General;

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32 P. Wiliński, P. Karlik, remark no. 19 to Article 183, in: M. Safjan, L. Bosek eds.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*; L. Garlicki, art. 183, in L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 4, Warsaw 2005, p. 6.

2) Ombudsman.

Special mandate to file an extraordinary appeal, limited through material competence of the entity, is enjoyed by:

1) President of the General Counsel to the Republic of Poland,

2) Children's Rights Ombudsman,

3) Patients' Ombudsman,

4) Chairman of the Polish Financial Supervision Authority,

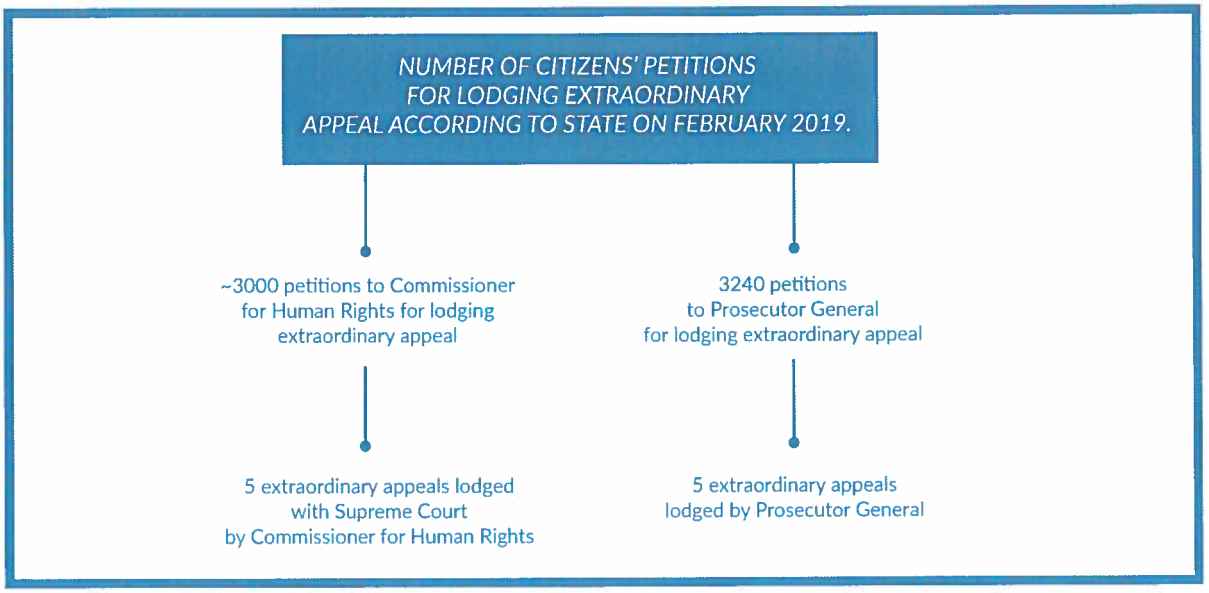
5) Financial Ombudsman,

6) Ombudsman for Small and Medium-sized Entrepreneurs,

7) President of the Office of Competition and Consumer Protection.

These entities may lodge an extraordinary appeal *ex officio* (on their own initiative) or at the request of the person concerned. Natural and legal persons who are parties to legal proceedings cannot, therefore, bring an extraordinary appeal on their own, but only through one of these entities.

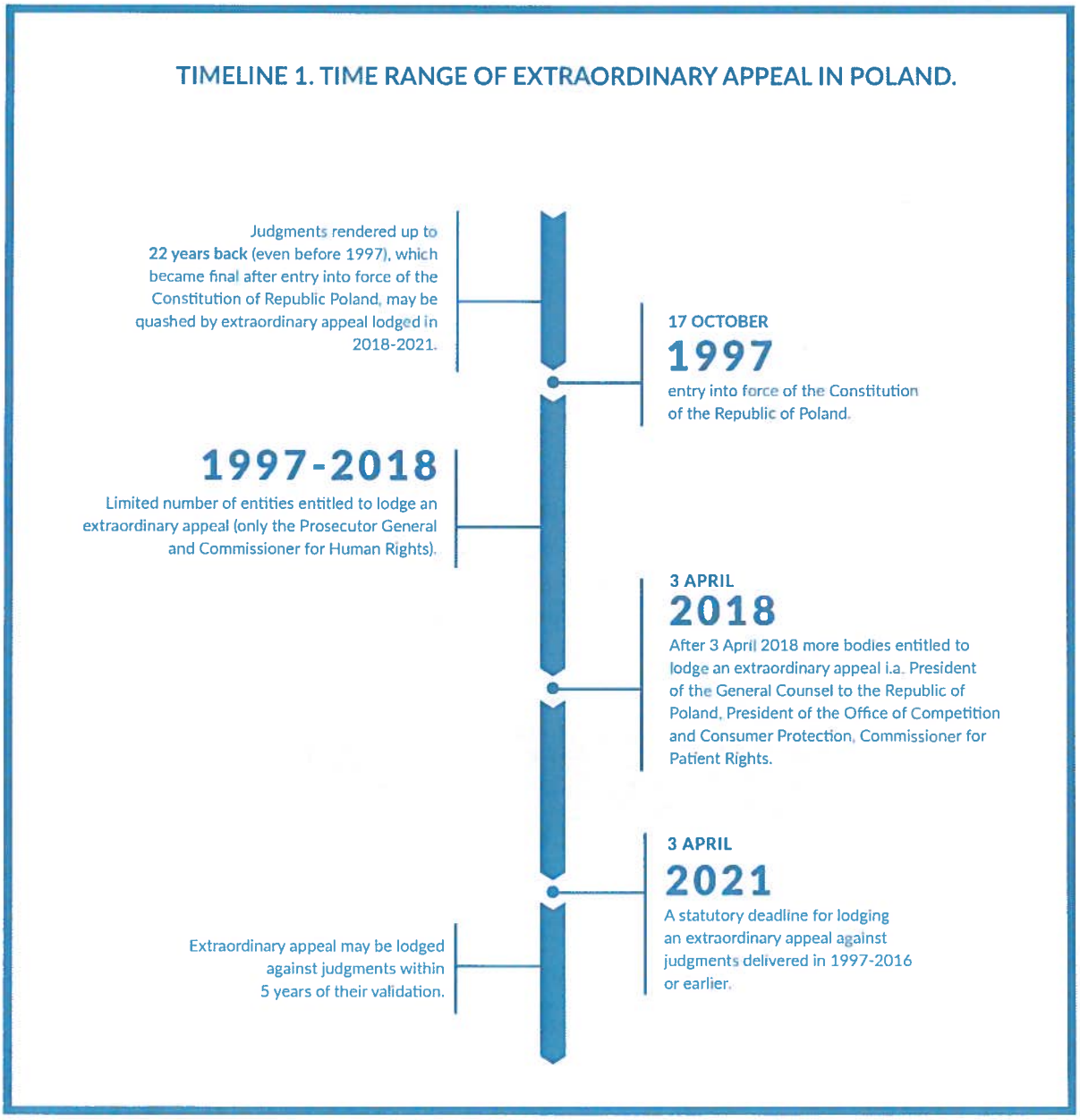
In response to allegations of the European Commission against the institution of an extraordinary appeal as a threat to the stability of court rulings, an amendment to the Act on the Supreme Court was adopted, according to which rulings finalised before 3 April 2018 may be challenged only by the Public Prosecutor General or the Ombudsman[33]. In the case of judgments finalised after 3 April 2018, the scope of the extraordinary appeal remained unchanged.



33 Article 2 item 5 of the Act of 10.5.2018 amending the Act - Law on the system of common courts, the Act on the Supreme Court and certain other acts (Journal of Laws, item 1045).

Time-limit for lodging an extraordinary appeal

An appeal may be lodged within five years of the decision becoming final, and the period is shortened to one year if a cassation or cassation appeal has been brought against the decision. However, the Act established a 3-year transitional period, in which the term extended to as much as 20 years from the issuance of the ruling is in force - until 3 April 2021, any final court decision which became final after the entry into force of the Constitution of the Republic of Poland, i.e. on 17 October 1997, may be the subject of an extraordinary appeal.



Examination of the extraordinary appeal

If an extraordinary appeal is accepted, the Supreme Court may:

1) repeal the contested decision and refer it back for reconsideration;

2) repeal the contested decision and decide itself on the merits;

3) limit itself to stating that the contested decision was issued in breach of law and to indicating the circumstances on account of which it issued such a decision, if the contested decision had irreversible legal consequences, in particular if 5 years have elapsed since the contested decision became final and if the reversal of the decision would violate the international obligations of the Republic of Poland.

It is worth noting that the second mentioned competence is a complete novelty - so far, the Supreme Court's competence has been of a purely cassation nature. Examination of an extraordinary appeal will be the only case in which the Supreme Court will not only be able to overturn a final decision, but also to rule on the merits of the case itself, without referring it back to it for re-examination.

5.2. Analysis of the most important legal problems

An extraordinary appeal is currently the strongest remedy in Polish procedural law, allowing for the revocation and amendment of any judgment made over the last 20 years.

The essence of the problem lies in the conflict between two values: the right to a fair trial (lawful, factual and equitable) on the one hand, and the security and stability of legal transactions on the other.

On the one hand, the security and stability of legal transactions has never been treated as an absolute value - neither in Poland nor in other European countries. Most, if not all, legal systems have extraordinary means of redress to verify final court decisions that grossly violate the law. The most common measure in Poland and abroad is cassation, which a party to the proceedings may lodge within a specified period of time with the highest court of a given country, which, in the event of a judgment being contrary to substantive or procedural law, may repeal it and remit it for re-examination.

Sometimes national law provides for additional, specific instruments to verify final court decisions.

In Germany, this is constitutional complaint (*Verfassungsbeschwerde*), by which a party to the proceedings can challenge a final and, in exceptional cases, an non-final decision of a court before the Federal Constitutional Tribunal for infringement of citizens' rights and freedoms within a period of one month.[34]. If the appeal is upheld, the FCT overturns the judgment and, if necessary, refers the case back to the court for re-examination.

34 Article 93 sections 4a–4b of the Basic Law of the Federal Republic of Germany (*Grundgesetz*) and § 90–95 of the Act of 12 March 1951 on the Federal Constitutional Tribunal (*Bundesverfassungsgerichtsgesetz*), BGBl. I S. 1473 as amended.

In France, such a specific instrument is the so-called cassation in the interest of the law (*cassation dans l'intérêt de la loi*), which the public prosecutor can bring to the Court of Cassation for any final decision without any time limit[35]. Such cassation serves only to harmonize the interpretation of the law, since even the annulment of a judgment by the Court of Cassation does not change the legal relationship between the parties to the proceedings - the annulled judgment continues to have legal effects between the parties.

In Polish criminal law, for years, without any controversy, there has been an institution of so-called extraordinary cassation, allowing the Minister of Justice and the Ombudsman to challenge any final decision in a criminal case without any time limit[36].

On the other hand, however, an extraordinary complaint differs significantly from the remedies described above. Unlike the French cassation in the interest of the law, an extraordinary appeal allows the judgment to be revoked with effect for the parties to the proceedings, and even a change of the judgment - unlike the German constitutional complaint. In practice, therefore, an extraordinary appeal is an atypical remedy which complements the court proceedings by a third instance. A similar solution does not seem to exist in the legal order of any European state.

The current structure of the extraordinary appeal raises doubts for two reasons:

1) compliance with the constitutional principle of non-retroactivity;

2) compliance with the constitutional principle of the stability of legal relations shaped by a final judgment.

Principle of non-retroactivity

Article 115 section 1 of the Act makes it possible to file an extraordinary appeal against final judgments ending the proceedings in cases which became final after the entry into force of the Constitution of the Republic of Poland, i.e. after 17 October 1997. The provision formulated in this way also makes it possible to appeal against court judgments which **were made** before 17 October 1997 and became final by that date. Thus, judgements made under other constitutional provisions may be controlled, from the point of view of the provisions of the new Constitution of the Republic of Poland, which was not yet in force at the time of the judgement. Such a solution may be inconsistent with the principle of *lex retro non agit* since it concerns the review of judgments of courts of first and second instance, which became final after 17 October 1997, but were issued before that date and in so far as the review is carried out from the point of view of the principles or freedoms and human and civil rights specified in the Constitution of the Republic of Poland, which were not then in force.

The problem described is not purely theoretical. For example, prior to the entry into force of the current Constitution of the Republic of Poland, the State Treasury was liable for damages for unlawful actions of public authorities on the basis of guilt - if a patient suffered damage as a result of unlawful actions of a policeman, he or she could only demand compensation from the

35 Articles 620 – 621 of the French Code of Criminal Procedure (*Code de procédure pénale*).

36 Article 521 of 6 June 1997 - Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

State Treasury if he or she proved an officer guilty. However, under the current Constitution of the Republic of Poland, the State Treasury is liable for damages regardless of whether a public official is to blame. *De lege lata* can therefore be appealed against through an extraordinary appeal against a court's judgment dismissing a compensation claim for failure to prove the guilt of a public official, citing Article 77, section 1 of the Constitution of the Republic of Poland.

The principle of stability of legal relations formed by final court decisions

The general provision of Article 89 of the Act, which makes it possible to move final court decisions within 5 years of their finalisation, and Article 115 of the Act establishing a 3-year transitional period during which it will be possible to move decisions from the last 20 years, raise doubts as to compliance with the principle of stability of the legal status shaped or confirmed by a final court decision, derived by the Constitutional Tribunal from the clause of a democratic state of law (Article 2 of the Constitution) and the right to court (Article 45 setcion 1 of the Constitution)[37]. In the judgment of 1 April 2008, SK 77/06, the Tribunal noted that at *some point in time there must be a ruling which is not subject to the control of other authorities and which gives rise to a presumption of legality which is not rebutted in further proceedings,* and the *proliferation of instances and legal remedies is not the most effective way of ensuring that public authorities respect the law.* Also in literature, the principle of stability of final judgments is recognised as a constitutional and international standard[38].

However, this principle is not absolute. In the light of the jurisprudence of the Constitutional Tribunal, a derogation from the principle of stability of legal transactions is permissible if the implementation of other constitutional norms and values so requires. The legislator may therefore create extraordinary appeals enabling final judgments with particularly serious factual or legal defects[39] to be moved within a reasonable period of time. A situation in which the decision issued does not reflect the reality due to the appearance of new evidence (judgment of the Constitutional Tribunal of 21 July 2009, K 7/09), and a situation in which the decision is burdened with qualified, gross illegality (judgment of the Constitutional Tribunal of 27 September 2012, SK 4/11) were found by the Constitutional Tribunal to be serious defects justifying the questioning of a final judgment.

Turning to the assessment of the grounds for an extraordinary action, it should be noted that the premise of a gross violation of law due to its misinterpretation or misapplication (Article 89 §1 item 2) and the premise of a manifest contradiction of material findings of the court with the content of evidence gathered in the case (Article 89 §1 item 3) may be regarded as „particularly serious defects", which justify the repeal of final court decisions. The introduction of the possibility to move a final judgment on these grounds falls within the freedom of the legislator, who in this case implements constitutional values justifying a derogation from the stability of legal transactions - the first premise serves to protect the rule of law, while the second premise reinforces the implementation of the principle of substantive truth resulting from the constitutional

37 See e.g. judgments of the Constitutional Tribunal of 19 February 2003, P 11/02; of 17 May 2004, SK 32/03; of 1 April 2008, SK 77/06; of 12 January 2010. SK 2/09; 22 September 2015, SK 21/14.

38 P. Grzegorczyk, *Stabilność orzeczeń sądowych w sprawach cywilnych w świetle standardów konstytucyjnych i międzynarodowych* [in:] T. Ereciński, K. Weitz (eds.), *Orzecznictwo Trybunału Konstytucyjnego a kodeks postępowania cywilnego*, Warsaw 2010, p. 26 et seq.

39 Cf. judgment of the Constitutional Tribunal of 19 February 2003, P 11/02. See also judgments of the Constitutional Tribunal of 15 May 2000, SK 29/99; of 13 May 2002, SK 32/01; of 17 May 2004, SK 32/03; 1 April 2008, SK 77/06.

right to a fair trial by a court[40]. The third premise (Article 89 §1 item 3) concerning the violation of a constitutional principle, human right or liberty *per se* serves to protect constitutional principles, norms and values, but seems to be formulated too broadly, since it covers not only serious (qualified) defects, but also ordinary ones, including irrelevant ones.

When assessing the time limits set out in the Act within which an extraordinary appeal would be admissible, it should be noted that the Constitution does not specify any limitations here. Nevertheless, the legislator should bear in mind the principle of legal certainty (Article 2 of the Constitution) and the related principle of stability of legal states shaped or confirmed by a final court ruling (Article 2 and Article 45 section 1 of the Constitution). The draft law provides for two time limitations for moving judgments: 5 years and 20 years, the latter only for a transitional period of 3 years.

The first limit seems to strike a sufficient balance between the need to respect social justice and the principle of stability of final judgments. In this case, decisions issued after 2012 will be the subject of an extraordinary appeal.

The second one, on the other hand, seems to be too long, since actions brought against judgments of the last 20 years may upset established facts which arose even decades ago and during that time caused legal consequences which woule be difficult to reverse or even irreversible. Bearing in mind that during the first three years of the Act's validity, the Supreme Court will be able to change even those judgments which caused irreversible legal consequences (see Article 115 § 2), there is a serious risk of destabilization of the existing legal states and situations of many citizens.

The jurisprudence of the Constitutional Tribunal does not clearly indicate after what date final court decisions or administrative decisions should not be moved by extraordinary appeal. In the case SK 13/98, the Constitutional Tribunal considered the period of 10 years to be long enough to ensure that the persons concerned could exercise their right of appeal against the final administrative decisions declaring the acquisition of agricultural holdings.

6. INTRODUCTION OF JURORS TO THE SUPREME COURT

6.1. DESCRIPTION OF THE LEGAL AND FACTUAL SITUATION

Jurors are non-legal graduates sitting on the court's panels, representing the social factor in the judiciary. Until 2018, jurors adjudicated only in common courts, in some criminal, family and labour cases.

The new Act on the Supreme Court introduced the institution of the Supreme Court juror (Articles 59-71, 73 and 94 of the Act). The position of a Supreme Court juror may be held by a person who:

40 Cf. more about the constitutional legitimacy of the principle of substantive law - B. Nita, A. Światłowski, *Kontradyktoryjny proces karny (między prawd prawdą materialną a szybość postępowania)*, [in:] „Państwo i Prawo" no. 1/2012, p. 33 et seq. See also judgment of the Constitutional Tribunal of 21 July 2009, K 7/09.

1) has exclusively Polish citizenship and enjoys full civil and public rights;

2) has impeccable character;

3) is not younger than 40 years of age;

4) at the date of election, is under 60 years of age;

5) is able, for health reasons, to perform the duties of a juror of the Supreme Court;

6) has at least a secondary or secondary vocational education.

The Supreme Court jurors are elected by the Senate for a 4-year term of office in a number determined by the Supreme Court College from among candidates nominated by associations, other social and professional organisations or at least 100 citizens with an active right to vote.

The Supreme Court jurors sit in panels adjudicating in two categories of cases: disciplinary cases concerning legal professions of public trust (dealt with within the Disciplinary Chamber) and extraordinary appeals (dealt with within the Chamber of Extraordinary Control and Public Affairs). Unlike in the case of common courts, where jurors constitute majority of the panel adjudicating in the consideration of specified criminal, family or labour cases, the jurors of the Supreme Court constitute a minority in the composition of adjudicating panels. When dealing with extraordinary appeals and disciplinary cases, the Supreme Court as a rule decides in a panel of 2 professional judges and 1 juror or 3 professional judges and 2 jurors.

6.2. ANALYSIS OF THE MOST IMPORTANT LEGAL PROBLEMS

Two objections can be raised against the institution of jurors: a constitutional and a practical one.

Firstly, the Constitution of the Republic of Poland empowers the legislator to include citizens without legal education to judge in courts exclusively in the field of the administration of justice (Article 182 of the Constitution of the Republic of Poland). In addition to the administration of justice, the Supreme Court also performs other activities provided for in the Act (Article 183 sections 1 and 2 of the Constitution). The term administration of justice is to be understood as the binding settlement of disputes over the law in which at least one party is an entity or a similar body[41]. In this context, it may be questionable whether the concept of administration of justice includes e.g. disciplinary cases. Firstly, the subject-matter of dispute in disciplinary case is not of legal, but of ethical nature– court assesses conduct of "defendant" from point of view of rules of professional ethics.

Secondly, in many disciplinary cases neither party is an individual in the traditional sense of the word: one party is the disciplinary ombudsman, and the other a person holding a public possi-

41 L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2014, p. 322; M. Granat, *Prawo konstytucyjne w pytaniach i odpowiedziach*, Warsaw 2014, p. 298.

tion: judge, prosecutor or notary (in the case of advocates or legal advisers, there are generally no such doubts).

In the Act on the Supreme Court, a clear distinction was made between the administration of justice by ensuring compliance with the law and uniformity of the jurisprudence of common courts and military courts through the recognition of appeals and adoption of resolutions resolving legal issues and extraordinary control of final court judgements (Article 1 item 1 letters a and b of the Act) and „other activities" such as the consideration of disciplinary legal cases of public trust professions (Article 1 section 2 of the Act). In this context, one may wonder whether entrusting jurors who do not have legal education with the competence to rule on disciplinary matters falls within the limits of the authority set out in Article 182 of the Constitution of the Republic of Poland.

From practical point of view it must be noted, that the Supreme Court is traditionally a court of law and not a court of fact, and its competence is limited to assessing the legality of court rulings and, in some cases, also the legality of actions of other public authorities (e.g. election commissions). In other words, in principle, the Supreme Court decides on the basis of the provisions of law, the problems it deals with are of a legal nature, while at this stage of the proceedings no factual findings are made. Therefore, in the 100-year history of the Supreme Court, exclusively professional judges have been adjudicating. In this respect, the Supreme Court is significantly different from the common and military courts, where the judges also assess facts, and where the experience of jurors may indeed prove useful. Meanwhile, the Supreme Court is traditionally an elite institution, composed exclusively of people with legal education and experience to deal with complex legal problems. The literature has so far ruled out the possibility of including a non-professional social factor in adjudicating in the Supreme Court[42]. In this context, doubts may be formulated as to whether a person without legal education possesses sufficient qualifications to assess, for example, whether the charged judge actually committed a disciplinary offence consisting in protractedness of proceedings within the meaning of the Act on complaints about the infringement of a party's right to hear a case in preparatory proceedings conducted or supervised by a prosecutor and court proceedings without undue delay[43].

7. METHOD OF APPOINTING NEW JUDGES OF THE SUPREME COURT, DESCRIPTION OF THE LEGAL AND FACTUAL SITUATION

The recruitment for 44 vacancies in the Supreme Court[44] was participated by a total of 215 candidates representing all legal communities (legal advisers, attorneys, judges, prosecutors, academics) [45]. The call was closed on 30 July. Initially, the NCJ spokesman declared that giving opinions on the candidates could last until the end of the year, but after the Supreme Court submitted

42 P. Wiliński, P. Karlik, remark no. 6 to Article 182, in: M. Safjan, L. Bosek (eds.), *op. cit.*

43 Act of 17 June 2004 on a complaint against the infringement of a party's right to hear a case in court proceedings without undue delay (Journal of Laws of 2018, item 75, as amended).

44 Announcement of the President of the Republic of Poland of 24 May 2018 No 127.1.2018 on the vacant positions of judges in the Supreme Court.

45 Depesza prasowa: *Krajowa Rada Sądownictwa: 215 kandydatów do Sądu Najwyższego, wycofało się 11*, w: portal TVN24 z 10 sierpnia 2018 r., https://www.tvn24.pl/wiadomosci-z-kraju,3/krajowa-rada-sadownictwa-215-kandydatow-do-sadu-najwyzszego,860197.html(26.11.2018).

preliminary questions to the CJEU, the Council accelerated its work and, as a result, the candidates were selected on 23 August 2018. As a result, the process of verification of candidates was reduced to a minimum: hearings of interested parties lasted on average several minutes, many did not attend the hearing at all, the formal requirements were checked superficially. As a result of haste, the Council also recommended legal counsel Małgorzata Ułaszonek-Kubacka as a judge of the Disciplinary Chamber of the Supreme Court, despite the fact that she herself had once been convicted in disciplinary proceedings. Eventually, the candidate withdrew her candidacy herself.

The President of the Republic of Poland appointed new judges on 19 September and 10 October 2018.

The appointment of new judges of the Supreme Court is also controversial.

The status of newly appointed Supreme Court judges is challenged on four grounds:

1) doubts concerning the correctness of filling vacancies in the National Council of the Judiciary (see questions referred for a preliminary ruling to the CJEU by the Supreme Court in cases ref. III PO 7/18, III PO 8/18, III PO 9/18 mentioned above),

2) correctness of the competition procedure (see questions referred for a preliminary ruling to the CJEU by the Supreme Administrative Court, which is reviewing resolutions of the National Council of the Judiciary of 23-28 August 2018 containing motions for appointing for the position of judge of the Supreme Court – case ref. II GOK 2/18 mentioned above)

3) due to the lack of signature of the Prime Minister under the announcement of the President of the Republic of Poland on vacant judicial positions in Supreme Court. Pursuant to Article 144 section 2 of the Constitution, official acts of the President of the Republic of Poland require **for their validity** the signature of the Prime Minister, except for the 30 prerogatives listed in paragraph 3 of this provision. The competence to issue announcements results from an act and not from the Constitution, so its implementation requires the Prime Minister's signature. In the opinion of some lawyers, lack of a signature under the announcement results in invalidity of the entire selection procedure[46]. In the opinion of the Chancellery of the President, the announcement is not an "official act" within the meaning of Article 144 section 2 of the Constitution, but a "technical action" which does not require the Prime Minister's signature[47].

4) interruption of the constitutional, four-year term of office of the National Council of the Judiciary by way of an act, the election of the new National Council of the Judiciary by the Sejm, and not by the judiciary, as it has been so far. On the one hand, the judgment of the Constitutional Tribunal of 20 June 2017, K 5/17, recognizing the previous procedure as uncon-

46 M. Florczak-Wątor, T. Zalasiński, *Opinia prawna w sprawie zgodności z Konstytucją obwieszczenia Prezydenta Rzeczypospolitej Polskiej z dnia 24 maja 2018 r. nr 127.1.2018 o wolnych stanowiskach sędziego w Sądzie Najwyższym, wydanego bez kontrasygnaty Prezesa Rady Ministrów*. http://monitorkonstytucyjny.eu/archiwa/5713 (24.11.2018).

47 Press article: *Uprzejma prośba o „obwieszczenie obwieszczenia" wywołała wielotygodniowy spór*, on TVN24 portal of 31 July 2018, https://www.tvn24.pl/wiadomosci-z-kraju,3/kontrasygnata-morawieckiego-spor-kancelarii-prezydenta-i-premiera,857835.html (24.11.2018).

stitutional, spoke in favor of interrupting the term of office of the NCJ. At the same time, the Constitution does not explicitly state who should elect the 15 judges who are members of the NCJ[48]. On the other hand, however, the judgment of the Constitutional Tribunal of 20 June 2017, K 5/17 concerned subtle procedural flaws and did not provide grounds to completely deprive judicial circles of the right to decide on the election of their representatives in the NCJ and to transfer it to the Sejm[49]. Moreover, although Article 187 of the Constitution does not state who should elect judges to the NCJ, it is difficult to conclude that the intention of the authors of the Constitution was to entrust this competence to the Sejm, since the Sejm, by virtue of Article 187 section 1 item 3 was to have only four representatives. Meanwhile, at present it has nineteen of them.

III. SUMMARY

The dispute over the Supreme Court in Poland focuses on seven problems:

1) lowering the retirement age of judges of the Supreme Court from 70 to 65 years old and compulsory retirement to judges who finished 65 years, who under previous regulations were supposed to serve until reaching 70 years old;

2) shortening of the constitutional term of the First President of the Supreme Court, prof. Małgorzata Gersdorf;

3) introduction of the requirement to obtain the consent of the President of the Republic of Poland for further adjudication after the age of 65;

4) creation of an autonomous chamber within the Supreme Court, which is dealing with disciplinary cases;

5) extraordinary appeal as a remedy of judicial supervision, enabling Supreme Court to quash any final judgment rendered since 1997;

6) introduction of non-lawyers (jurors) to the Supreme Court;

7) method of appointing new judges of the Supreme Court.

On 21 November 2018 and 23 November 2018 the parliament (Sejm and Senate) passed an act amending the Act on the Supreme Court which solves problems mentioned in 1-3. This change was a consequence of CJEU order of 19 October 2018, which obliged Poland to freeze provisions concerning retirement of Supreme Court judges, until Court will consider a case and deliver a final judgment. The remaining solutions mentioned in 4-7, however, remained in effect.

48 According to Article 187 section 1 of the Constitution of the Republic of Poland, the National Council of the Judiciary shall consist of 25 members: 15 judges, 4 deputies, 2 senators, First President of the Supreme Court, President of the Supreme Administrative Court, Minister of Justice and representative of the President of the Republic of Poland. Judges have a majority in the NCJ, and therefore have a decisive influence on all resolutions, including those concerning the presentation of candidates for judges to the President.

49 There is also a dispute in Poland over the correctness of the election of 3 of the 15 judges of the Constitutional Tribunal - 2 judges whose legal status is being challenged participated in the decision.

On the one hand, government reforms were to rejuvenate the judges (lowering the retirement age), bring the Supreme Court closer to citizens (by introducing representatives of the society - jurors), increase trust in the judiciary (by introducing an extraordinary appeal which allows to quash grossly unfair judgments). On the other hand, the reform can be contrasted with allegations of action in violation of the principle of judicial independence, the principle of irremovability of judges and the principle of legal certainty and stability of final court rulings. The dispute over the Supreme Court in Poland continues and it will be a long time before it is definitively concluded.

CHAPTER III.

THE REFORM OF THE NATIONAL COUNCIL OF THE JUDICIARY

1. INTRODUCTION

Judicial independence in today's democratic states is ensured and protected on many levels, by various means. In many European countries, judicial councils have been established for this purpose. Their establishment alone, however, does not guarantee respect for the independence of the judiciary and the independence of judges, transparency and freedom from influence from the world of politics and professional corporations. Therefore, it is extremely important to embark on a general discussion on the system (competences, organizational structure, way of functioning) of judicial councils based on substantive arguments.

In connection with the controversies surrounding the recent reforms of the National Council of the Judiciary in Poland, the aim of this paper is an objective analysis of the position and system of the National Council of the Judiciary on the basis of the Constitution of the Republic of Poland and statutory provisions, as well as a thorough review of all previous amendments to the Act on the NCJ. In addition, the draft amendments to the Act of July 2017 vetoed by the President of the Republic of Poland will be discussed. The second part of the paper will present positive and negative opinions on the recent reforms of the National Council of the Judiciary and a review of international legal standards in the field of shaping judicial councils.

2. NATIONAL COUNCIL OF THE JUDICIARY ON THE BASIS OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

The National Council of the Judiciary (hereinafter: the NCJ, the Council) is a constitutional body which upholds the independence of the judiciary and the independence of judges[1], but which is not a judicial authority. Due to the lack of judicial powers, it cannot be considered a court or tribunal whose main task is to issue rulings on behalf of the Republic of Poland (in accordance with Art. 174 of the Constitution)[2]. However, the Constitution does not prejudge the political position of the NCJ, and doctrine and jurisprudence are not uniform in this matter. In the opinion of some, it is a judicial authority in a broad sense[3], sometimes treated as a *sui generis* separate constitutional body of the state[4], and even referred to as a judicial corporation[5]. The Supreme Court has classified the National Council of the Judiciary as an "administering body"[6], and in

1 Article 186 section 1 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended), https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 12.11.2018), hereinafter: the Constitution.

2 M. Haczkowska (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Lexis Nexis 2014.

3 Cf. P. Winczorek, Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r., Warsaw 2000, p. 241; M. Haczkowska (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Lexis Nexis 2014.

4 T. Ereciński, Rola rady sądownictwa w państwie demokratycznym, „Przegląd Sądowy" no. 5/1994, p. 3-18.

5 Cf. A. Wasilewski, Władza sądownicza w Konstytucji Rzeczypospolitej Polskiej, „Państwo i Prawo" vol. 7/1998, p. 10-11

6 Resolution of the Supreme Court of 23 July 1992 , ref. no. III AZP 9/92, OSNC no. 7-8/1994.

the jurisprudence of the Constitutional Tribunal elements of all the above mentioned concepts can be found[7].

The basic constitutional competences of the National Council of the Judiciary include applying for the appointment of judges[8] of the Supreme Court, common courts, administrative courts and military courts, and applying to the Constitutional Tribunal for verification of the constitutionality of normative acts in so far as they concern the independence of courts and judges[9]. However, there are doubts as to whether the NCJ may submit a request to examine constitutionality of the provisions concerning the political position of the Council itself. According to some, it is difficult to deem that the provisions concerning the organization of the NCJ (including its independence and possible independence of its members) are directly part of the issue of independence of the judiciary and of judges[10].

According to the wording of the Constitution of Republic of Poland (hereinafter: the Constitution), the National Council of the Judiciary consists of:

- First President of the Supreme Court, Minister of Justice, President of the Supreme Administrative Court and a person appointed by the President of the Republic of Poland;
- fifteen members elected from among judges of the Supreme Court, common courts, administrative courts and military courts;
- four members elected by the Sejm from among its Members;
- two members elected by the Senate from among the senators[11].

The term of office of members of the NCJ lasts 4 years[12]. The NCJ elects a President and two Vice-Presidents[13] from among its members.

The Constitution refers to the respective act[14] with regard to the definition of the organizational structure , scope of activity and procedures for work of the NCJ and the manner of choosing its members.

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7 Cf. rulings of the Constitutional Tribunal of: 18 February 2004, ref. no. K 12/03, OTK ZU no. 2/A/2004, item 8; 11 July 2000, ref. no. K 30/99, OTK ZU no. 5/2000, item 145; 15 December 1999, ref. no. P 6/99, OTK ZU no. 7/1999, item 164.

8 Art. 179 of the Constitution.

9 Art. 186 section 2 of the Constitution.

10 Separate opinion of Constitutional Tribunal judge Wojciech Hermeliński to the ruling of the Constitutional Tribunal of 18 July 2007, ref. no. K 25/07.

11 Art. 187 section 1 of the Constitution.

12 Art.187 section 3 of the Constitution.

13 Art. 187 section 2 of the Constitution.

14 Art.187 section 4 of the Constitution.

3. ACT OF 12 MAY 2011 ON THE NATIONAL COUNCIL OF THE JUDICIARY - LEGAL STATUS UNTIL DECEMBER 2017

On 12 May 2011, the Sejm of the Republic of Poland passed an act on the National Council of the Judiciary, regulating its competences, election of members, system and proceedings before the Council[15].

3.1. POWERS OF THE NATIONAL COUNCIL OF THE JUDICIARY

The powers of the Council were enumerated in Article 3 of the Act, and one of the most important of them included: considering and evaluating candidates for the positions of judges of the Supreme Court and judges in common courts, administrative courts and military courts; presenting the President of the Republic of Poland with requests for appointing judges in the Supreme Court, common courts, administrative courts and military courts; expressing a position in cases concerning the judiciary and judges brought to its deliberations by the President of the Republic of Poland, other public authorities or judicial self-government bodies; giving opinions on draft normative acts concerning the judiciary and judges, as well as presenting requests in this respect; adopting a set of rules of professional ethics of judges and ensuring that they are observed[16].

Moreover, on the basis of the aforementioned Act, the NCJ performed other tasks specified in the acts, including: adopting resolutions on applying to the Constitutional Tribunal for examination of compliance with the Constitution of the Republic of Poland of normative acts in the scope in which they concern the independence of courts and judges; expressing an opinion on the appointment and dismissal of the president or vice-president of a common court and the president or vice-president of a military court, and considered requests for transferring a judge to retirement[17].

As part of its audit competences, the NCJ had the right to visit the court or its organisational unit, vet the court and the work of a judge[18], however, these activities could not violate the independence of judges[19]. The Council also elected a disciplinary counsel for judges of common courts after candidates were put forward by general assemblies of judges of courts of appeal (similarly - disciplinary ombudsman for judges of military courts)[20]. Moreover, the Committee of the Council for disciplinary liability of judges also had the power to submit requests to the Council to undertake disciplinary actions, appeal against decisions of disciplinary courts and disciplinary ombudsmen, and to demand the resumption of disciplinary proceedings[21].

In 2015, the competences of the Council were extended, among others, to include powers related to the positions of trainee judges, including consideration and evaluation of candidates for the position of trainee judges, presenting requests for appointing trainee judges to the President of the Republic of Poland, adopting a set of rules of professional ethics for trainee judges, speaking

15 Act of 12 May 2011 on the National Council of the Judiciary (Journal of Laws No. 126, item 714), hereinafter: Act on the NCJ.

16 Art. 3 section 1 of the Act on the NCJ.

17 Art. 3 section 2 of the Act on the NCJ.

18 Art. 5 section 1 of the Act on the NCJ.

19 Art. 5 section 2 of the Act on the NCJ

20 Art. 1 section 2 item 4 and Article 6 of the Act on the NCJ.

21 Art. 19 section 1 item 1 of the Act on the NCJ

out about the state of the trainee judges' staff[22]. In addition, the Council obtained disciplinary competence towards trainee judges analogous to that of judges (vetting of the trainee judge's work[23], selection of disciplinary ombudsmen[24], demand to take disciplinary action[25]).

In May 2017, the Sejm passed subsequent amendments to the statutory provisions concerning the NCJ[26]. The existing competences of the NCJ have been modified by depriving it of the right to consider and evaluate candidates for the position of trainee judge in common courts and to present requests to the President for the appointment of trainee judges in common courts. In return, the Council was given the power to object to the performance by trainee judges in common courts of judicial duties of a judge within one month from the date of submission by the Minister of Justice of the list of appointed trainee judges and a request to entrust to them the performance of the duties of a judge[27]. The reasons for the objection were not specified, which meant that the NCJ was left with a high degree of discretion when adopting a resolution on expressing an objection against a particular person.

In July 2017, the Council has been deprived by the Sejm of the right to express an opinion on the appointment of the president or vice-president of a common court (and a military court)[28].

3.2. MEMBERS OF THE NATIONAL COUNCIL OF THE JUDICIARY

The Act on the NCJ specified constitutional provisions concerning the election and term of office of Council members. The First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice were members of the Council during their term of office[29]. Person appointed by the President of the Republic of Poland performed his or her function without specifying the term of office and could be recalled at any time[30], but his or her mandate expired no later than within three months after the end of the term of office of the President of the Republic of Poland or after the vacancy of the office of the President of the Republic of Poland[31]. The Council also consisted of four members elected by the Sejm for the term of office of the Sejm (4 years) and two senators elected by the Senate for the term of office of the Senate (4 years)[32].

According to the Constitution, the remaining 15 members of the Council are judges (their term of office lasts 4 years). According to Article 11 of the Act on the NCJ, they are elected by the judiciary:

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22 Art. 23 section 1 item a of the Act of 10 July 2015 amending the Act - Law on the system of common courts and certain other acts (Journal of Laws, item 1224), hereinafter: the Act of 10 July 2015.

23 Art.23 section 2 of the Act of 10 July 2015.

24 Art. 23 section 1 item c and item 3 of the Act of 10 July 2015.

25 Art. 23 section 4 of the Act of 10 July 2015.

26 Act of 11 May 2017 amending the Act on the National School of Judiciary and Public Prosecution, the Act - Law on the system of common courts and some other acts (Journal of Laws, item 1139), hereinafter: Act of 11 May 2017.

27 Art. 8 section 1 item a in conjunction with Article 2 section 36 of the Act of 11 May 2017.

28 Art. 9 section 1 of the Act of 12 July 2017 amending the Law on the system of common courts and certain other acts (Journal of Laws, item 1452), http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20170001452/O/D20171452.pdf (access: 14.11.2018).

29 Art. 7 of the Act on the National Council of the Judiciary.

30 The possibility to recall a person appointed by the President did not stem from the Constitution, but was a result of a practice.

31 Art. 8 of the Act on the NCJ.

32 Art. 9 of the Act on the NCJ.

1) The General Assembly of the Supreme Court Judges elected two members of the Council[33] from among the judges of the Supreme Court.

2) The General Assembly of the Supreme Administrative Court together with the representatives of the general assemblies of voivodship administrative courts elected two members of the Council[34] from among the judges of administrative courts.

3) The meeting of representatives of general meetings of judges of courts of appeal elected two members of the Council[35] from among the judges of courts of appeal.

4) The meeting of representatives of the general assemblies of district judges elected eight members of the Council[36] from among its members.

5) The Assembly of Military Court Judges elected one member of the Council[37] from among its members. Each judge could serve as a member of the Council for only two terms[38].

On the basis of the then regulations, the meetings of representatives performed important functions, not only by taking part in the election of members of the Council, but also by assessing the activities of members of the Council elected by them, by submitting postulates concerning its activities to the Council and by adopting resolutions concerning problems arising in the activities of common courts[39].

The circumstances of early expiry of the mandate of a member of the Council were specified in Article 14 of the Act on the NCJ. In accordance with this provision, the mandate of the elected member of the Council expired before the expiry of the term of office in case of:

1) death;

2) resignation from office;

3) expiry of the mandate of an MP or senator;

4) appointment of a judge to another judicial post, except for the appointment of a judge of a district court as a judge of the circuit court, a military judge of the garrison court as a military judge of the circuit court or a judge of voivodship administrative court as a judge of the Supreme Administrative Court;

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33 Art. 11 section 1 of the Act on the NCJ.

34 Art. 11 section 2 in connection with Art. 12 of the Act on the NCJ. The general assemblies of judges of voivodship administrative courts elected from among their members two representatives for a 4-year term of office.

35 Article 11 section 3 in conjunction with Article 11 section 3 of the Treaty on the Functioning of the European Union. Pursuant to Article 13 sections 1 and 3 of the Act on the NCJ. The General Meetings of Court of Appeal judges elected representatives of the General Meetings of Court of Appeal judges from among the Court of Appeal judges in the number of one-fifth of the number of those judges for a 4-year term of office.

36 Article 11 section 4 in connection with Article 13 sections 2 and 3 of the Act on the NCJ. The general assemblies of circuit judges elected representatives of the general assemblies of circuit judges from among their members in the number of one-fiftieth of the number of circuit judges for a 4-year term of office.

37 Article 11 section 5 of the Act on the NCJ.

38 Article 10 of the Act on the NCJ.

39 Article 13 section 5 of the Act on the NCJ.

5) expiration or termination of the official relationship of a judge;

6) retiring or retirement of a judge.

Moreover, resignation from the Council's mandate was effective upon notification of the President of the NCJ in writing. The Chairperson immediately notifies the body which elected the member. In each case, a new member of the NCJ should be elected within two months from the date of expiry of the mandate[40].

3.3. JUDGMENT OF THE CONSTITUTIONAL TRIBUNAL OF 20 JUNE 2017, REF. NO. K 5/17

In 2017, some provisions of the Act on the NCJ became the subject of a ruling by the Constitutional Tribunal at the request of the Prosecutor General, whose main objections considered:

1) the unconstitutional way of regulating the procedure for the election of judges to the Council, which violates judicial independence and equal status of judges;

2) defective provisions on the term of office of elected members of the Council and the related permanent and common practice, inconsistent with constitutional requirements.

The Constitutional Tribunal unanimously accepted the Prosecutor General's allegations and ruled that:

1) Article 11 sections 3 and 4 in conjunction with Article 13 sections 1 and 2 of the Act of 12 May 2011 on the NCJ is incompatible with Article 187 section 1 items 2 and 4 in conjunction with Article 32 section 1 of the Constitution.

2) Article 11 section 2 in conjunction with Article 12 section 1 of the Act referred to in the first subparagraph is incompatible with Article 187 section 1 items 2 and 4 in conjunction with Article 32 section 1 of the Constitution.

3) Article 13 section 3 of the Act referred to in the first subparagraph is understood as meaning that the term of office of members of the NCJ elected from among judges of common courts is individual in nature is inconsistent with Article 187 section 3 of the Constitution[41].

In the justification of the judgment, with reference to the first standpoint of the Prosecutor General, the Constitutional Tribunal stated that "the Constitution does not list the criteria that the legislator could adopt in order to differentiate the possibility of being a candidate for membership of the NCJ for judges listed in Article 187section 1 item 2. Therefore, these criteria cannot

40 Article 14 section 3 of the Act on the NCJ.

41 Judgment of the Constitutional Tribunal of 20 June 2017, ref. no. K 5/17, the sentence is published in the Journal of Laws of 2017, item 1183, the verdict with justification is available on http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20170001183/T/D20171183TK.pdf (access: 13.11.2018).

be freely defined in an act. The composition of the NCJ is a constitutional matter and cannot be modified without constitutional authority"[42].

Considering the second standpoint of the Prosecutor General, the Constitutional Tribunal identified the problem differently than the applicant. The Court held that the reason for the unconstitutionality of the indicated provisions is not a legislative omission indicated by the Prosecutor General, but a defective, unconstitutional interpretation of the provisions of the Act on the National Council of the Judiciary. Article 187 section 3 of the Constitution does not provide for an individual term of office of elected members of the NCJ, and the construction of the constitutional provision indicates that all elected members of the NCJ have one, common term of office. The diversity of terms of office within a group of members elected at the level of the statutory provisions results in an infringement of Article 187 section 3 of the Constitution.

3.4. WORK OF THE NATIONAL COUNCIL OF THE JUDICIARY

Article 15 of the Act on the NCJ defines the President and Presidium of the Council as bodies of the Council. The Council elected from among its members the President, two Vice-Presidents and three members of the Presidium for a four-year term of office[43]. The Presidium of the Council directed its work and ensured its proper functioning between plenary meetings[44]. The President, on the other hand, represented the Council and organised its work through, among others, convening Council meetings, chairing meetings, signing Council resolutions or performing activities commissioned by the Council[45]. The NCJ has also set up four standing committees: a committee on the disciplinary liability of judges; a budgetary committee, a visitation and vetting committee and a committee on the professional ethics of judges.

The Council met in plenary sessions, convened by the President as necessary, but not less frequently than once every two months[46]. In order for the resolutions to be valid, at least half of the members of the Council had to be present, while the resolutions were adopted in an open vote by an absolute majority of votes[47].

4. ACT OF 12 JULY 2017 *AMENDING THE ACT ON THE NATIONAL COUNCIL OF THE JUDICIARY AND CERTAIN OTHER ACTS* (VETOED)[48].

On 14 March 2017, a government draft act amending the Act on the NCJ and certain other acts, including the Act of 12 May 2011 on the NCJ, the Act of 21 August 1997 - Law on the system of

42 Judgment of the Constitutional Tribunal of 20 June 2017, ref. no. K 5/17, p. 21.

43 Article 16 sections 1 and 2 of the Act on the NCJ.

44 Article 16 section 3 of the Act on the NCJ.

45 Article 17 section 1 of the Act on the NCJ.

46 Article 20 sections 1 and 2 of the Act on the NCJ.

47 Article 21 sections 1 and 2 of the Act on the NCJ.

48 Sejm print no. 1423/VIII kad., government draft act *amending the act on the National Council of the Judiciary and some other acts*, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1423, access: 14.11.2018r.

military courts[49], Act of 25 July 2002. - Law on the system of administrative courts[50] and the Act of 23 November 2002 on the Supreme Court[51] was submitted.

4.1. BASIC ASSUMPTIONS

The main assumptions of the legislator concerned three areas of functioning of the National Council of the Judiciary, i.e. changes in the regulations governing the selection of members of the NCJ from among judges through introduction of the principle of election by the Sejm, establishment of a joint term of office of elected members of the NCJ and termination of the term of existing elected members, introduction of new rules of issuing opinions by the NCJ on candidates for positions of judges and trainee judges and creation of new NCJ bodies for this purpose[52].

According to justification of the bill, its main objective was to simplify the rules governing the procedure for the selection of judges-members of the NCJ and at the same time to introduce the principle of representativeness of all groups of professional judges against previous accusations of excessive complexity, lack of democracy and non-transparency of the procedure[53].

I. THE GOVERNMENT DRAFT PROVIDED THAT THE SEJM, AS A BODY OF LEGISLATIVE POWER, WOULD ELECT JUDGES WHO SIT IN THE NATIONAL COUNCIL OF THE JUDICIARY (ARTICLE 1 SECTION 1 OF THE GOVERNMENT DRAFT).

The proposed election was to be carried out by the Sejm from among candidates proposed by the Speaker of the Sejm, proposed to the Speaker by the Presidium of the Sejm or at least 50 MPs (Article 1 item 1 of the government draft, amending Article 11 section 2, Article 12 section 2 of the Act on the NCJ).

The justification indicated that the previously functioning model distorted the manner of selection and representation of judges of common courts. The government draft amending the act was to amend it in order to implement the principle of representativeness of all professional groups of judges in the constitutional body guarding independence of the judiciary and independence of judges[54].

However, in the process of evaluating the project, the fear was often expressed that the proposed solution is not justified on the grounds of the Constitution. The risk of seriously undermining the political principle of division of power has been pointed out many times. It was stressed that the principle of division and balance of powers in relation to the judiciary, as expressed in Article 10 of the Constitution, i.e. that its „distinctness and independence" should be duly respected,

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49 Journal of Laws of 2016, items 358, 2103 and 2261.

50 Journal of Laws of 2016, items 1066 and 2261.

51 Journal of Laws of 2016, items 1254, 2103, 2261 and Journal of Laws of 2017 item 38.

52 M. Dobrowolski, *Opinia prawna dotycząca rządowego projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Sejm print no. 1423)*, p.1.

53 Print 1423/ VIII kad., justification of the government's draft act *amending the act on the National Council of the Judiciary and certain other acts*, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1423, access: 14.11.2018r., p.1

54 Ibid., p.1.

and the extent of legislative or executive interference in the sphere of influence of the judiciary should be regulated only at the constitutional level[55].

The negative opinion of the Supreme Bar Council[56] pointed out that the proposed amendments to the amending act led to a complete change in the then procedure and, from the point of view of balance in the division of power, would make the NCJ an institution subordinate to political influence and would be detrimental to the principle of judicial independence. This would be particularly evident in the context of the establishment of the two internal NCJ bodies, where, in the course of the procedures for issuing opinions on candidates for judges, the voice of the legislative and executive authorities would be disproportionately strengthened, despite the numerical superiority of the judiciary, which would blatantly infringe Article 187 section1 of the Constitution[57]. Opponents of this solution stressed that the legislator, by conferring on the NCJ competences related to safeguarding function of protecting the independence of courts and judges, has also introduced a mechanism to protect its independence through constitutional normalization of membership, which cannot be changed by an act. According to Article 187 section 1 of the Constitution, the composition of the NCJ is mixed: it connects representatives of the judiciary with the obligatory participation of the First President of the Supreme Court, the President of the Supreme Administrative Court, representatives of the executive and the legislative. The Constitution also regulates the term of office of the members of the NCJ, the manner of their appointment and election, providing for a significant majority in the composition of the NCJ of the elected judges of the Supreme Court, common courts, administrative and military courts[58].

II. THE GOVERNMENT DRAFT ALSO PROVIDED FOR A NEW WAY OF SELECTING A JUDGE OR TRAINEE JUDGE

The justification of the draft act indicated that so far the Council had taken decisions, including applying to the President for the appointment of a judge, in full panel, in which judges were in decisive majority (17/25), which resulted in a disproportion in the weight of a vote of a member of the NCJ who was a representative of the legislative or the executive. It was emphasized that the election of whom the NCJ will present to the President as a candidate for a judge, a person exercising public authority, should be genuinely influenced by representatives of other authorities, having a mandate from democratic elections and periodically verified[59]in this manner.

To this end, it was proposed to establish two bodies within the NCJ, i.e. the First Assembly of the Council (hereinafter: FAC) and the Second Assembly of the Council (hereinafter: SAC), whose competence was to consider and evaluate candidates for performing the function of a judge. The FAC would be composed of the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, four MPs and two senators. The SAC was

55 R. Piotrowski, *Opinia prawna na temat rządowego projektu ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (print 1423)* of 3 April 2017, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1423, accessed 14.11.2018, p. 3.

56 Opinion of the Supreme Bar Council of 5 April 2017, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1423, accessed 14.11.2018.

57 Ibid., p. 3.

58 R. Piotrowski, *Opinia prawna*...., p. 4, access: 14.11.2018; see also: justification of the judgment of the Constitutional Tribunal of ..... ref. no. K 40/97.

59 Sejm print no. 1423/VIII kad., justification of the government draft act *amending the act on the National Council of the Judiciary and some other acts*, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1423, access: 14.11.2018, p.2.

to include the remaining 15 judges from the Council. Election would require a positive assessment of a particular candidate by both bodies. In the event of a difference in opinions, the draft provided for a determination procedure whereby the body which issued the positive opinion had the opportunity to adopt a resolution on the opinion on a given candidate in full panel, where obtaining a positive opinion would require 17 votes of the members of the NCJ, including the First President of the Supreme Court, the President of the Supreme Administrative Court and judges sitting in the NCJ[60]. The draft proponent indicated that this would achieve the objective of balancing the votes of judges against the votes of representatives of the legislative and the executive, and thus exclude the situation in which the political factor would be decisive[61]. In an opinion commissioned by the Sejm's Office of Analyses, however, inadmissibility of this solution was pointed out, as the legislator defined in detail the composition of the NCJ, i.e. 17 judges and 8 politicians, guaranteeing the judge's component a permanent advantage. The doctrine also pointed out that albeit the remaining members of the NCJ who were not judges were a minority, criticism of the solution adopted in the Constitution did not give right to its amendment by way of an act, and could be a premise for an appropriate political initiative[62].

III. EXPIRY OF THE TERM OF OFFICE OF THE THEN MEMBERS OF THE NATIONAL COUNCIL OF THE JUDICIARY

The author of the draft act considered it appropriate to introduce additional transitional provisions, assuming the necessity for the mandates of current members of the NCJ elected from among judges to expire. The expiration of the mandate of members of the NCJ elected from among judges was to take place 30 days after the date of entry into force of the Act (Article 5 section 1 of the government draft act). Although, according to Article 187 section 3 of the Constitution, the term of office of the elected members of the NCJ lasts four years[63], the Constitution states at the same time that 15 members are elected from among judges without specifying how many members are elected from among particular groups of judges, and the only possibility to introduce the proposed election model is to interrupt and terminate the individual terms of office of the members of the NCJ, which is justified on grounds of important public interest[64].

Against the proposal to end the four-year term of office, in the opinion of the Supreme Bar Council, it was raised that this would in fact lead to the dissolution of the NCJ and the establishment of a completely new institution, accepted by the legislative authorities, which was assessed as an unjustified and radical postulate[65]. Opinions commissioned by the Sejm's Office of Analyses also pointed out that the government draft act provided for solutions changing the systemic position of the NCJ without amending the Constitution, and also posed a risk of limiting the ability

60 Sejm paper no. 1423/VIII kad., justification of the government draft act *amending the act on the National Council of the Judiciary and some other acts*, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1423, access: 14.11.2018, p. 3.

61 Op. cit., p. 4.

62 R. Piotrowski, *Opinia prawna...*, p. 11, accessed 14.11.2018.

63 Contrary opinion: M. Dobrowolski PhD, *Opinia prawna dotycząca rządowego projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Sejm print no. 1423)*, p.16.

64 Sejm print 1423/VIII kad., justification of the government's draft act *amending the act on the National Council of the Judiciary and some other acts*, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1423, access: 14.11.2018r., p. 5-6.

65 Op.cit., p. 4.

to perform the constitutional function of guardian of court independence and independence of judges. In view of the above, this solution was also declared inadmissible[66].

4.2. SUMMARY

The main list of objections concerned constitutional issues (violation of Article 179, Article 186, Article 187 of the Constitution), introduction of a solution changing the systemic position of the Sejm and the President of the Republic of Poland without a prior change of the Basic Law. It was stressed that the adoption of the draft in question would change the relationship between the legislative and the judiciary, as defined in the Constitution, replacing the previous advantage of judges in the NCJ with the domination of a political factor, as well as a potential strengthening of the position of the executive (the President of the Republic of Poland) in a way that is not justified by the provisions of the Basic Law[67].

In the legislative process, neither the Chancellery of the Prime Minister nor the General Prosecutor's Office of the Republic of Poland raised any objections to the draft in question[68].

4.3. PRESIDENTIAL VETO

In view of the above doubts, the adopted act was vetoed by the President of the Republic of Poland on 31 July 2017[69].

5. ACT ON THE NATIONAL COUNCIL OF THE JUDICIARY - LEGAL STATUS FROM DECEMBER 2017 AND CRITICAL ANALYSIS

In December 2018, the Sejm of the Republic of Poland passed another amendment to the Act on the NCJ, a draft of whicfh was prepared by the President of the Republic of Poland[70]. The concept of appointing two separate Assemblies within the NCJ was abandoned. Formally, therefore, the Council is to continue to be a single constitutional collegial body, not divided into curias or teams, and all its members are to enjoy the same position in its composition, in particular equal voting rights. Representatives of the judiciary, including judges elected to the NCJ, will continue to have a significant numerical advantage in the composition of the NCJ[71].

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66 R. Piotrowski, *Opinia prawna...*, p. 5, accessed 14.11.2018.

67 R. Piotrowski, *Opinia prawna...*, p. 16, accessed 14.11.2018.

68 Opinion of the Prosecutor's Office of the Republic of Poland, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?documentId=5BFA5E4B34DF532CC1258116002869AD and https://legislacja.rcl.gov.pl/docs//2/12284955/12350844/12350846/dokument279044.pdf, access: 14.11.2018.

69 Request of the President of the Republic of Poland to reconsider the Act of 12 July 2017 amending the Act on the National Council of the Judiciary and certain other acts, Print 1792, http://orka.sejm.gov.pl/Druki8ka.nsf/o/DB68E664E1215734C1258191003FCBFB/%24File/1792.pdf, access: 14.11.2018.

70 Act of 8 December 2017 amending the Act on the National Council of the Judiciary (Journal of Laws of 2018, item 3), http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000003/O/D20180003.pdf (access: 14.11.2018).

71 K. Grajewski, *Krajowa Rada Sądownictwa w świetle przepisów ustawy z dnia 8 grudnia 2017 r. – zagadnienia podstawowe*, ‚National Council of the Judiciary', No 1/2018, pp. 17-35.

5.1. ELECTION OF MEMBERS OF THE NATIONAL COUNCIL OF THE JUDICIARY

The fundamental changes in the functioning of the NCJ concern the term of office and the way in which members of the Council are elected from among judges. According to the current regulations, the Sejm elects fifteen members of the Council from among judges of the Supreme Court, common courts, administrative courts and military courts for a joint four-year term of office[72]. The joint term of office of new members of the Council elected from among the judges shall commence on the day following their election and the members of the previous term of office shall remain in office until the date of the joint term of office of the new members of the Council[73]. It is worth mentioning here, however, that - as K. Grajewski notes - some judges were allowed to terminate their term of office earlier, as well as to elect judges to the Council for an incomplete term[74], which means the possibility of appointing judges for a shorter period than provided for in the Constitution (in particular, the situation of filling the seat of the person whose mandate in the Council has expired)[75].

The procedure for the selection of NCJ members can be divided into three stages:

I. The first stage begins with the announcement of the Speaker of the Sejm in the Official Journal of the Republic of Poland „Monitor Polski", published not earlier than 120 days and not later than 90 days before the end of the term of office of members of the Council elected from among judges[76]. Candidates for members of the Council may be proposed to the Speaker of the Sejm by a group of at least two thousand adult citizens of the Republic of Poland or a group of at least twenty-five judges within 30 days from the date of the announcement[77]. A single proposal may involve only one candidate, but those entities may submit more than one request[78].

   The proposal of a candidate, made in writing by a plenipotentiary, includes information about the candidate, his or her functions and social activity and other important events occurring during the candidate's term of office as a judge, as well as the judge's consent to stand as a candidate[79]. The Speaker of the Sejm, within three days from the date of receipt of the proposal of a candidate, applies in writing to the President of the court competent for the proposed candidate [80] with a motion to draw up and transmit, within seven days from the date of receipt of the motion, information including the candidate's case-law achievements and relevant information concerning the candidate's work[81]. If the above information is not prepared within the specified time limit, the Speaker of the Sejm applies in writing to the candidate for a member of the Council for such information to be prepared by him or her

72 Article 9a section 1 of the Act on the NCJ.

73 Article 9a section 3 of the Act on the NCJ.

74 Article 11e in connection with Article 14 of the Act on the NCJ.

75 K. Grajewski, *Krajowa Rada...*, pp. 17-35.

76 Article 11a section 1 of the Act on the NCJ.

77 Article 11a sections 2 and 4 of the Act on the NCJ.

78 Article 11a section 3 of the Act on the NCJ.

79 Article 11a section 5 of the Act on the NCJ.

80 A where the candidacy concerns the President of:
1) district court, circuit court or military garrison court - to the president of a higher court,
2) a court of appeal, a voivodship administrative court or a military circuit court - to the vice-president or a deputy president of that court.

81 Article 11a section 6 of the Act on the NCJ.

within seven days from the date of receipt of the request of the Speaker of the Sejm[82]. If the candidate does not prepare the aforementioned information, the Speaker of the Sejm refuses to accept the candidacy[83].

In the case of doubts as to the correctness of the required number of signatures, the National Electoral Commission in the proceedings at the request of the Speaker of the Sejm determines whether the required number of signatures has been obtained[84]. If the number of correctly placed signatures is lower than required, the Speaker of the Sejm refuses to accept the candidacy[85]. A decision in this matter may be appealed against by the plenipotentiary to the Supreme Court within 3 days of delivery. The Supreme Court examines the complaint within three days in non-contentious proceedings in a panel of three judges. As a result of examination of the complaint, the Supreme Court amends or upholds the appealed decision. The Supreme Court's decision is not subject to appeal. If the Supreme Court does not examine the complaint within three days, the proceedings before the Supreme Court are discontinued by virtue of law, and the decision of the Speaker of the Sejm refusing to accept the candidacy is binding.[86].

From among the candidates mentioned above, each parliamentary club shall nominate no more than nine candidates for members of the Council[87]. If the total number of candidates indicated by parliamentary clubs is less than fifteen, the Presidium of the Sejm shall indicate, from among the candidates proposed under Article 11a, the number of candidates missing to fifteen[88].

II. Next, the competent parliamentary committee shall determine the list of candidates by selecting fifteen candidates for members of the Council, provided that the list includes at least one candidate indicated by each parliamentary club, who was active within sixty days from the date of the first meeting of the Sejm of the term of office during which the election is made[89].

III. Finally, at the next meeting, the Sejm elects judges-members of the National Council of the Judiciary for a joint four-year term of office by a 3/5 majority of votes in the presence of at least half of the statutory number of MPs[90]. If the above procedure does not lead to an election, the Sejm elects members of the Council by an absolute majority of votes in the presence of at least half of the statutory number of MPs.

The Sejm, as far as possible, is to take into account the need to represent judges of different types and levels of courts in the Council[91].

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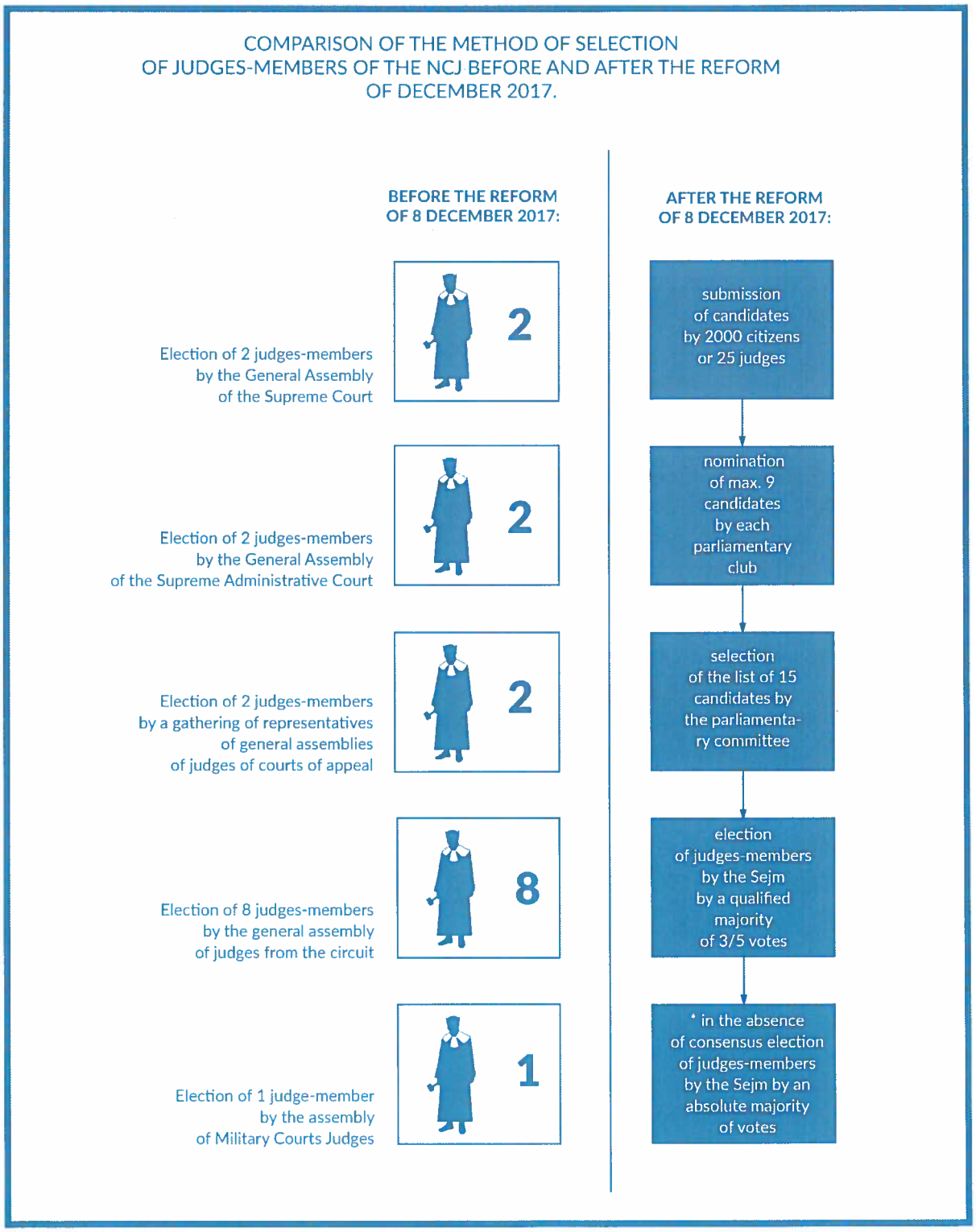
82 Article 11a section 7 of the Act on the NCJ.
83 Article 11a section 8 of the Act on the NCJ.
84 Article 11b sections 3 and 4 of the Act on the NCJ.
85 Article 11d section 5 of the Act on the NCJ.
86 Article 11b section 6 of the Act on the NCJ.
87 Article 11d section 2 of the Act on the NCJ.
88 Article 11d section 3 of the Act on the NCJ.
89 Article 11d section 4 of the Act on the NCJ.
90 Article 11d section 5 of the Act on the NCJ.
91 Article 9a section 2 of the Act on the NCJ.

Due to the introduction of a joint term of office for members of the Council who are judges and the change in the procedure for the election of these members, the Act amending the Act on the NCJ introduced a solution resulting in the expiry of the mandate of all members of the Council referred to in Article 187 section 1 item 2 of the Constitution, elected on the basis of existing provisions. Pursuant to Article 6 of the Act of 8 December 2017, the mandate of the above mentioned members of the Council lasts until the day preceding the beginning of the term of office of new members of the NCJ elected in accordance with the new regulations, but not later than ninety days after the entry into force of the Act of 8 December 2017.

COMPARISON OF THE METHOD OF SELECTION OF JUDGES-MEMBERS OF THE NCJ BEFORE AND AFTER THE REFORM OF DECEMBER 2017.



5.2. OTHER CHANGES

The amendment to the Act on the NCJ of December 2017 also introduced changes in the mode of the Council's work, increasing the transparency and streamlining the operation of the NCJ. Firstly, pursuant to the amended Article 21 section 1 of the Act on the NCJ, plenary sessions of the Council are broadcast via the Internet, unless the Council adopts a resolution on the exclusion of publicity of the session. The Council excludes disclosure in whole or in part, if it could lead to disclosure of classified information or violate an important private interest by disclosing data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, religious, party or trade union membership, as well as data on health, genetic code, addictions or sexual life and data concerning convictions, decisions on punishment and criminal fines, as well as other decisions issued in judicial or administrative proceedings.

Secondly, transparency is also to be enhanced by the paragraph 1a added to Article 22 of the Act on the NCJ, according to which the Council, while defining detailed mode of its operation, is guided by the need to ensure availability of information on proceedings before the Council and comprehensive information on candidates and reasons for which a request for appointing a person to perform the office of a judge or trainee judge of the court was presented.

Thirdly, pursuant to Article 21 sections 2a-2c of the Act on the NCJ, the legislator made it possible for the NCJ to adopt resolutions by circulation. In justified cases, the president of the Council may order a vote via e-mail, but it cannot be a secret vote. Voting by circulation is valid if at least half of the Council members cast their votes within the time limit set.

Then, in Article 24 section 4 of the Act on the NCJ, provisions concerning employees of the Office (with the help of which the Council performs its tasks) were clarified, indicating that the provisions of the Act of 18 December 1998 on employees of courts and prosecutor's office[92] apply to them, with the exception of the requirement to serve an internship in a court or prosecutor's office.

Subsequent amendments to the Act on the NCJ concern the composition of the team appointed by the president of the Council in order to prepare an individual case for consideration at the Council meeting. According to the current regulations, the team consists of three members of the Council, however, the members may not be only judges or deputies and senators[93]. When appointing a team, the president of the Council notifies the Minister of Justice about the appointment of the team and informs the Minister about individual cases submitted to the team for consideration at the meeting of the Council[94]. Within 21 days, the Minister of Justice may present to the Council his or her opinion on an individual case. Failure to present the above mentioned opinion within the set time limit does not halt the work of the team[95]. The opinion of the Minister of Justice or information about the lack of opinion is attached to the documentation of the proceedings in that case[96].

92 Journal of Laws of 2017 items 246 and 1139.

93 Article 31 sections 1 and 1a of the Act on the NCJ.

94 Article 31 section. 2a of the Act on the NCJ.

95 Article 31 section 2c of the Act on the NCJ.

96 Article 31 section 2d of the Act on the NCJ.

With regard to the statutory criteria for selection of candidates for judicial posts, it was specified that when establishing the list of candidates, the team takes into account, inter alia, experience in the application of the law and scientific achievements[97].

As regards the appeal procedure in proceedings before the NCJ, an exception to the principle of appeal to the Supreme Court by a participant in the proceedings was introduced. In individual cases concerning the appointment of a judge to serve as a judge of the Supreme Court the appeal may be lodged to the Supreme Administrative Court. Furthermore, the appeal cannot be based on the accusation of incorrect evaluation of whether the candidates meet the criteria taken into account when deciding on the submission of an application for the appointment of a judge to serve as a judge of the Supreme Court[98].

Subsequently, the added Article 44a introduces the obligation for the National Council of the Judiciary to submit requests to the President of the Republic of Poland for the appointment of specific judges or trainee judges, together with a justification, as well as information on the remaining candidates together with the assessment of all candidates.

In 2018, the Act on the NCJ was amended again. The most important change concerned the institution of the Council's objection to the performance of judge's duties by trainee judges in common courts, which has been replaced by the power of the NCJ to present to the President of the Republic of Poland requests for the appointment of the examined trainee judges and trainee prosecutors for the positions of trainee judges in common courts[99]. This modification was dictated by the amendment of the Law on the system of common courts, according to which the President of the Republic of Poland took over from the Minister of Justice the powers related to the appointment of trainee judges.

6. CONTROVERSY OVER THE AMENDMENT OF THE ACT ON THE NATIONAL COUNCIL OF THE JUDICIARY ADOPTED 8 DECEMBER 2017.

The provisions enshrined in the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts[100] (hereinafter referred to as the „the Act of 8 December 2017") which mainly raised doubts in the context of the Constitution concerned the following issues:

I. **Election of members that are judges to the National Council of the Judiciary by the Sejm;**

II. **Termination by an act of the term of office of the current members of the NCJ referred to in Article 187 section 1 item 2 of the Constitution;**

97 Article 35 section 2 item 1 of the Act on the NCJ.

98 Article 44 section 1a of the Act on the NCJ.

99 Article 4 section 1 of the Act of 10 May 2018 amending the Act - Law on the system of common courts, the Act on the Supreme Court and certain other acts (Journal of Laws, item 1045).

100 Journal of Laws 2018.3 of 2 January 2018.

III. **Proposing of candidates for members of the NCJ by a group of at least two thousand citizens;**

IV. **Representativeness of lower instance judges in the composition of the NCJ;**

V. **Other issues.**

6.1. ARGUMENTS OF OPPONENTS AND SUPPORTERS OF THE CHANGES INTRODUCED

I. ELECTION OF MEMBERS THAT ARE JUDGES OF THE NATIONAL COUNCIL OF THE JUDICIARY BY THE SEJM

The legislator justified granting the Sejm, in Article 9a section 1 of the Act on the NCJ, the right to elect judges to the Council with the need to introduce mechanisms of social control over this body in order to guarantee its better functioning.[101]

Critical opinions

The following institutions were critical of this provision: the Supreme Court, the Supreme Bar Council, the National Council of the Judiciary, the Ombudsman, the "Iustitia" Association and the Helsinki Foundation for Human Rights[102].

According to the above entities, the current Article 9a section 1 of the Act on the NCJ, which grants the Sejm the right to elect members of the Council from among judges, is inconsistent with the following articles of the Constitution: Article 10 section 1, Article 45 section 1, Article 173, Article 178 section 1, Article 187 section 1 item 2.

The inconsistency of the current provision of the Act on the NCJ with Article 187 section 1 item 2 of the Constitution is to result from the fact that the competence to elect judges to the Council was granted by the legislator as the exclusive competence of the judiciary. Although Article 187 section 1 item 2 of the Constitution does not indicate which body is to elect fifteen members of the NCJ from among judges of the Supreme Court, common courts, administrative courts and military courts, it is the judiciary (in the form of the General Assembly of Judges of the Supreme Court and Supreme Administrative Court, meeting of representatives of meetings of judges of courts of appeal, meeting of representatives of general assemblies of district judges and the

101 Sejm's paper no. 2002/VIII term, p. 1 of the justification for the draft act.

102 Opinion of the Supreme Court of the Republic of Poland of 23 October 2017 *to the draft act submitted by the President of the Republic of Poland amending the Act on the National Council of the Judiciary and certain other acts*; Opinion of the Legislative Committee of the Supreme Bar Council of 17 October 2017 *to the Presidential draft act amending the Act on the National Council of the Judiciary and certain other acts of 26 September 2017*; Opinion of the National Council of the Judiciary of 31 October 2017 on the *draft act presented by the President of the Republic of Poland amending the Act on the National Council of the Judiciary and certain other acts* and Opinion of the National Council of the Judiciary of 6 December 2017 *on the draft act amending the Act on the National Council of the Judiciary and certain other acts (Sejm paper No 2070)*; Opinion of the Ombudsman of 31 October 2017 on the *draft Act of 26 September 2017 amending the Act on the National Council of the Judiciary*; Opinion of the Polish Judges Association „Iustitia" of 14 November 2017 *on the presidential draft Act amending the Act on the National Council of the Judiciary and certain other acts*; Opinion of the Helsinki Foundation for Human Rights of 11 December 2017 on the *Act amending the Act on the National Council of the Judiciary (Senate print No 686)*.

Assembly of Military Court Judges) that all constitutional regulations and the whole of Article 187 of the Constitution indicate.

In the opinion of the critics, it is important that since Article 187 section 1 item 3 of the Constitution clearly indicates that MPs - members of the NCJ are elected by the Sejm and senators - members of the NCJ by the Senate, it could not have been the intention of the legislator to entrust the election of fifteen judges to the Parliament or one of its chambers. If the powers of the Sejm were to include the competence to elect judges to the Council, such a right would be expressly granted in item 3 of Article 187 section 1 of the Constitution. The mere comparison of Article 187 section 1 item 2 and 3, where the Constitution provides only for the election by the legislative of members referred to in Article 187 section 1 item 3 thereof, leads to such conclusions.

Additionally, in the opinion of the critics, Article 9a section 1 of the Act on the NCJ, the above conclusion is not contradicted by Article 187 section 4 of the Constitution, which states that „the system, scope of operation and mode of work of the NCJ and the manner of selection of its members shall be determined by an act". The fact that the Constitution indicates that the procedure for electing members of the NCJ is determined by an act does not mean that the legislator may entrust this competence to any chosen entity. The legislator is bound by other constitutional norms, where Article 187 section 1 item 2 should be interpreted with reference to the whole of this provision and with reference to at least Articles 10, 173 and 186 of the Constitution. Moreover, Articles 10 and 173 of the Constitution clearly indicate the scope of the presumption of competence. As constitutional presumptions, they cannot be abolished by the provisions of ordinary acts.

As a consequence, the current Article 9a section 1 of the Act on the NCJ, apart from Article 187 section 1 of the Constitution, violates Article 10 section 1 and Article 173 of the Constitution by violating the principle of separateness and independence of the judiciary from the legislative. The choice of judges for the NCJ should therefore be made by the judges themselves. The Council upholds the independence of the judiciary and of the judges and, as an independent body and one of the main bodies in a democratic state governed by the rule of law, should retain an equivalent position and not be subordinated to the legislature. The Council performs guarantee functions vis-à-vis the judiciary, which results from the tasks entrusted to it, in particular with submitting to the President of Republic of Poland a motion about the appointment of the judges. In view of the Council's guarantee function for the judiciary, the Constitution limits the number of members of the NCJ elected by the legislative and the executive so as to guarantee the balance of powers within the Council.

According to the critics, the current legislation violates the constitutional balance between the legislative and the judiciary by granting the former the right to fill a total of 21 posts in the NCJ, which leads to a significant impact of the legislative on this body. Moreover, as the critics of the current Act on the NCJ point out, such a regulation of the selection of members of the NCJ has a negative impact not only on the independence of the judiciary (Article 10 section 1 and Article 173 of the Constitution) and the independence of judges (Article 178 section 1 of the Constitution), but in consequence on the right to a court (Article 45 section 1 of the Constitution), which exercised is protected by compliance with the above constitutional principles.

Positive opinions

According to the General Prosecutor's Office of the Republic of Poland and some representatives of the doctrine,[103] Article 9a section 1 of the Act on the NCJ is consistent with Article 187 section 1 item 2 and Article 187 section 4 of the Constitution. This view was supported by three arguments.

The first of these concerns the fact that Article 187 section 4 of the Constitution granted the legislator a wide discretion in determining the way in which members of the Council were elected from among judges. The scope of freedom includes the right to shape the system, scope of operation, mode of operation of the Council and the method of selection of its members. In the opinion of the commentators, the broad discretion of the ordinary legislator is to result either from a comparison of the scope of issues submitted to it for regulation in the case of other constitutional bodies or from the absence of such referral norms.

The second argument results from the comparison of Article 187 section 1 items 2 and 3 of the Constitution. The absence of an explicit provision in Article 187 section 2 that fifteen members elected from among the judges are to be elected by judges indicates that the legislator has deliberately left the freedom to determine the entity to elect judges. Otherwise, the analogous solution adopted in Article 187 section 1 item 3 of the Constitution would be applied, in which the entity electing MPs and senators is clearly indicated. Consequently, leaving the issue open, in the opinion of the commentators, leads to the conclusion that it is the legislator who is responsible for the competence and the obligation to indicate this entity, which is to result directly from Article 187 section 4 of the Constitution.

The third argument relates to the status of the NCJ. The Council is not an institution of judicial self-government, therefore its members do not have to be elected by judges[104]. It is only a body composed of representatives of all authorities.

The above theses are confirmed by the judgment of the Constitutional Tribunal of 20 June 2017, K 5/17[105]. The Constitutional Tribunal dealt in detail with the systemic position of the National Council of the Judiciary, stating that "the NCJ is not a judicial authority"[106] and that "the National Council of the Judiciary cannot be treated as a self-government or a representation of Polish judges"[107]. Thus, "the current political position of the NCJ, its tasks and competences do not oblige the same guarantees to apply to the Council as to constitutional judicial authorities (cf. judgment of the Constitutional Tribunal ref. K 28/04)"[108].

With regard to judges-members of the NCJ, the Constitutional Tribunal noted that "Article 187 section 1 item 2 of the Constitution provides only that these persons shall be elected from among

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103 J. Potrzeszcz, *Opinia w sprawie zgodności z Konstytucją przedstawionego przez Prezydenta Rzeczypospolitej Polskiej projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*, 9 October 2017. See < http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=2002> (access: 16.11.2018).

104 P. Mikuli, *Konstytucyjność trybu wyboru sędziów sądów powszechnych do NCJ*, „Krajowa Rada Sądownictwa - Kwartalnik" 2014, No. 4 p. 10.

105 Ref. K 5/17.

106 Judgement of the Constitutional Tribunal of 20 June 2017, K 5/17, p. 7

107 Ibid, p 8

108 Ibid, p 10

judges. However, the legislator has not indicated who is to elect these judges. (...) Nothing prevents judges from electing judges to the NCJ. However, one cannot agree with the statement that only judicial bodies must be the guardian of active electoral law. While Article 187 section 1 item 3 of the Constitution clearly indicates that Members of the NCJ elected by the Sejm and Senators elected by the Senate, there are no constitutional guidelines for judges of members of the National Council of the Judiciary in this respect. This means that the Constitution does not prejudge who can elect judges to the NCJ. For this reason, it should be stated that, within the limits of legislative freedom, this issue may be regulated in different ways"[109].

The content of the Constitutional Tribunal's judgment also allows for rejection of allegations of negative impact of the new statutory regulations on the independence of the judiciary and judges. As mentioned above, the NCJ does not play the role of a judicial body, and "Membership in the NCJ is independent of the functions or profession, and its members are not bound by instructions from the entities that have appointed or elected them. The essence of membership in the Council is to undertake tasks which fall within its constitutional framework, i.e. to uphold the independence of courts and the independence of judges"[110].

II. TERMINATION BY AN ACT OF THE TERM OF OFFICE OF THE CURRENT MEMBERS OF THE NATIONAL COUNCIL OF THE JUDICIARY REFERRED TO IN ARTICLE 187 SECTION 1 ITEM 2 OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

In Article 6 of the Act of 8 December 2017, the legislator expired by way of an act the mandate of all current members of the Council referred to in Article 187 section 1 item 2 of the Constitution. According to the author of the draft act, the reason for expiration of mandates of a selected group of NCJ members was the introduction of changes in the competencies to elect judges-members of the Council and the introduction of a common term of office for these judges. According to the legislator, the expiry of the mandate does not violate Article 187 section 3 of the Constitution, which guarantees a four-year term of office for members of the Council. In the opinion of the author of the draft act, it would be possible to speak of contradiction with the aforementioned provision with the Constitution only if e.g. a three-year term of office was established. Thus, according to the author of the draft act, the constitutional term of office is respected and the principle itself has not been violated. Moreover, according to the author, the principle of continuity of operation of a constitutional body is also respected, as „the possibility for current members of the Council to perform their functions will cease only on the date of commencement of the joint term of office of new members of the Council"[111]. In addition, Article 6 of the 8 December 2017 is proportionate to the intended system changes.

109 Ibid, p. 13

110 Ibid, p. 14

111 Sejm's print no. 2002/VIII term , p. 9 of the justification for the draft act.

Critical opinions

The following institutions were critical of this provision: the Supreme Court, the Supreme Bar Council, the National Council of the Judiciary, the Ombudsman, the „Iustitia" Association and the Helsinki Foundation for Human Rights.[112]

According to the above entities, Article 6 of the 8 December 2017 the mandate of all current members of the Council referred to in Article 187 section 1 item 2 of the Constitution is incompatible with Article 187 section 3 of the Constitution.

Article 187 section 3 of the Constitution explicitly states that "the term of office of elected members of the National Council of the Judiciary is four years". This provision gives rise to two important facts. First of all, members of the Council cannot be dismissed before the end of the four-year term of office. Secondly, the constitutional term of office of members of the NCJ cannot be interfered with by way of an ordinary act. The fact that the continuity of the term of office of a selected group of NCJ members has been abolished means that the independence of the NCJ has been violated in favour of the legislative and the executive.

In addition, according to critics, in the situation described above there were no extraordinary, constitutionally justified circumstances that could justify a violation of the constitutional principle, and moreover the new regulation does not meet the requirements of proportionality.[113] Additionally, the draft author did not demonstrate either the proportionality of the solution proposed or the occurrence of special and extraordinary circumstances justifying the shortening of the term of office of NCJ members. In the opinion of critics, such a circumstance is not an important public interest manifested in the need to „democratise the process of electing members of the NCJ" or „the coherence of the changes introduced and the possibility of the NCJ functioning in accordance with a single statutory concept" by abandoning the principle of individual term of office in favour of joint term of office.[114] Nor do the proposed provisions meet the proportionality test, where the proposed normative solutions are necessary and the objective cannot be achieved by any other measure that imposes fewer restrictions on rights and freedoms. This view is supported by the Article 11 e of the Act on the NCJ. It provides for a „less onerous" measure, i.e. a supplementary election, which may be used to unify the terms of office of all members of the NCJ elected from among judges without the need to interrupt the terms of office of current members of the NCJ.

Positive opinions

According to the General Prosecutor's Office of the Republic of Poland and some representatives of the doctrine[115], Article 6 of the amending Act is consistent with Article 187 section 3 item 4 of the Constitution.

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112 See footnote 94.

113 Cf. Judgment of the Constitutional Tribunal of 18 July 2007, ref. no. K25/07.

114 Sejm's print No. 2002/VIII kad., p. 9 and 10 of the justification for the draft act.

115 J. Potrzeszcz, *Opinia....*, *op.* cit.

This view is based on the distinction between the concepts of „term of office" and „mandate". Moreover, positive opinions based on the grounds of the recent ruling of the Constitutional Tribunal of 20 June 2017, ref. no K 5/17 (see more subsection 2.3.). If the expiry of a term of office must meet the requirement of proportionality and be dictated by extraordinary, constitutionally justifiable circumstances, the expiry of the mandate of a NCJ member is not questioned. The Constitutional Tribunal, while analysing the provisions concerning the term of office of NCJ members, did not question such a possibility.[116] It referred to the view of the legal doctrine, according to which it is permissible to dismiss a member of the Council by the entity making their election before the end of the term of office. Similar was the judgment of the Constitutional Tribunal of 20 June 2017.[117] Moreover, in this judgment, the Tribunal stated that both the interpretation of the Constitution and the literature of the subject matter do not allow to state that the term of office of the members of the NCJ is absolutely irremovable. "In the Constitution there is no basis to formulate a ban on the regulation of the issue of dismissal of an elected member of the Council in an ordinary act developing its provisions"[118]. The expiry of a mandate does not violate the constitutional principle of a four-year term of office. The very principle of not shortening the term of office continues to be respected. Proponents of the expiration of the term of office of the existing members of the NCJ argue that it is necessary in connection with the recognition by the Constitutional Tribunal that the members of the Council hold a joint term of office[119]. This is to imply a simultaneous commencement and termination of the term of office of all members of the Council, the composition of which is to be renewed every four years.

III. REPRESENTATIVENESS OF LOWER INSTANCE JUDGES IN THE COMPOSITION OF THE NATIONAL COUNCIL OF THE JUDICIARY

The existing Article 9a section 2 is to ensure as far as possible the representation of judges belonging to different types and instances of courts. Article 9a section 2 states that „When making the choice referred to in paragraph 1, the Sejm shall, as far as possible, take into account the need to represent judges of different types and levels of courts in the Council". The draft act author notes, on the one hand, that the number of judges from lower instances is disproportionately small in relation to the number of judges from higher instances. On the other hand, given that the representation of different groups of judges will depend on the proposed candidates, it introduces a guarantee of representativeness only as a guideline - ‚as far as possible'.

Critical opinions

The following institutions were critical of this provision: the National Council of the Judiciary, the Ombudsman, the General Prosecutor's Office of the Republic of Poland[120], the "Iustitia" Association and the Helsinki Foundation for Human Rights.[121]

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116 Judgment of the Constitutional Tribunal of 18 July 2007, ref. no. K25/07.

117 Judgment of the Constitutional Tribunal of 20 June 2017, K 5/17, p 17.

118 Ibid, p. 16.

119 Ibid.

120 Opinion of the General Prosecutor's Office of the Republic of Poland of 6 November 2017 *to the draft act presented by the President of the Republic of Poland amending the Act on the National Council of the Judiciary and certain other acts.*

121 See footnote 78.

According to the above mentioned entities, Article 9a section 2 of the Act on the NCJ does not in fact guarantee any increase in the representativeness of the Council. This provision does not contain any legal guarantee that judges of all types of courts will be elected to the Council. It only expresses the preferred direction of choice. Moreover, this provision does not preclude a situation in which the Council consists exclusively of judges from one type of a court. In turn, the lack of any representation, even of one of the types of courts, may, in the opinion of critics, lead to a violation of Article 187 section 1 item 2 of the Constitution.

The plausibility of the above accusation is supported by the fact that after the new election to the Council, the representation of the Supreme Court, the Supreme Administrative Court and the appellate courts was eliminated in the Council. Currently, the Council includes: 13 district court judges, 1 circuit court judge and 1 judge of the provincial administrative court.

Positive opinions

In the opinion of the Prime Minister, the solution in force in Article 9a section 2 of the Act on the NCJ is to contribute to the increase in the number of judges of district courts in the Council composition. As the Prime Minister notes: „the National Council of the Judiciary has been dominated by judges of higher courts in recent years."[122] "Currently, there is only one judge of a district court in the NCJ, although the judges of these courts constitute more than ⅔ of all judges in Poland. For almost 30 years of the Council's operation, its members were only 4 such judges - despite the fact that district courts decide almost 95% of cases in Poland"[123].

However, it is worth noting that the Constitution, indicating that judges elected from among judges of the Supreme Court, common courts, administrative courts and military courts are members of the NCJ, does not determine the necessity of representation by judges-members of the NCJ of each of the above mentioned types of court, nor the ratio between the respective groups. As the Constitutional Tribunal stated, "the shape of the constitutional composition of the NCJ is connected with the principle of equality resulting from Article 32 section 1 of the Constitution. (...) Persons who, in accordance with the Constitution, may be a member of a given body should be given equal opportunities to apply for a given position. Access criteria must be clear and transparent"[124].

IV. PROPOSING CANDIDATES FOR MEMBERS OF THE NATIONAL COUNCIL OF THE JUDICIARY BY A GROUP OF AT LEAST TWO THOUSAND CITIZENS

According to the author of the draft act, the possibility of proposing candidates for members of the NCJ by a group of two thousand citizens will democratize the election process. In particular, it will increase the democratic legitimacy of NCJ members, strengthen the transparency of elections and introduce public debate on candidacies[125].

122 The Chancellery of the Prime Minister, „White Paper on the Reforms of the Polish Judiciary", 7 March 2018, item 110.

123 *Ibid.*

124 Ruling of the Constitutional Tribunal of 20 June 2017, K 5/17, p. 21.

125 Sejm's print no. 2002/VIII kad., p. 1 of the justification for the draft act.

Critical opinions

Critical opinions on this provision were expressed by the Supreme Court and the National Council of the Judiciary[126]. According to the above mentioned entities, the current Article 11a section 2 of the Act on the NCJ is inconsistent with Article 178 section 3 of the Constitution and Article 103 section 2 of the Constitution.

The current provision may in fact lead to judges taking action to obtain the support of citizens which is not in line with the limitations of their position. Judges are prohibited from belonging to political parties, trade unions and public activities in order to protect the principle of judicial independence and the independence of the judiciary. Such a possibility of submitting candidacies may expose a judge to a violation of his or her independence by seeking the support of citizens in whose cases he or she decides or may decide. In addition, it may expose the judge to accusations of bias in a situation where he or she decides in favour of citizens whose support he or she has previously won.

Positive opinions

In the opinion of the Prime Minister, the current Article 11a section 2 of the Act on the NCJ is aimed at democratisation of the Council. This can be achieved by giving society the opportunity to influence the development of human resources in the judiciary.[127]

V. OTHER ISSUES

Critical opinions also apply to the following provisions:

- Article 24 section 4 of the Act on the NCJ on applying provisions of the Act of 18 December 1998 on court and prosecutorial employees (Journal of Laws of 2017, item 246 and 1139) to the employees of the National Council of the Judiciary Office, with the exception of the requirement to serve an internship in a court or prosecutorial office, referred to in Article 2 item 7 of this Act;

- Article 31 of the Act on the NCJ on the appointment of teams to examine individual cases, including the requirements for notification to the Minister of Justice of each appointment of the team and of individual cases submitted to the team for examination;

- Article 35 of the Act on the NCJ on determining the order of candidates on the list if more than one candidate for the position of judge or trainee judge is applied for;

- Article 44a of the Act on the NCJ on the presentation to the President of the Republic of Poland of a resolution containing a request for appointing a candidate to hold the office of a judge or trainee judge.

As a rule, positive opinions concerned increasing the transparency of the work of the NCJ and increasing citizens' trust in the work of the Council through the introduction of Internet trans-

126 See footnote 78.

127 The Chancellery of the Prime Minister, *White Paper...*, item 138.

mission of the proceedings of the NCJ. Such a guarantee is introduced by Article 20 section 1 of the Act on the NCJ. Increasing the transparency of the work of the NCJ, which was the main objective of proposed amendments, the current Act also guarantees the protection of the personal data in the case of discussing cases of specific individuals.

6.2. INTERNATIONAL LEGAL STANDARDS

International organizations were involved in the discussion on the reform of the judiciary in Poland, while supporters and opponents of changes in the Polish judiciary referred to solutions applied in other countries.

I. COUNCIL OF EUROPE

In 2010, in the *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities* the Council of Europe stated that "the Judicial Council should be composed of at least in half of judges elected by their representatives from among judges at all levels and respecting the principle of pluralism within the judiciary"[128].

In October 2017, at the request of the President of the National Council of the Judiciary of the Republic of Poland, the Consultative Council of European Judges of the Council of Europe (hereinafter: CCJE)[129]. With regard to the election of judges-members of the NCJ by the Sejm, the CCJE Bureau expressed concern about "the transfer of powers to appoint members of the Council from the judiciary to the legislature, which poses a serious risk of politicization of members who are judges as a result of the politicized election procedure"[130] . A similar position was taken by the Commissioner for Human Rights of the Council of Europe in a letter to the Speaker of the Sejm, in which he considered the proposed changes to be worrying in the context of the constitutional separation of powers and independence of the judiciary[131]. The CCJE stated that a situation in which almost all members of the NCJ are elected by parliament is "contrary to the standards of the Council of Europe for judicial self-government bodies such as the councils of the judiciary"[132]. At the same time, according to the CCJE, the amendment of the Act on the NCJ is contrary to the Council's Action Plan to strengthen the independence and impartiality of the judiciary, according to which "measures should be taken to depoliticize the process for selecting or appointing members of the councils of the judiciary"[133].

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128 Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, adopted by the Committee of Ministers on 17 November 2010, during 1098. Meeting of deputy ministers, https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true (access: 22.11.2018).

129 Opinion of the Bureau of the Consultative Council of European Judges (CCJE) of 12 October 2017 at the request of the Polish National Council of the Judiciary for an opinion on the draft law of September 2017 presented by the President of the Republic of Poland, on the amendment of the Act on the National Council of the Judiciary and certain other acts, CCJE-BU(2017)9REV.

130 Ibid.

131 Letter of the Commissioner for Human Rights of the Council of Europe of 31 March 2017 to the Speaker of the Sejm of the Republic of Poland, ref: CommHR/NM/sf 015-2017, http://n-15-1.dcs.redcdn.pl/file/o2/tvn/web-content/m/p1/f/798ed7d4ee7138d-49b88289580481300/8a6a985c-20a1-48da-97ff-56d97f8e085b.pdf (access: 22.11.2018).

132 Opinion of the Bureau of the Consultative Council of European Judges....

133 Ibid.

Subsequently, in its opinion of December 2017, the Venice Commission[134] (the Council of Europe's advisory body on constitutional law) concluded that although the composition of councils of the judiciary varies from one European country to another, it is widely accepted that at least half of the judges should members elected from the judiciary[135]. According to the Venice Commission, election of the majority of NCJ members by the Polish Parliament will politicize the NCJ, in particular that "the Parliament is not obliged to select candidates supported by other judges[136]. With regard to expiration of the mandates of existing members of the NCJ, the Venice Commission noted that the Polish Constitutional Tribunal, which presented the concept of a "joint term of office for members of the NCJ"[137], did not call for the simultaneous removal of all the judges currently in office in the NCJ. According to the Venice Commission, a better solution would be to leave the current judges-members of the NCJ for the remainder of their term of office and to elect new judges for a shorter period of time, which would also ensure institutional continuity[138].

II. ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE)

In May 2017, the Organization for Security and Cooperation in Europe presented its "Final Opinion on the draft act amending the Act on the National Judicial Council and certain other laws (the Republic of Poland)"[139]. This document referred to the governmental amendment, finally vetoed by the President of the Republic of Poland, but it contains an assessment of the solutions also applied in the finally adopted Act of the 8 December 2017.

Referring to the role of a council of the judiciary in a democratic state, the OSCE stated that "in principle, councils of the judiciary and other similar bodies are necessary to support and guarantee the independence of the judiciary in a given country and should therefore be *independent and impartial themselves*, i.e. free from interference by the executive and legislative"[140]. At the same time, however, the OSCE pointed out that bodies such as councils of the judiciary should not consist exclusively or excessively of representatives of the judiciary in order to prevent self-interest, mutual defense within the environment, cronyism and allegations of corporatism[141].

Further, quoting the case law of the European Court of Human Rights (ECtHR), the OSCE recalled that "in order to determine whether a body can be considered to be independent, various aspects need to be considered, including the way in which its members are appointed and its term of office, the guarantees of its protection against external pressure and whether the body functions independently"[142].

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134 European Commission for Democracy through Law, *Opinion On The Draft Act Amending The Act On The National Council Of The Judiciary, On The Draft Act Amending The Act On The Supreme Court, Proposed By The President Of Poland, And On The Act On The Organization Of Ordinary Courts*, Strasbourg 11 December 2017, Opinion no. 904/2017, CDL(2017)/031.

135 Ibid, p. 6.

136 Ibid, p. 7

137 Judgement of the Constitutional Tribunal of 20 June 2017, K 5/17.

138 Opinion on the Draft Amending..., p. 8.

139 Final Opinion of the OSCE/ODIHR on the draft act amending the Act on the National Council of the Judiciary and certain other acts (Republic of Poland), Warsaw, 5 May 2017, Opinion no: JUD-POL/305/2017-FINAL [A1C/YM], https://www.osce.org/pl/odihr/315961?download=true, (access: 23. 11.2018).

140 Ibid, item 37.

141 Ibid, item 38.

142 Ibid, item 25.

With regard to the election of judges-members of the NCJ by parliament, according to the OSCE "the procedure for appointing members of the National Judicial Council is left primarily to the other two powers, i.e. the executive and/or legislative (apart from ex-officio members, 21 members would be appointed by the legislative and one by the executive), increasing their influence on the process of appointing its members, thus endangering the independence of the National Council of the Judiciary, and consequently the independence of the judiciary as a whole, as guaranteed by Article 173 of the Constitution"[143].

Furthermore, the OSCE stressed that the method for the election of judges-members of the NCJ "will also be inconsistent with the recommendations on the selection of members of judicial and other similar bodies developed under the auspices of the OSCE and the Council of Europe, which state that judges acting as members of councils of the judiciary should be elected by the judiciary"[144].

III. EUROPEAN UNION

The European Commission has been involved in the dispute over the Polish judicial system since 2016, when the composition of the Polish Constitutional Tribunal was changed. In January 2016, the European Commission launched a dialogue with the Polish authorities in accordance with the procedure concerning the framework of the rule of law introduced in 2014.. The European Parliament and the Council are kept informed about the results of the dialogue.

By November 2018, the European Commission issued four recommendations on the rule of law in Poland (27 July 2016, 21 December 2016, 26 July 2017 and 20 December 2017), which were supported by resolutions of the European Parliament (13 April 2016, 14 September 2016, 15 November 2017).

The last recommendation of the European Commission of 20 December 2017 was issued after the adoption of an amendment to the Act on the NCJ currently in force[145]. The document complements the previous recommendations and at the same time the Commission expresses "new concerns about the rule of law in Poland"[146], in particular "from the point of view of the principle of judicial independence and separation of powers"[147]. With regard to the National Council of the Judiciary, the Commission criticized, firstly, the early termination of the mandate of all judges-members (except for the First President of the Supreme Court and the President of the Supreme Administrative Court) by the legislative, which raises "concerns regarding respect for the independence of the Council and the principle of separation of powers" and "concerns regarding compliance with the Basic Law"[148].

143 Ibid, item 40.

144 Ibid, item 41.

145 Commission Recommendation (EU) 2018/103 of 20 December 2017 on the rule of law in Poland, complementing the following recommendations: (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, OJ L 17/50, https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:32018H0103&from=PL (access: 26.11.2018).

146 Ibid, section 1 item 2.

147 Ibid, section 2 item 4.

148 Ibid, section 2 item 30

Secondly, according to the Commission, introduction of a new system for the selection of judges-members of the NCJ significantly increases the Parliament's influence over the Council and adversely affects its independence, contrary to European standards[149]. As an example of the emerging threat, it was presented as a situation where "a judge of a district court who is to rule on a politically sensitive case and who at the same time has applied for the position of judge of a circuit court may be inclined to take the position preferred by the political majority in order not to jeopardize his or her chances of being promoted"[150].

In its recommendations, the Commission referred to the opinion of the Venice Commission and the 2010 recommendations of the Committee of Ministers of the Council of Europe.

IV. SOLUTIONS IN OTHER EUROPEAN COUNTRIES

When analyzing the controversies surrounding the reform of the National Council of the Judiciary in Poland, it is worth looking at legal solutions concerning councils of the judiciary in other European countries.

In 2018, the European Commission issued the annual report on judicial systems, elements of criminal law and the organization of prosecution bodies in the European Union – "The 2018 EU Justice Scoreboard"[151]. The document stresses that councils of the judiciary are key bodies for ensuring independence of the judiciary. At the same time, it was reminded that in accordance with European standards, as reflected, *inter alia* in the recommendations of the Council of Europe already in 2010[152], judges should represent at least half of the members of the council of the judiciary, elected by other judges of all levels of the judiciary, while respecting the principle of pluralism within the judiciary[153].

Analysis of the method of electing judges-members of the councils of the judiciary in 20 EU countries (Belgium, Bulgaria, Denmark, Ireland, Greece, Spain, France, Croatia, Italy, Latvia, Lithuania, Hungary, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, the United Kingdom) showed that:

- in 15 states, judges-members of the councils of the judiciary are elected by judges;
- in 3 states, judges-members of the councils of the judiciary are elected by judges, but they are formally nominated by the Parliament or the executive (no impact on the selection of candidates);
- in 1 state, candidates for judges-members of the councils of the judiciary are appointed by judges and nominated by the Parliament;

149 Ibid, section 2 item 32.

150 Ibid, section 2 item 33.

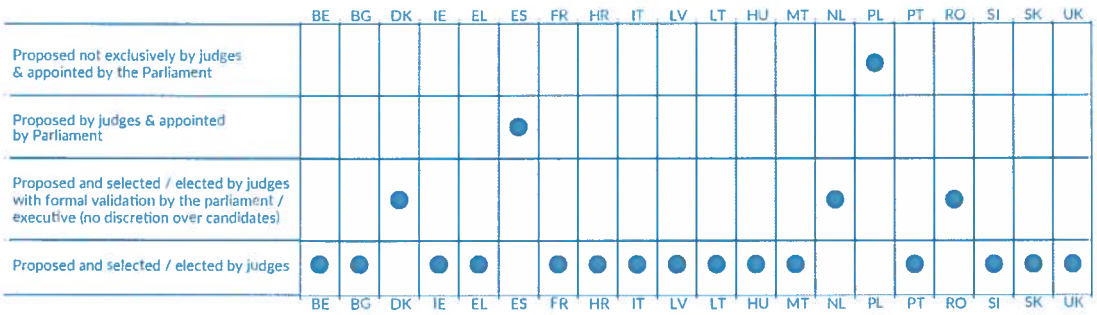
151 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2018) 364 final, *The 2018 EU Justice Scoreboard*, ISSN 2467-2254, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf (access: 23.11.2018).

152 Council of Europe, *Judges: independence, efficiency and responsibilities. Recommendation CM/Rec(2010)12 and explanatory memorandum*, https://rm.coe.int/16807096c1 (access: 23.11.2018).

153 Ibid, item 27.

- only in Poland, candidates for judges-members of the council of the judiciary are appointed by judges or a group of citizens, and the final election is made by the Parliament.

APPOINTMENT OF JUDGES-MEMBERS OF THE COUNCILS FOR THE JUDICIARY: INVOLVEMENT OF THE JUDICIARY*



(*) The Member States appear in the alphabetical order of their geographical names in the original language. The figure presents the national frameworks as they were in place in December 2017. DK: judges-members of the Council are selected by judges. All members are formally appointed by the Minister of Justice. EL: judges-members are selected by lot. ES: judges-members are appointed by the Parliament – the Council communicates to the Parliament the list of candidates who have received the support of a judges' association or of 25 judges. NL: judges-members are selected by the judiciary and are appointed on the proposal of the Council, based among others on the advice of a selection committee (consisting mainly of judges and court staff). All members of the Council are formally appointed by a Royal Decree, an administrative act which does not leave any room for discretion to the executive. PL: Candidate judges-members are proposed by groups of at least 2 000 citizens or 25 judges. From among the candidates, the deputies' clubs select up to nine candidates, from which a committee of the lower chamber of the Parliament (Sejm) establishes a final list of 15 candidates, who are appointed by the Sejm. RO: The campaign and election of judges-members are organised by the Superior Council of Magistracy. Once the final list of elected judges-members is confirmed, the Senate will validate it «en bloc». The Senate may refuse to validate the list only in case of infringement of the law in the procedure for the election of the members of the council and only if the infringement has had an influence over the result of the election. The Senate cannot exercise discretion over the the choice of candidates UK: judges-members are selected by judges.

The most similar to the Polish model for the election of judges-members of the council of the judiciary has been in place in Spain since 1985. The Spanish General Judicial Council is mostly composed of judges (13 out of 21 members) elected by the Parliament for a joint term of office[154]. However, the main difference between the Polish and Spanish systems is that in Spain the members of the Judicial Council "are elected by the Parliament from a list of candidates *who have received the support of an association of judges or at least twenty-five judges*"[155].

However, it appears that not all EU countries comply with the recommendations of international organizations, e.g. with regard to the desired number of judges-members of the council of the judiciary. In Denmark, France, Portugal or the Netherlands, less than half of the members of the council of the judiciary are judges (Denmark - 5 out of 11; France - 7 out of 22; Portugal - 8 out of 17; the Netherlands - the current distribution is 2-2, but the law allows a majority of 3 - 2 of non-judges)[156].

In addition, several European councils of the judiciary do not function at all (e.g. Germany, Austria, the Czech Republic). As the Polish government argued in the discussion on the state of the Polish judiciary, "Judges in Germany have even less influence on the staffing of courts (4th

154 White Paper on the Polish justice system, Warsaw, 7 March 2018, https://www.premier.gov.pl/files/files/biala_ksiega_pl_full.pdf (access: 26.11.2018), hereinafter: White Paper, item 131.

155 Final Opinion of the OSCE/ODIHR..., item 44.

156 White Paper, item 128.

place in the cited ranking of independence). There is no equivalent of the Polish National Council of the Judiciary at all, and judges are elected by commissions composed exclusively of politicians (at the federal level) or in which they have a clear advantage (in most federal states). (....) these commissions may dismiss judges from office for the first four years of their careers"[157].

7. SUMMARY

For several years now, Polish authorities have been trying to implement a reform of the judiciary which will solve the latter's problems such as low public trust in courts or lengthy proceedings.

The amendments adopted in December 2017 included, among others, the constitutional body that guards the independence of the judiciary and the independence of judges, which is the National Council of the Judiciary. Part of the amendment concerning the NCJ raised controversies both at home and abroad. The shortening of the term of office of all current members of the NCJ and the new system of election of judges-members of the NCJ by the Sejm from among candidates proposed by a group of 2000 citizens or at least 25 judges were criticized. Opponents accuse the amended regulations of incompatibility with the Constitution of the Republic of Poland, politicization of the NCJ and being a threat to the independence of courts in Poland. According to the supporters of the reform, the changes introduced were necessary to implement the judgment of the Polish Constitutional Tribunal of 20 June 2017 and do not pose a threat to the democratic state of law. According to Polish authorities, the adopted solutions do not deviate from international standards, as in some European countries there are no councils of the judiciary at all (e.g. Germany) or the way of electing members of the council of the judiciary is similar to that in Poland (Spain).

Undoubtedly, the attempt to increase transparency of the work of the National Council of the Judiciary through introduction of web-streaming of the NCJ plenary sessions deserves approval.

157 White Paper, item 130.

CHANGES IN THE SYSTEM OF COMMON COURTS (CHAPTER I) - SHORT SUMMARY

The Polish constitutional legislator incorporated into the Polish legal system the principle of the triple division of power, under which common courts are separate and independent from other authorities, and it is their competence to issue judgments on behalf of the Republic of Poland.

The Polish Basic Law provides for a number of regulations aimed at independence of the judiciary, safeguarding the right to a fair trial, as well as ensuring citizens the right to defence. Polish Constitution express that detailed regulations should be the source of legal norms of general character, which were specified by the legislator in the specific legal act (Act of 27 July 2001 - Law on the system of common courts).

In the years 2017-2018, the Polish authorities carried out a series of legislative actions aimed at reforming the Supreme Court, the National Council of the Judiciary and common courts. In the matter of common courts, the most important amendments to the Act - Law on the system of common courts were adopted in the acts of **30.11.2016, of 23.03.2017, of 11.05.2017, of 12.07.2017, of 08.12.2017, of 12.04.2018, of 10.05.2018, of 20.07.2018.**

Disputes concerning the potential unconstitutionality of laws reforming the Polish judiciary concern differences of opinion on the assessment of constitutionality or unconstitutionality of new regulations.

A flagship change is, for example, introduction of the principle of random allocation of judges to individual cases to the Polish civil procedure. The aim of this regulation is to make the workload of all judges more even, as well as to limit the influence of the heads of the judicial departments on the selection of judges for a particular case. The new solutions use an ICT system based on algorithms using random number generators, and although they successfully operate in other countries, they are criticized, e.g. regarding the possible influence of programmers on the content of algorithms.

Negative reactions of the reform opponents resulted from legislative changes concerning: retirement of judges, the possibility of dismissal of presidents and vice-presidents of courts by the Minister of Justice within 6 months from the entry into force of the amendment to the Law on the system of common courts, as well as clarification of situations in which it is possible to transfer a judge to another judicial department without his or her consent. Ith should be noted that some of the changes, after presentation of the remarks of EU institutions and opponents of reforms, have been withdrawn.

Finally, it should be pointed out that a number of regulations concerning the reform of common courts met with a neutral or positive reaction of the judiciary in Poland. Apart from random allocation of cases, these include the introduction of new rules for allocating activities in divisions to judges, trainee judges and legal clerks, entrusting certain activities in the field of justice to trainee judges, introduction of improvements and the institution of foreign law coordinators in each district of the court, etc.

THE REFORM OF THE SUPREME COURT (CHAPTER II)- SHORT SUMMARY

The dispute over the Supreme Court in Poland focuses on seven problems, which have been meticulously discussed above.

Firstly, lowering the retirement age of judges of the Supreme Court from 70 to 65 years old and compulsory retirement to judges who finished 65 years, who under previous regulations were supposed to serve until reaching 70 years old, raises concerns from perspective of principle of irremovability of judged under Article 180 (1) of Constitution of the Republic Poland. On the other hand, same Article in parahraph 4 authorises parliament to establish an age limit beyond which a judge shall proceed to retirement.

Secondly, shortening of the constitutional term of the First President of the Supreme Court, prof. Małgorzata Gersdorf may constitute a violation of Article 183 (3) of the Constitution. However, it is not clear, whether First President is exempted from rule of Article 180 (4), which requires all judges to retire at age set out by law.

Thirdly, introduction of the requirement to obtain the consent of the President of the Republic of Poland for further adjudication after the age of 65 raises concerns from perspective of Article 173 of the Constitution, according to which courts and tribunals shall constitute a separate power and shall be independent of other branches of power. On the other hand, there is no proof, that President will be abusing his power to consent for political purposes.

Fourthly, creation of an autonomous chamber within the Supreme Court, which is dealing with disciplinary cases, may constitute a violation of several provisions of Constitution (e.g. Article 183) which clearly distinguish between position Presidents of Supreme Court's Chambers and First President. It may be implied from these provisions, that statute shall set forth adequate position for the First President, which should have certain power to coordinate and supervise all Chambers and their Presidents. However, Constitution does not expressly prohibit creation of a Chamber, which will be exempted from First President's supervision.

Fifthly, extraordinary appeal as a remedy of judicial supervision, enabling Supreme Court to quash any final judgment rendered since 1997 may violate rule of legal certainty, but on the other hand it can also serve as guarantee of justice.

Sixthly, introduction of non-lawyers (jurors) to the Supreme Court is controversial, but not expressly prohibited by the Constitution.

Seventhly, method of appointing new judges of the Supreme Court may raise concerns, because independence of members of National Judiciary Council, who have been elected by a Sejm in political vote. However, Constitution does not expressly preclude possibility of election members of NCJ by Sejm.

On 21 November 2018 and 23 November 2018 the parliament (Sejm and Senate) passed an act amending the Act on the Supreme Court which solves problems mentioned in 1-3. This change was a consequence of CJEU order of 19 October 2018, which obliged Poland to freeze provisions

concerning retirement of Supreme Court judges, until Court will consider a case and deliver a final judgment. The remaining solutions mentioned in 4-7, however, remained in effect. The dispute over the Supreme Court in Poland continues and it will be a long time before it is definitively concluded.

NATIONAL COUNCIL OF JUDICIARY IN POLAND (CHAPTER III) – SHORT SUMMARY

The National Council of the Judiciary is a constitutional body which upholds the independence of the judiciary and the independence of judges, but which is not a judicial authority. The basic constitutional competences of the National Council of the Judiciary (hereinafter: the NCJ) include applying for the appointment of judges of the Supreme Court, common courts, administrative courts and military courts, and applying to the Constitutional Tribunal for verification of the constitutionality of normative acts in so far as they concern the independence of courts and judges.

In 2017, Polish government submitted a draft amending the Act on the National Council of the Judiciary. Its main assumptions were the following: changes in the regulations governing the selection of members of the NCJ from among judges through introduction of the principle of election by the Sejm; establishment of a joint term of office of elected members of the NCJ and termination of the term of existing elected members; introduction of new rules of issuing opinions by the NCJ on candidates for positions of judges and trainee judges and creation of new NCJ bodies for this purpose.

The government act raised doubts in the context of the Constitution of the Republic of Poland and was highly controversial in Europe. The President of the Republic of Poland vetoed it and in December 2017, the Sejm adopted another act amending the Act on the National Council of the Judiciary (hereinafter: the Act of 8 December 2017).

The fundamental changes in the functioning of the NCJ concern the term of office and the way in which members of the NCJ are elected from among judges. According to the current regulations, the Sejm elects fifteen members of the NCJ from among judges of the Supreme Court, common courts, administrative courts and military courts for a joint four-year term of office. The legislator expired by way of an act the mandate of all current members of the NCJ referred to in Article 187 section 1 item 2 of the Constitution. The Act of 8 December 2017 also introduced, *inter alia*, changes in the mode of the Council's work, increasing the transparency and streamlining the operation of the NCJ.

Opponents of the reform accuse the amended regulations of incompatibility with the Constitution, politicization of the NCJ and being a threat to the independence of courts in Poland. According to the supporters, the changes introduced were necessary and do not pose a threat to the democratic state of law. According to Polish authorities, the adopted solutions do not deviate from international standards, as in some European countries there are no councils of the judiciary at all (e.g. Germany) or the way of electing members of the council of the judiciary is similar to that in Poland (Spain).

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