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## Contemporary Problems of the Judicial Power in Poland

### Introduction

Since 2015, the political situation in Poland has changed significantly. This is strictly due to the fact that for the first time in independent Poland as a result of the presidential and parliamentary elections held in 2015 the executive and legislative powers were concentrated in the hands of the same political party. In subsequent years, the ruling party introduced a number of constitutional reforms which aroused much controversy from the point of view of their compliance with the provisions of the Polish Constitution of 1997.<sup>1</sup> The reforms implemented concerned many aspects of public life (public media, freedom of assembly, etc.); however, the most essential ones affected judicial power. In fact, successive elements of the third power were “reformed” one by one in subsequent years. This process began as early as in 2015 with regard to the Constitutional Tribunal. The reforms implemented two years later focused on the common courts, the Supreme Court and the National Council of the Judiciary. The problems of the “third power”, which have specific consequences for citizens, have been one of the leading topics in public discussion in Poland. Debate on these issues, especially in the context of the violation of the rule of law in Poland, has also spread beyond Polish borders. Given the international character of this issue of *Gdańsk Legal Studies* and the fact that it is also addressed to foreign readers, it is important to discuss the main problems that the judiciary in Poland has been struggling with for almost five years.

One of the fundamental principles of the Polish constitutional system is that of the division and balance of powers. Article 10 par. 1 of the Constitution *expressis verbis* provides that “The system of government of the Republic of Poland shall be based on the division of and balance between legislative, executive and judicial powers” and then in par. 2 of this article indicates that judicial power shall be vested in courts and tribunals. The Constitutional Tribunal has several times pointed out that the constitutional requirement of the division of powers should be treated more strictly in regard to the judiciary than in case of other powers.<sup>2</sup> The “separateness” of the judiciary is strength-

<sup>1</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483).

<sup>2</sup> This is justified by the particular connection between the judiciary and the protection of human rights and freedoms.

ened by art. 173 of the Constitution, which states that courts and tribunals shall be separate and independent from other authorities. At the same time, it emphasizes that the principle of the independence of courts and the principle of their separation allow for interference by other authorities only in the non-judicial sphere of court activities and also require certain procedural guarantees, e.g., in regard to the free assessment of evidence.

## Constitutional Tribunal

Constitutional regulation of the Constitutional Tribunal is provided for in chapter VIII (art. 188–197) of the current Constitution. In addition to its primary function that is the constitutional review of law, the Polish Constitutional Tribunal also performs several other functions such as deciding on the conformity to the Constitution of the purposes or activities of political parties, considering constitutional complaints, settling competence disputes between central constitutional organs of the state and stating the President's temporal inability to hold the office.<sup>3</sup> Its judgements are universally binding and final (art. 190 par. 1) and they are subject to immediate publication in the official journal of laws in which the original normative act was promulgated (art. 190 par. 2). The Constitutional Tribunal consists of fifteen judges elected individually by the Sejm for nine years. The President and the Deputy President of the Tribunal are appointed by the President of the Republic from among candidates presented to him/her by the General Assembly of Judges of the Constitutional Tribunal. The judges of the Tribunal are also independent in the exercise of their office and are subject only to the Constitution. The organization of the Tribunal and proceedings before the Tribunal are determined by statute.

This constitutional background is essential to understanding the constitutional crises surrounding the Tribunal that happened in several steps. The first one concerned its composition. On 25 November 2015, just after parliamentary elections, the new parliamentary majority stated the lack of the legal force of five resolutions of the Sejm of the previous term of office on the choice of judges to the Constitutional Tribunal and appointed five new judges for these seats. In any case, none of the judges elected by the previous Parliament prior to this could perform their duties as they were blocked by the President of the Republic who refused to take oaths from them. At the same time, the President immediately took oaths from the newly appointed judges. This aroused much controversy as on the very next day the Constitutional Tribunal ruled<sup>4</sup> that the appointment of two of the five judges by the previous Sejm was based on law that was inconsistent with the Constitution therefore the newly elected parliament was entitled to choose only two judges for these vacancies. As the other three

<sup>3</sup> See more: A. Rytel-Warzocho, "The role and scope of powers of the Constitutional Tribunal in Poland" [in:] *Proceedings of The International Conference, European Union's History, Culture and Citizenship* 2018, vol. 11, p. 335 *et seq.*

<sup>4</sup> Judgment of the Constitutional Tribunal of 3 December 2015, K 34/15.

“judges” appointed by the Sejm of the new term were *de facto* appointed to already legally occupied seats, the President of the Constitutional Tribunal did not allow them to adjudicate. Their problem was “resolved” when Justice Andrzej Rzepliński ended his term of office on 20 December 2016 and Justice Julia Przyłębska (appointed to the Tribunal in December 2015) was elected as the President of the Tribunal. In subsequent years when seats in the Tribunal were vacated, the Sejm of the 8th term successively appointed new judges with the omission of the three judges legally appointed by the Sejm of the 7th term. As the President of the Republic of Poland still had not taken their oaths, they were in a kind of “suspended” state. On the other hand, the presence of three judges appointed to seats that were already occupied provoked a discussion over the correct formation of adjudication panels and, consequently, the legality of judgements passed by the Constitutional Tribunal. At present (September 2020), fourteen of the fifteen active adjudicating judges of the Constitutional Tribunal were appointed by the Sejm of the 8th term elected in 2015.

Serious doubts were also raised in regard to the appointment of the new President of the Constitutional Tribunal as the presentation of the candidates for that office to the President, which took place on 20 December 2016, was based on non-binding regulations that came into force on 3 January 2017. Additionally, the presentation of candidates for this office to the President was not preceded by the resolution of the General Assembly of Judges of the Constitutional Tribunal that is required by law.

Another aspect of the constitutional crises regarding the Constitutional Tribunal concerned a series of so-called “recovery laws”. Between December 2015 and November 2016 the parliament adopted six laws amending or introducing entirely new regulations concerning the Constitutional Tribunal. The amendment adopted on 22 December 2015<sup>5</sup> introduced a set of procedural rules that were considered unconstitutional by the Constitutional Tribunal<sup>6</sup> mainly because their implementation would block the possibility of adjudication by the Tribunal (e.g., it obliged the Tribunal to consider most cases by a full bench of at least 13 judges, extended time limits, introduced the rule that cases should be adjudicated in the order of their receipt without taking into account their importance). Because of the lack of the relevant *vacatio legis*, the Tribunal was forced to adjudicate mainly on the basis of directly applicable provisions of the Constitution and applied the law on the Constitutional Tribunal in the wording before the amendment. In response to this judgement, the government refused to publish it in the official journal of laws assuming that the ruling issued by the Tribunal was not “a judgment” because it was not issued on the basis of the newly adopted provisions. The government consistently refused to publish the Tribunal’s judgements issued between March and July 2016.<sup>7</sup> In the face of the critical assessment both of

<sup>5</sup> The Act of 22 December 2015 on the amendment of the Act on the Constitutional Tribunal, Official Journal of Laws, item 2217.

<sup>6</sup> Judgement of the Constitutional Tribunal of 9 March 2016, not published.

<sup>7</sup> About the problems that resulted from the government’s refusal to publish the judgements of the Constitutional Tribunal issued between March and July 2016 see: A. Rytel-Warzocho, “The dispute over the Constitutional Tribunal in Poland and its impact on the protection of constitutional rights and freedoms” [in:] *International Comparative Jurisprudence* 2017, vol. 3, no. 2, p. 153 *et seq.*

the new solutions and the manner of their implementation (among others by the Venice Commission<sup>8</sup> and the European Parliament<sup>9</sup>), in July 2016 a new Act on the Constitutional Tribunal was adopted<sup>10</sup>. The problem of not publishing the judgements of the Constitutional Tribunal was partly solved by this law as it obliged the government to publish them with the exception of those referring to acts that had already ceased to apply. Therefore, three important judgements<sup>11</sup> concerning the unconstitutionality of the amendments to the Act on the Constitutional Tribunal have not been published to date. In November 2016 the act of July was replaced by two new acts concerning the status of the judges of the Constitutional Tribunal, its organization and the mode of proceedings before the Tribunal<sup>12</sup> which are still in force. At present, there are serious doubts as to whether the Constitutional Tribunal is performing its basic function of conducting the constitutional review of law. It is also very disturbing that the current situation has generated a very significant decrease in the public's trust in institutions and in the status and role of the Constitutional Tribunal as such.<sup>13</sup>

## The Supreme Court

The Supreme Court exercises supervision over common and military courts regarding judgments in order to ensure the legal compliance and uniformity of court rulings. It also examines cassations and other appeals against decisions of these courts in

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<sup>8</sup> In its two opinions about the new regulations considering the Constitutional Tribunal, the Venice Commission referred to them as "legislative obstruction". In the conclusions it indicated that the Polish legislator did not meet two basic standards of the balance of power – the independence of the judiciary and the position of the Constitutional Tribunal as a final arbitrator in constitutional matters. See: Opinion 833/2016 for Poland on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal adopted by the European Commission for Democracy Through Law (Venice Commission) on 11 March 2016; Opinion 860/2016 for Poland on the Act on the Constitutional Tribunal adopted by the European Commission for Democracy Through Law (Venice Commission) on 14 October 2016, CDL-AD(2016)026.

<sup>9</sup> European Parliament resolution of 13 April 2016 on the situation in Poland (2016/3031(RSP)), European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP)).

<sup>10</sup> The Act of 22 July 2016 on the Constitutional Tribunal (Journal of Laws, item 1157).

<sup>11</sup> Judgements of the Constitutional Tribunal issued in cases K 47/15, K 39/16 and K 44/16.

<sup>12</sup> The act of 30 November 2016 on the status of the judges of the Constitutional Tribunal (Journal of Laws, item 2073); the Act of 30 November 2016 on the organisation and the mode of proceedings before the Constitutional Tribunal (Journal of Laws, item 2072).

<sup>13</sup> These problems have been noticed both at home and abroad. At the beginning of 2020, the European Commission spokesman Christian Wigand stated that the independence and legitimacy of the Constitutional Tribunal in Poland has been "seriously undermined" and that it can no longer issue an "effective constitutional judgment", while Prof. Wojciech Sadurski bluntly pointed out that "There is no longer any Constitutional Tribunal in Poland. There is a dummy, a façade. There is only a building with the inscription: Constitutional Tribunal," <https://polskatimes.pl/siedem-grzechow-glownych-polskiego-wymiaru-sprawiedliwosci/ar/c1-14759822> (accessed 2020.09.23).

accordance with the provisions of procedural law (complaints about the resumption of proceedings, the length of proceedings, the non-compliance of the final rulings with law and other complaints). The Supreme Court also performs other duties specified in the Constitution and statutes, in particular those concerning elections and referendums. It recognizes electoral protests and confirms the validity of parliamentary elections, the elections to the European Parliament and the election of the President of the Republic, and it also recognizes protests against referendums and confirms their validity. Additionally, the Supreme Court provides opinions on the drafts of statutes and other normative acts concerning the adjudication and operation of courts and settles discrepancies in the interpretation of law revealed in the case law of common courts, military courts and its own. The Supreme Court is composed of the First President, Presidents and judges. The First President of the Supreme Court is appointed by the President of the Republic for a six-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court (art. 183 para. 3 of the Constitution). The First President of the Supreme Court is *ex officio* the Chairman of the Tribunal of State and a member of the National Council of the Judiciary.

Currently, a detailed regulation concerning the Supreme Court is provided for in the act of 8 December 2017 on the Supreme Court.<sup>14</sup> The circumstances of its adoption were quite controversial. The draft of the new act on the Supreme Court submitted to the parliament on 12 July 2017<sup>15</sup> as a “necessary element of wider judicial reform” was proceeded by the parliament for only eight days and was adopted on 20 July 2017. However, on 31 July 2017 the President of the Republic refused to promulgate the act and returned it to the Sejm for reconsideration (according to the constitutional right of the President to veto acts before their promulgation provided for in art. 122 of the Constitution). It should be emphasized that the President mainly pointed out that the adoption of the act on the Supreme Court had not been preceded by consultations or a comprehensive discussion. He also had doubts whether the functioning of the Supreme Court should be dependent on the discretionary powers of the Minister of Justice who, since 2016,<sup>16</sup> has also been the General Prosecutor. The new regulations increased enormously the influence of the Minister of Justice – General Prosecutor on the activities of the Supreme Court. It must be remembered that the Minister of Justice, who is a member of the government, as the General Prosecutor became a party to a series of proceedings before the Supreme Court and also obtained the right to interfere in other court proceedings by giving written instructions to all public prosecutors concerning the content of any individual case they are dealing with. The Minister of Justice – General Prosecutor also obtained discretionary power (there were no criteria

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<sup>14</sup> The Act of 8 December 2017 on the Supreme Court (unified text: Journal of Laws 2019, item 825, with amendments).

<sup>15</sup> Document no. 1789 of the Sejm/VIII term of office.

<sup>16</sup> In January 2016 an Act on the Public Prosecutor's Office was adopted which strengthened the competences of the Minister of Justice whose office was merged with the Prosecutor General. The amendment entered into force on 4 March 2016; the Act of 28 January 2016 – Law on the Public Prosecutor's Office (Journal of Laws, item 177).

specified) to indicate which of the Supreme Court's judges appointed on the basis of the existing provisions should not retire at the age of 65. The participation of the President in making such decisions was only illusory as he could only approve or refuse the extension of the term of office in regard to judges indicated by the Minister, without the right to decide on other judges. Because the President's veto was not rejected by the Sejm (in fact no vote was taken on this matter), on 26 September 2017 the President submitted to the parliament a new draft of the Act on the Supreme Court. It was adopted on 20 December 2017 and entered into force in March 2018.

The new law introduced essential changes both to the status of judges and the organization of the Supreme Court. Among others, it lowered the retirement age from 70 to 65 years, which resulted in the forced retirement of 27 judges of the Supreme Court. The new law also established two new Chambers of the Supreme Court: the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber.<sup>17</sup> The first one was set up to discipline Polish judges, in particular to punish those who were critical of controversial court reforms. Its jurisdiction included disciplinary cases concerning Supreme Court judges, lawyers, notaries, legal advisors, military and common court judges, prosecutors, as well as labor and social security cases concerning Supreme Court judges including those related to their retirement. The Extraordinary Control and Public Affairs Chamber was to consider extraordinary complaints, consider protests against the validity of elections and nationwide referendums, confirm the validity of elections and referendums, consider other public law matters, including matters concerning the protection of competition, the regulations of energy, telecommunications and rail transport, cases in which an appeal is lodged against the decision of the Chairman of the National Broadcasting Council, as well as complaints regarding the length of proceedings before common and military courts and the Supreme Court.

Controversies regarding the establishment of these chambers, in particular the scope of jurisdiction granted to the Disciplinary Chamber, were reinforced by the fact that the judges for the new Chambers were appointed by the National Council of the Judiciary composed according to new rules introduced in 2017, which made that authority dependent on the governing party. Ten new judges of the Disciplinary Chamber were appointed by the President of the Republic in September 2018, and in February 2019 the President appointed the heads of the two new chambers.

The new law on the Supreme Court sparked much controversy, and not only in Poland. On 16 January 2018, the General Assembly of the Supreme Court passed a resolution in which it stated that the new Act on the Supreme Court (similarly to the Act on common courts and the Act on the National Council of the Judiciary) were proceeded and adopted in violation of the basic rules of a legislative procedure, without due consultations, disregarding submitted legal opinions. The Court pointed out that the new regulations were in many aspects inconsistent with the current Constitution of the Republic of Poland, in particular they violated the fundamental principles of the divi-

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<sup>17</sup> Before that the Supreme Court was composed of three chambers: the Civil Chamber, the Criminal Chamber and the Labor Law and Social Security Chamber.

sion of powers and the independence of courts and judges. It also pointed out that the new law on the Supreme Court could not shorten the constitutionally determined six-year term of the First President of the Supreme Court (which was to expire at the end of April 2020).

As early as in the stage of legislative work, the First President of the Supreme Court presented an opinion on the presidential draft of the Act on the Supreme Court, in which she pointed out the dangers resulting from the implementation of the proposed regulation.<sup>18</sup> The Court noticed that the real purpose of the new regulations were to conduct the “de-communization” of the part of its composition and at the same time to introduce the disciplinary liability of judges which would result in the termination of their terms of office. Additionally, the Supreme Court stated that the new law was also supposed to verify the previous case law of the Supreme Court by means of an “extraordinary complaint” (the law allowed challenging decisions adopted after 1997), to exclude the possibility of conducting a dispersed constitutional review of law by the common courts and the Supreme Court and to remove, both in future and retroactively, decisions related to electoral matters, including the confirmation of the validity of elections. It should be noted that the possibility to verify legally valid court decisions made before the entry into force of the act would open the possibility of bringing disciplinary liability against judges who participated in issuing such judgments. The Supreme Court stated that the new Chambers of the Supreme Court are Chamber “only by name” and *de facto* “they constitute two separate and independent courts – unknown to the Constitution – that will exercise control over common courts and the Supreme Court.”

Referring to the Act on the Supreme Court, the Venice Commission in its opinion of 11 December 2017<sup>19</sup> formulated the following critical remarks:

The creation of two new chambers within the Supreme Court (Disciplinary Chamber and Extraordinary Chamber), composed of newly appointed judges, and entrusted with special powers, puts these chambers above all others and is ill-advised. The compliance of this model with the Constitution must be checked; in any event, lay members should not participate in the proceedings before the Supreme Court;

The proposed system of the extraordinary review of final judgments is dangerous for the stability of the Polish legal order. It is in addition problematic that this mechanism is retroactive and permits the reopening of cases decided long before its enactment (as from 1997);

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<sup>18</sup> Opinion on the draft of the Act on the Supreme Court submitted by the President of the Republic of Poland presented by the First President of the Supreme Court Prof. dr hab. Małgorzata Gersdorf on 16 October 2017. As the draft submitted by the President was not substantially changed during the legislative work, the remarks formulated in this opinion can be also referred to the Act on the Supreme Court adopted on 8 December 2017.

<sup>19</sup> Opinion no. 904/2017 concerning Poland of the European Commission for Democracy Through Law (Venice Commission) 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 organisation of ordinary courts adopted by the Venice Commission at its 113<sup>th</sup> Plenary Session on 11 December 2017; CDL-AD(2017)031.

The competency for the electoral disputes should not be entrusted to the newly created Extraordinary Chamber;

The early removal of a large number of justices of the Supreme Court (including the First President) by applying to them, with immediate effect, a lower retirement age violates their individual rights and jeopardises the independence of the judiciary as a whole; they should be allowed to serve until the currently existing retirement age;

The President of the Republic as an elected politician should not have the discretionary power to extend the mandate of a Supreme Court judge beyond the retirement age;

The five candidates to the positions of the First President of the Supreme Court, presented to the President of the Republic, should all have a significant support of the General Assembly of judges;

The Act should limit the discretion of the First President in the matters related to the distribution of cases and assigning judges of the Supreme Court to the panels.

In 2018 the European Commission brought proceedings against Poland to the Court of Justice of the European Union. The case was about the consistency with European law of the rule adopted in December 2017 that judges of the Polish Supreme Court shall enter retirement upon reaching 65. However, if their health allowed they could continue active service in the Court upon the consent of the President of Poland. This rule was also to be applied immediately to judges already in office. In the meantime, the regulation concerning the retirement age of the judges that was being challenged was amended.<sup>20</sup> According to the new wording of art. 37 par. 1 of the Act on the Supreme Court, “a judge of the Supreme Court retires on the day he/she turns 65.” However, it was clearly indicated that this provision applies only to the Supreme Court judges who took office after 1 January 2019 when the amendment entered into force. Supreme Court judges who took office before that date are subject to the earlier provisions establishing the retirement age of 70. Additionally, the new law allowed for the return of judges who had been subject to the provisions on lowering the retirement age with immediate effect to the position held on the date of entry into force of that law. Their terms as judges of the Supreme Court shall be deemed uninterrupted. Although the provisions challenged by the Commission were repealed, the Commission maintained its complaint, and the case was considered by the Court of Justice of the European Union, which issued a judgement on 24 June 2019.<sup>21</sup> The Court formulated the requirements of judicial independence and pointed out that “the principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term”.

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<sup>20</sup> The Act of 21 November 2018 on the amendment of the Act on the Supreme Court (Journal of Laws, item 2507). It entered into force on 1 January 2019.

<sup>21</sup> Judgement of the Court of Justice of the European Union of 24 June 2019, European Commission v Republic of Poland, case C-619/18.



## Common courts

Common courts in Poland are established and closed by the Minister of Justice pursuant to opinions from the National Council of the Judiciary. The detailed regulation of common courts is covered in the act of 27 July 2001 – Law on the system of common courts.<sup>22</sup> According to the Constitution (art. 178–180), judges of common courts, are appointed by the President of the Republic of Poland on the motion of the National Council of the Judiciary, for an unspecified period of time. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. They cannot belong to a political party, a trade union or perform public activities incompatible with the principles of the independence of courts and judges. Judges shall not be removable. The recall of judges from office, suspension from office, transfer to another adjudication panel or position against their will, can occur only by virtue of a court judgment and only in those instances prescribed in the statute. Judges can be retired as a result of illness or infirmity which prevents them from discharging the duties of their office according to the procedure determined by the statute.

On 12 April 2017, a group of deputies from the ruling party submitted a draft amendment to the Law on the system of common courts,<sup>23</sup> which was adopted by the Sejm three months later. The legislative proceedings were accompanied by extremely sharp legal arguments. The proposed solutions were assessed critically by the Supreme Court, the Supreme Bar Council, the National Council of the Judiciary, the Institute of Legal Sciences of the Polish Academy of Sciences, the State Treasury Solicitor's Office and the National Chamber of Legal Advisors,<sup>24</sup> as well as several experts who submitted their opinions to the Analysis Office of the Chancellery of the Sejm.<sup>25</sup> The entry into force of the new law in August 2017 resulted in the strengthening of the administrative supervision of the Minister of Justice over the activities of common courts. In particular, the Minister obtained the arbitrary right to appoint and dismiss presidents and deputy presidents of courts – within six months from the date of the entry into force of the act – without a statutory determination of that conditions which should be taken into account by the Minister of Justice. The new law also established a new office of the Disciplinary Prosecutor for Common Courts, who is appointed (along with his/her deputies) by the Minister of Justice. The main task of this office is to investigate possible offences of judges pursuant to requests of the Minister of Justice, presidents

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<sup>22</sup> Law of 27 July 2001 – Law on the system of common courts (unified text: Journal of Laws 2020, item 365, with amendments).

<sup>23</sup> Law of 12 June 2017 on the amendment of the Act – Law on the system of common courts and some other acts, Journal of Laws, item 1452).

<sup>24</sup> All these opinions are available at: <http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1491> (accessed: 2020.09.23).

<sup>25</sup> Critical opinions were submitted by the following experts on constitutional law: Prof. Marek Chmaj, Prof. Mariusz Jabłoński, Prof. Krzysztof Skotnicki, Prof. Andrzej Szmyt. The full texts of these opinions (in Polish) are available at: <http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=1491> (accessed: 2020.09.23).

of appeal or district courts, colleges of appeal or district courts, the National Council of the Judiciary or on their own initiative.

In the opinion of the Venice Commission issued on 11 December 2017, mentioned previously, the Commission called on the Polish parliament to “reconsider” changes introduced to the Act on the common courts. The Commission agreed that judges should be subject to supervision, however it cannot lead to a violation of the constitutional principles of the independence of courts and judges. The Commission pointed out that:

The decision of the Minister of Justice to appoint/dismiss a court president should be subject to the approval of the NCJ [National Council of the Judiciary] or by the general assembly of judges of the respective court, taken by a simple majority of votes. Ideally, general assemblies of judges should submit candidates to positions of presidents to the MoJ [Minister of Justice] for approval;

The MoJ also should not have the discretionary power to extend the mandate of a judge beyond the retirement age;

The MoJ should not have “disciplinary” powers vis-à-vis court presidents.

According to the Commission, the Act should also “limit the discretion of court presidents in matters related to the distribution of cases and assignment of judges to the panels; exceptions from the general principle of random allocation of cases should be narrowly and clearly defined in the law”.

## The National Council of the Judiciary

The constitutional body of fundamental meaning to the judiciary is the National Council of the Judiciary. According to the Constitution, it “shall safeguard the independence of the courts and judges” (art. 186 par. 1). In order to perform this task, the Council can make applications to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges.<sup>26</sup>

After the reforms of the Constitutional Tribunal (2015–16), the Public Prosecutor’s Office (2016), the Supreme Court (2017) and the common courts (2017), the National

<sup>26</sup> On the genesis of the National Council of the Judiciary in Poland, as well as its constitutional position and performing its powers see: A. Rytel-Warzocho, P. Uziębło, “National Council of the Judiciary as the guardian of the independence of judges and courts in Poland in the light of recent legislative amendment’s” [in:] *The International Conference European Union’s History, Culture and Citizenship* 2017, vol. 10, p. 231 *et seq.*; A. Szmyt, “Some remarks on the amendment to the act on the National Council of the Judiciary in Poland” [in:] *The International Conference European Union’s History, Culture and Citizenship* 2018, vol. 11, p. 115 *et seq.*; P. Sarnecki, “Krajowa Rada Sądownictwa” [in:] *Trzecia władza. Sądy i Trybunały w Polsce*, ed. A. Szmyt, Gdańsk 2008; P. Tuleja, “Konstytucyjne kompetencje Krajowej Rady Sądownictwa” [in:] *Trzecia...*; A. Bałaban, “Krajowa Rada Sądownictwa - regulacja konstytucyjna i rola w systemie władzy sądowniczej” [in:] *Sądy i Trybunały w konstytucji i w praktyce*, ed. W. Skrzydło, Warszawa 2005.

Council of the Judiciary underwent profound reform in regard to the manner of the appointment of its members. In this context, it is important to emphasise that the Constitution directly specifies the composition of the National Council of the Judiciary which, according to art. 187, consists of:

- 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic,
  - 2) fifteen judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts,
  - 3) 4 members chosen by the Sejm from amongst its deputies and 2 members chosen by the Senate from amongst its senators.
- (...)
3. The term of office of those chosen as members of the National Council of the Judiciary is 4 years.
  4. The organizational structure, the scope of activity and procedure for work of the National Council of the Judiciary, as well as the manner of choosing its members shall be specified by statute.

The statutory regulation of the National Council of the Judiciary is included in the Act of 12 May 2011,<sup>27</sup> which was significantly amended on 8 December 2017.<sup>28</sup> The new regulation provides that fifteen members of the National Council of the Judiciary chosen from amongst judges shall be chosen by the Sejm. This solution was contrary to the rule that member-judges are appointed by judges themselves, which is well-established in the doctrine of constitutional law and the jurisprudence of the Constitutional Tribunal.<sup>29</sup> Such constitutional practice complies with the constitutional assumption of the “mixed” character of the National Council of the Judiciary which serves as a kind of self-government of judges. It should be also emphasized that although the Constitution does not explicitly provide that the choice of fifteen judges to the Council shall be made by judges themselves, it expressly refers the creative powers of the Sejm in this regard permitting it to elect four deputies to the Council (art. 187 par. 1 point 3). The new provisions are not only contrary to art. 187 par. 1 of the Constitution but also the constitutional principle of the division and balance of powers (art. 10) and the principle of the independence and separateness of the judicial power (art. 173 and art. 186 par. 1.<sup>30</sup> As the Venice Commission pointed out in the opinion of 11 December 2017, “the election of the 15 judicial members of the National Council of the Judiciary

<sup>27</sup> The Act of 12 May 2011 on the National Council of the Judiciary (unified text: Journal of Laws 2019, item 84, with amendments).

<sup>28</sup> The Act of 8 December 2017 on the amendment of the Act on the National Council of the Judiciary and some other acts (Journal of Laws 2018, item 3).

<sup>29</sup> See also: Judgement of the Constitutional Tribunal of 18 July 2007, K 25/07, OTK-A 2007, no. 7, item 80, and the Judgement of the Constitutional Tribunal of 16 April 2008, K 40/07, OTK-A 2008, no. 3, item 44.

<sup>30</sup> See more: K. Grajewski, “Zmiany statusu prawnego Krajowej Rady Sądownictwa” [in:] *Współczesne problemy sądownictwa w Republice Czeskiej i w Rzeczypospolitej Polskiej*, ed. Z. Witkowski et al., Toruń 2017, p. 91 et seq.

by Parliament, in conjunction with the immediate replacement of the currently sitting members, will lead to a far reaching politicisation of this body". It also recommended that judicial members of the Council should be elected by their peers, as it was before.

A serious problem that arose against this background concerned the legitimacy of the National Council of the Judiciary, which was composed according to the new rules in March 2018, to appoint judges both to common courts and the Supreme Court. Because of numerous doubts related to the new method of appointing the National Council of the Judiciary, many voices questioned the independence of judges appointed by this body.

Based on cases under the new regulations concerning the retirement of three judges of the Supreme Court who were 65, in 2018 the Supreme Court referred questions to the Court of Justice of the European Union for a preliminary ruling. The Supreme Court asked, *inter alia*, whether the newly established Disciplinary Chamber that is composed of judges appointed by the National Council of the Judiciary, which due to the current model of its formation and the manner of operation that does not guarantee independence from the legislative and executive authorities, is an independent court within the meaning of European law. In its judgement of 19 November 2019,<sup>31</sup> the Court of Justice did not give a direct answer about the nature of the National Council of the Judiciary or the status of judges appointed by its new composition but it indicated that judges of common courts and the Supreme Court have the full right to verify the legality of the new National Council of the Judiciary and the Disciplinary Chamber of the Supreme Court. The Court of Justice pointed out that, according to settled case-law, the said requirement of independence has two aspects. The first one, of an external nature, requires that "the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever" thus remaining protected against interference and pressure from outside, which may threaten the independence of its members and could affect their decisions. The second aspect, which is internal in nature, is in turn linked to the concept of impartiality which "requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law."

According to the rulings of the Court of Justice of the European Union, the Supreme Court issued a judgement on 5 December 2019<sup>32</sup> in which it concluded that the National Council of the Judiciary in its current formation is neither impartial nor independent of the legislature or the executive; consequently, the resolution passed by the Council must be annulled. It shall also refer to resolutions concerning the appointment of the new judges to the Supreme Court (including all the judges of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber) as well

<sup>31</sup> Judgement of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, cases C-624/18, C-625/19 A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy.

<sup>32</sup> Judgment of the Supreme Court of 5 December 2019, III PO 7/18; available in English at: [http://www.sn.pl/aktualnosci/SitePages/Komunikaty\\_o\\_sprawach.aspx?ItemSID=331-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty\\_o\\_sprawach](http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=331-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach) (accessed: 2020.09.23).

as resolutions appointing judges to other courts. Consequently, in this concrete case the Supreme Court expressly stated that the Disciplinary Chamber of the Supreme Court is not a court within the meaning of EU law.

In regard to this problem, an important resolution of the Supreme Court was adopted on 23 January 2020<sup>33</sup> by the formation of the combined Civil Chamber, Criminal Chamber, and Labor Law and Social Security Chamber. The Supreme Court stated that the Disciplinary Chamber, due to the circumstances of its creation, scope of powers, composition and participation in its appointment of the National Council of the Judiciary in the new composition, cannot be regarded as a court under European or Polish law. The Supreme Court also ruled that all judges from the Chamber of Extraordinary Control and seven judges from the Civil Chamber should refrain from adjudicating, and if they fail to do so, their judgments may be challenged due to the premise of improper composition of the adjudicating panel. At the same time, the Supreme Court appealed to all judges appointed by the “new” National Council of the Judiciary to refrain from adjudicating in cases concerning citizens from 24 January 2020. At the same time, the Supreme Court stated that the judgments that were handed down up to 24 January, in which judges elected by the “new” National Council of the Judiciary were ruling, remain valid, justifying this by the responsibility for citizens’ affairs and their safety.<sup>34</sup> The Minister of Justice decided, however, that the Supreme Court’s resolution was invalid, which introduced even more legal chaos. On the one hand, the Disciplinary Chamber of the Supreme Court and the National Council of the Judiciary is acting as if nothing has happened. On the other hand, some judges appointed by the “new” National Council of the Judiciary are refraining from adjudicating. Some commentators are already talking about two legal orders being in force in Poland at the moment.<sup>35</sup>

As a consequence of Polish authorities ignoring this judgment and the resolution of the Supreme Court, on 8 April 2020 the Court of Justice of the European Union issued an order,<sup>36</sup> on the request of the European Commission, in which it obliged Poland to immediately suspend the application of national provisions regarding the competence of the Disciplinary Chamber of the Supreme Court in disciplinary matters concerning judges. Nevertheless, the Disciplinary Council is still working and issuing decisions concerning particular judges.<sup>37</sup>

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<sup>33</sup> Resolution of the joint composition of the Chambers: Civil, Criminal and Labour and Social Security of the Supreme Court of 23 January 2020, BSA I-4110-1/20; available in English at: <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=602-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia> (accessed: 2020.09.23).

<sup>34</sup> Data show that the judges recommended by the “new” National Council of the Judiciary have already managed to issue an estimated 100,000 judgments.

<sup>35</sup> See: <https://polskatimes.pl/siedem-grzechow-glownych-polskiego-wymiaru-sprawiedliwosci/ar/c1-14759822> (accessed: 2020.09.23).

<sup>36</sup> Order of the Court of Justice of the European Union of 8 April 2020 in Case C-791/19 R Commission v Poland,

<sup>37</sup> See: <https://www.rp.pl/Sedziowie-i-sady/307079921-lzba-Dyscyplinarna-SN-sedziowie-i-prokuratorzy-traca-immunitety-urzedu-i-pieniadze.html> (accessed: 2020.09.23).

## Conclusions

The need for changes in the functioning of the Polish judiciary has been discussed for years and probably nobody questions that changes in this regard are necessary. The changes introduced under the rule of Law and Justice concerning virtually all elements of the judiciary not only raise serious doubts as to their constitutionality, but also do not solve the actual problems faced by the Polish judiciary, such as lengthy proceedings. According to the government, backed by the parliamentary majority, the reforms concerning the judiciary implemented after 2015 were needed to curb inefficiency, corruption and the influence of the former communist elite. According to the government, the reform of the justice system was supposed to improve democratic control over the Polish judiciary. However, the new laws on the judiciary, both when it comes to their substantive content and the circumstances of their adoption, triggered widespread public discussion and criticism which resulted in social protests and demonstrations in the defense of courts in subsequent years.<sup>38</sup> Moreover, the government's actions against the judiciary led to a very negative and dangerous social phenomenon, namely the discrediting of judges and thus the weakening of the authority of the third power.

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<sup>38</sup> The first "wave" of demonstrations took place in July 2017 just after the adoption of the two bills concerning the judiciary. Then, thousands of people protested in July 2018 against the changes in the Supreme Court. In January 2020 a march organised in Warsaw in defence of human rights, an independent judiciary and the rule of law in Poland was joined by judges and lawyers from at least fourteen countries.

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## Summary

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### Contemporary Problems of the Judicial Power in Poland

Since 2015, when most of the seats in the Parliament, as well as the office of the President of Republic, were taken over by the current ruling party, a number of constitutional reforms have been implemented, the most important of which concern the judiciary. As early as in 2015, provisions relating to the Constitutional Tribunal were significantly amended and in November 2016 entirely new laws in this respect were adopted. In subsequent years, reforms were implemented concerning the common courts, the Supreme Court and the National Council of the Judiciary. Since then, the problems of the “third power”, which have specific consequences for citizens, have become one of the leading topics in public debate in Poland. The debate on these

issues, especially in the context of the fear of violating the rule of law in Poland, has also spread beyond Polish borders. The Venice Commission, the European Commission, the European Parliament and finally the Court of Justice of the European Union have all expressed concerns about the negative influence of these reforms on the independence of courts and judges in Poland.

**Keywords:** independent judiciary, division of powers, National Council of the Judiciary, Supreme Court, common courts

## Streszczenie

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### Aktualne problemy władzy sądowniczej w Polsce

Od 2015 r., kiedy większość miejsc w parlamencie, a także urząd Prezydenta RP zdobyło obecne ugrupowanie rządzące, przeprowadzono szereg reform konstytucyjnych, z których najważniejsze dotyczą wymiaru sprawiedliwości. Już w 2015 r. istotnej zmianie uległy przepisy dotyczące Trybunału Konstytucyjnego, a w 2016 r. uchwalone zostały zupełnie nowe ustawy w tym zakresie. W kolejnych latach reformy dotyczyły sądów powszechnych, Sądu Najwyższego i Krajowej Rady Sądownictwa. Od tego czasu problemy „trzeciej władzy”, które mają określone konsekwencje dla obywateli, stały się jednym z wiodących tematów debaty publicznej w Polsce. Debata na ten temat, zwłaszcza w kontekście obawy przed naruszeniem praworządności w Polsce, wykroczyła również poza granice Polski. Obawy o negatywny wpływ przeprowadzonych reform sądownictwa na niezawisłość sędziów i niezależność sądów w Polsce wyraziły Komisja Wenecka, Komisja Europejska, Parlament Europejski, a wreszcie Trybunał Sprawiedliwości Unii Europejskiej.

**Słowa kluczowe:** niezależne sądownictwo, podział władzy, Krajowa Rada Sądownictwa, Sąd Najwyższy, sądy powszechne