

# Dysfunctionality of the National Council of the Judiciary in the Polish Constitutional System After Statutory Changes

Resolution of the Combined Chambers of the Supreme Court: Civil, Criminal, Labour Law and Social Security of 23 January 2020, BSA I-4110-1/20

Abbreviation of the term of office of the hitherto members of the National Council of the Judiciary and selection of new members of this authority pursuant to the Act amending the Act on the National Council of the Judiciary of 8 December 2017 raises fundamental reservations with respect to the compliance with art. 187(1) and (3) of the Constitution of the Republic of Poland and thus casts doubts as to the legality of operation of the National Council of the Judiciary and the nomination procedure of candidates for judges, in which the National Council of the Judiciary participates.

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## Commentary

1. The resolution of the Combined Chambers of the Supreme Court: Civil, Criminal, Labour Law and Social Security<sup>1</sup> has recently been one of several communications of the judiciary pertaining to the issues related to the broadly understood position of the judiciary in Poland. Statutory changes of the third authority systematically introduced on the legislative level since 2015 by the currently ruling parliamentary majority have raised numerous doubts in the doctrine and the governmental practice. It is worth noting once again that such initiatives are clearly aimed at reduction of the con-

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<sup>1</sup> Resolution of the Combined Chambers of the Supreme Court: Civil, Criminal, Labour Law and Social Security of 23 January 2020, BSA I-4110-1/20, *OSNK* 2020, no. 2, item 7, *OSNC* 2020, no. 4, item 34, *LEX* no. 2784794.

stitutional principle of the independence of courts (art. 173 of the Constitution<sup>2</sup>) and the independence of judges (art. 178 of the Constitution)<sup>3</sup>, and their extensive range has even led to the formulation of a thesis on the “hostile takeover” of the constitutional order in the reference books. “A *hostile takeover* is the process of procuring, by the parliamentary majority (...), of control over the essential state authorities and mechanisms of their operation by the application of unconstitutional and anti-constitutional methods. The process does not meet the criteria required for constitutional changes due to the absence of a qualified majority in the parliament required for changes in the constitution and meets with opposition of (...) constitutional state authorities safeguarding the constitution and the legal order (...)”<sup>4</sup>

2. It is obvious that one of the issues tackled in the multi-layered grounds of the resolution are the issues related to the National Council of the Judiciary.<sup>5</sup> The National Council of the Judiciary is an authority that “safeguards the independence of courts and judges” (art. 186(1) of the Constitution). It is emphasised in reference books that the existence of such special state authority in some modern democracies is considered a significant safeguard for the independence of the judiciary. Even though the standardisation of the constitutional role of the Council should not be perceived as the defining task of this authority consisting exclusively in opposition to the violations of independence of courts and judges, yet by using – in the aforementioned provision – of a phrase on safeguarding the independence of courts and judges, the particular importance of these principles was definitively highlighted (including their protection) with respect to the existence and the operation of a democratic state.<sup>6</sup> Therefore, it goes without doubt that the NCJ is a constitutional safeguard for the independence of courts and judges.<sup>7</sup> In any case, the function consisting in the protection of independence of the third authority is fundamental and typical for this type of body.<sup>8</sup>

<sup>2</sup> Constitution of the Republic of Poland of 2 April 1997 (Polish Journal of Laws No. 78, item 483 as rectified and amended; hereinafter: the Constitution).

<sup>3</sup> K. Grajewski, “Rada do spraw sądownictwa czy rada do spraw kontroli sądownictwa? Uwagi na tle projektów konstytucji Prawa i Sprawiedliwości” [in:] *Konstytucjonalizm polski. Refleksje z okazji 70-lecia urodzin i 45-lecia pracy naukowej Profesora Andrzeja Szmyta*, eds A. Gajda, K. Grajewski, A. Rytel-Warzocho, P. Uziębło, M.M. Wiszowaty, Gdańsk 2020, p. 1079.

<sup>4</sup> M. Wyrzykowski, “‘Wrogie przejęcie’ porządku konstytucyjnego”, <http://konstytucyjny.pl/wrogie-przejecie-porzadku-konstytucyjnego-miroslaw-wyrzykowski/> (accessed: 2020.08.19).

<sup>5</sup> Hereinafter: the Council, NCJ.

<sup>6</sup> L. Garlicki, uwagi 2 i 5 do art. 186 [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 13, Warsaw 2005. Cf. also: S. Patyra, *Krajowa Rada Sądownictwa w Polsce* [in:] *Rady sądownictwa w wybranych krajach europejskich*, eds R. Balicki, S. Grabowska, M. Jabłoński, *Przegląd Prawa i Administracji*, vol. 119, p. 125.

<sup>7</sup> A. Łazarska, *Niezawisłość sędziowska i jej gwarancje w procesie cywilnym*, Warsaw 2018, p. 401. It should be noted that the safeguarding role of the Council has been emphasised, a number of times, in the judgements of the Constitutional Tribunal. Cf., e.g., judgement of the Constitutional Tribunal of 18 July 2007, K 25/07, OTK-A 2007, no. 7, item 80; and judgement of the Constitutional Tribunal of 16 April 2008, K 40/07, OTK-A 2008, no. 3, item 44.

<sup>8</sup> P. Mikuli, “Krajowa Rada Sądownictwa – zakres regulacji konstytucyjnej i ustawowej a potencjał kompetencyjny organu” [in:] *Minikommentarz dla maksiprofesorów. Księga jubileuszowa profesora Leszka Garlickiego*, ed. M. Zubik, Warsaw 2017, p. 790.

The statement that the independence of courts and judges is a value related to other constitutional principles is a cliché. Here, the general regulations of the system of government are taken into account (e.g. the principle of separation and the balance of powers – art. 10(1) of the Constitution), but also the greatly important judgements related to the position of the individual in the state. Independence of courts and judges is the *sine qua non* condition for the fulfilment of the right to “fair and public hearing of the case, without undue delay, before a competent, impartial and independent court” (art. 45(1) of the Constitution, also cf. art. 6(1)1 European Convention on Human Rights<sup>9</sup>), because the independence of courts and judges forms the basic safeguard of the right to trial formulated in this manner.<sup>10</sup>

3. Pursuant to the Act of 2011,<sup>11</sup> the basic area of operation of the National Council of the Judiciary encompasses personnel issues of the judiciary, e.g. review and assessment of candidates who are going to hold the positions of judges, decisions pertaining to promotions and transfers of judges, as well as furnishing the President of the Republic of Poland with motions for the appointment of judges. The constitutional role of the Council is dominant not only because the head of state cannot nominate candidates to any court positions without the NCJ submitting a relevant motion (art. 149 of the Constitution, also see section 31 of the grounds of the resolution), but also because the quality of the system of justice is dependent on the fulfilment of high ethical and professional requirements.<sup>12</sup> In this context, it seems justified to conclude that only a body independent from the legislative and executive authority and from the authority to which a motion for the appointment of a judge is to be submitted<sup>13</sup> is capable of selecting proper candidates, who will offer a guarantee of holding of the position of judges in an independent mode, in an adequate procedure.

In reference to the prior judgements of the Constitutional Tribunal, the Supreme Court justly claims that the motion for the appointment of judges “cannot derive from merely anybody, but only from an authority acting as the National Council of the Judiciary, not only on account of reference to a certain name, but also the mode of staffing these positions and the terms in which the judges competence is exercised.”<sup>14</sup> In reference to the former of the aforementioned issues (mode of staffing), it is to be noted in the first place that in the aforementioned judgement K 40/07, the Constitutional

<sup>9</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, prepared in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented with Protocol No. 2 (Polish Journal of Laws 1993, no. 61, item 284 with amendments).

<sup>10</sup> M. Bożek, “Sądy i prokuratura” [in:] *Polskie prawo konstytucyjne na tle porównawczym*, ed. R.M. Małajny, Warsaw 2013, p. 576.

<sup>11</sup> Act on the National Council of the Judiciary of 12 May 2011 (unified text: Polish Journal of Laws 2019, item 84).

<sup>12</sup> A. Łazarska, *Niezawisłość sędziowska...*, p. 401.

<sup>13</sup> Cf. section 137 and 138 of judgement of the European Court of Justice (grand chamber) of 19 November 2019, C-585/18, C-624/18 i C-625/18, <https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1597856714359&uri=CELEX:62018CJ0585> (accessed: 2020.08.19). Cf. also: section 17 of the grounds of the resolution.

<sup>14</sup> Cf. section 31 of the grounds.

Tribunal stated that the Constitution defines “the rules *pertaining* to the composition of the Council”, as well as the “term of office of its members and the mode of appointing and selecting them, offering a definite advantage in the composition of the Council to the *selected* judges of the Supreme Court, common, administrative and military courts. Regulations *pertaining to the selection* of judges to the Council are constitutionally grounded and have special significance in the system of government, given the fact that their position, in fact, determines the independence of this constitutional authority and efficiency of the Council’s operation.”<sup>15</sup> As is commonly known, by means of Act of 8 December 2017<sup>16</sup> very material changes were introduced in the mode of appointment of a significant part of the members of the Council, namely the judges selected to the Council, who are referenced in art. 178(1) and (2) of the Constitution. The Constitution does not define, *expressis verbis*, the selecting entity, yet the hitherto interpretation of this provision had not posed any difficulties. It was commonly believed that these judges were selected by the judges of individual courts.<sup>17</sup> This was not an interpretative misuse: the conclusion about the right to elect fifteen judges forming a part of this authority followed from the provisions of art. 187 of the Constitution also regulating the competence of other state authorities to elect the non-judge members of the Council. Apart from it, the presented interpretation was supported by reference both to the basic constitutional principles (the principle of separation and balance of powers – art. 10 of the Constitution and the principle of separateness of the judiciary – art. 173 of the Constitution), as well as the ascertainment of the protective (guarantee) function of the Council in reference to the authorities of the judiciary and the judges. Meanwhile, by means of the amending the Act of 2017, the mode of selection of the judges was completely changed and entrusted to the Sejm. In the grounds to the resolution, the Supreme Court noted justly that such legislative solution is not only contradictory with art. 187(1) and (2) of the Constitution, but also deprives the representatives of the judiciary of any impact on the composition of such authority “and in this mode indirectly – also in relation to amendments in other system acts – on candidates presented to the President for the purpose of appointing them to hold the position of judges (...)” One must also agree with another conclusion of the Supreme Court

<sup>15</sup> Cf. also: S. Patyra, “Opinia prawna na temat zgodności z Konstytucją Rzeczypospolitej przedstawionego przez Prezydenta Rzeczypospolitej Polskiej projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw”, <http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=2002>, pp. 4–5 (accessed: 2020.08.20).

<sup>16</sup> Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Polish Journal of Laws 2018, item 3, hereinafter: Amending act of 2017). The Act entered into force on 17 January 2018, with the exception of certain provisions which entered into force on the day following the date of publication of the Act, thus 3 January 2018.

<sup>17</sup> Cf. for example: T. Ereciński, J. Gudowski, J. Iwulski, *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, ed. J. Gudowski, Warsaw 2009, pp. 714–716; Anna Rakowska-Trela, “Krajowa Rada Sądownictwa po wejściu w życie nowelizacji z 8.12.2017 r. – organ nadal konstytucyjny czy pozakonstytucyjny?” [in:] *Konstytucja. Praworzędność. Władza sądownicza. Aktualne problemy trzeciej władzy w Polsce*, eds Ł. Bojarski, K. Grajewski, J. Kremer, G. Ott, W. Żurek, Warsaw 2019, pp. 111–112; and K. Grajewski, “Krajowa Rada Sądownictwa w świetle przepisów ustawy z dnia 8 grudnia 2017 r. – zagadnienia podstawowe,” *Krajowa Rada Sądownictwa* 2018, no. 1, pp. 19–20.

in line with which the Council became, in this mode, "dominated by politically selected persons", and transfer of the right to select judges to the Sejm resulted in the fact that nowadays as many as twenty-one persons among twenty-five members of the NCJ have the political backing of both chambers of the Polish parliament.<sup>18</sup> This situation is in blatant contradiction not only to the above-listed basic principles pertaining to the system of government, but – which should be strongly stressed – also to the constitutional concept of the composition of the NCJ, which has been shaped in a manner that debates can be held as part of the collegial body and most important decisions pertaining to the judiciary can be made by persons appointed or holding specific positions (functions) in bodies forming a part of the legislative, executive and judicial authority. It goes without doubt that the adopted solution not only violates but also completely undermines this specific construction.

**4.** One must also agree with the opinion of the Supreme Court which, in the assessment of the capacity of the current Council to perform its constitutional functions, took into account not only the selection of judges by the Sejm, but also the fact of "extinguishing" by the legislature of the mandates of the hitherto judge-members of the Council (art. 6 of the Amending act of 2017), which is in direct contradiction to art. 187(3) of the Constitution, where the members of the Council are guaranteed a four-year term of office. In the context of the "extinguishing" of mandates of the hitherto members of the Council, the anti-constitutional purpose of the regulation transferring the elective competence becomes particularly obvious. Paradoxically, this conclusion is reinforced by the one of the fragments of the presidential amending draft act, where it is stated that the introduction of the solution consisting of the "extinguishing" of the mandates of the hitherto judge members of the Council does not violate the principle of the four-year term of office. In line with the draft act, only the introduction of, e.g., a three-year term of office would be a violation of such constitutional principle.<sup>19</sup> These absurd arguments ultimately show that the purpose of the statutory changes was not introduction of a concept of changes that would be consistent with the system of government, but simply the taking over of political control over the NCJ.

**5.** Over the course of its two years of operation, the incorrectly formed Council has held a number of sessions at which opinions were issued on persons who were candidates for positions in various courts. Therefore, the Council performed the tasks of an authority with a composition strictly defined in the Constitution, in a situation where its composition was formed in violation of such provisions. Such state of affairs offers sufficient justification for the statement of the Supreme Court adopted in the resolution, in line with which the "political domination of the National Council of the Judiciary results in high probability of settlement of selection processes for the positions of judges not according to the substance-related criteria, but on the basis of political loyalty or support for the reforms of the parliamentary majority pertaining to

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<sup>18</sup> Cf. section 31 of the grounds.

<sup>19</sup> Sejm printed matter 2002/8<sup>th</sup> parliamentary term.

the system of justice, contradictory with the Constitution of the Republic of Poland.”<sup>20</sup> In other words: the NCJ does not offer sufficient guarantee of independence from the legislative and the executive authority and thus from the currently ruling parliamentary majority in the procedure of judge appointment.<sup>21</sup> It is obvious that the Supreme Court cannot deprive persons appointed in this manner of the status of judges, yet it is difficult to overestimate the significance of the aforementioned statements of the supreme body of the third authority in Poland.

It is worth adding that two more arguments are also significant with respect to the negative assessment of the current NCJ. First of all, it must be taken into account that – as mentioned earlier – changes in the legal status of the Council are only one of the many elements of the broadly planned so-called reform of the judiciary. They co-exist with a whole range of provisions and with a practice of operation of certain authorities intended to accomplish an at least significant – if not dominant – impact of the political class on the operation of the judiciary. In this context, it is sufficient to mention, for example, the disciplinary proceedings initiated *en masse* against judges in relation to the judgements passed by them.<sup>22</sup> Although constitutional solutions are known in democratic countries where the selection of a member of a body handling judicial matters is made by the parliament<sup>23</sup>, the present-day statutory shape of the NCJ is to be assessed negatively not only on account of blatant contradiction with the Constitution which does not foresee selection of judges who form a part of the NCJ by a legislative authority, but also due to the context of other statutory changes.

Secondly, a significant element of evaluation of the new National Council of the Judiciary is the actual mode of its operation. In a certain scope, it was already the object of assessment of the European Court of Justice. In the context of the attempt at making changes in the composition of the Supreme Court assuming, among others, retirement of the First President of the Supreme Court and a significant part of its judges, the Court of Justice assessed that “analysis of the operation of the newly created NCJ shows complete lack of resolutions where the authority would take a stance aimed at protecting the independence of the Supreme Court in the context of the crisis caused by (...) the legislative reforms that referred to this court. On the other hand, the NCJ or its members publicly criticised the members of the Supreme Court for applying to the Tribunal with prejudicial inquiries or cooperation with the EU institutions, in particular with the European Commission. Furthermore, the practice applied by the NCJ when issuing opinions on the further holding of the position of judges of the Supreme Court after the end of the newly-determined age of retirement at 65 years of age consists in (...) issue of negative opinions without presentation of any grounds or limited to the

<sup>20</sup> Cf. section 38 of the grounds.

<sup>21</sup> Cf. section 60 of the grounds to judgement of the Supreme Court of 5 December 2019, III PO 7/18, OSNCP 2020, no. 4, item 38.

<sup>22</sup> With respect to this issue, cf. very extensive study: D. Mazur, “Sędziowie pod specjalnym nadzorem, czyli „wielka reforma” wymiaru sprawiedliwości” [in:] *Konstytucja. Praworzędność...*, pp. 261–367.

<sup>23</sup> This is the case in, e.g., Spain. Cf. P. Glejt-Uziębło, P. Uziębło, “Rada Główna Władzy Sądowniczej w Hiszpanii” [in:] *Rady sądownictwa w wybranych...*, pp. 63–65.

reiteration of content" of provisions adopted at that time. Unfortunately, this description does not paint a picture of an independent authority, guarding the independence of the courts and the independence of the judges, but an authority acting at the political order of the current parliamentary majority.

6. Taking the presented arguments into account, in the conclusion of this paper one must reiterate after the Supreme Court that the currently existing "defectiveness of the procedure of designating candidates to the office of the judge by the National Council of the Judiciary has a structural nature, making this authority incapable of correctly performing its constitutional functions. At the same time, it cannot be exculpated by the mere statements of the members of the National Council of the Judiciary that it operates in a correct and reliable mode." This conclusion deserves full endorsement.

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## Summary

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### **Dysfunctionality of the National Council of the Judiciary in the Polish Constitutional System After Statutory Changes**

The subject of the commentary is related to the resolution of the three chambers of the Supreme Court devoted to the most important constitutional problems of the third authority in Poland in the context of anti-constitutional changes in the legislation on the judiciary which have been carried out by the legislature for several years. The subject under analysis is the issue of the National Council of the Judiciary which, according to the Constitution, is to be a body that safeguards the independence of courts and judges. The author of the paper strongly endorses the view of the Supreme Court, which proves that the statutory changes made in the recent years concerning the third authority, including changes in the way in which the so-called "judicial part of the NCJ" is selected, are directly unconstitutional and deprive the judicial milieu of its influence on appointments within the judiciary. This situation entails illegal operation of the authority whose composition has been formed in violation of the Constitution, and results in a systemic flaw in the judicial nomination procedure.

**Keywords:** National Council of the Judiciary, independence of courts, independence of judges

## Streszczenie

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### **Dysfunkcjonalność Krajowej Rady Sądownictwa w polskim systemie ustrojowym po zmianach ustawowych**

Tematyka glosy jest związana z uchwałą trzech izb Sądu Najwyższego, poświęconą najistotniejszym problemom ustrojowym trzeciej władzy w Polsce w kontekście przeprowadzanych od kilku lat przez ustawodawcę antykonstytucyjnych zmian w przepisach dotyczących sądownictwa. Analizowanym tematem jest problematyka Krajowej Rady Sądownictwa, która zgodnie z Konstytucją, ma być organem stojącym na straży niezależności sądów i niezawisłości sędziów. Autor glosy zdecydowanie aprobuje pogląd Sądu Najwyższego, który dowodzi, że dokonane w ostatnich latach zmiany ustawowe dotyczące trzeciej władzy, w tym zmiany sposobu wyłaniania



tw. sędziowskiej części KRS, są wprost niezgodne z Konstytucją i pozbawiają środowisko sędziowskie wpływu na nominacje w obrębie sądownictwa. Ta sytuacja *de facto* oznacza nielegalność działania organu, którego skład został ukształtowany wbrew przepisom Konstytucji, co skutkuje systemową wadliwością procedury nominacji sędziowskich.

**Słowa kluczowe:** Krajowa Rada Sądownictwa, niezależność sądów, niezawisłość sędziów