COMMISSIONER FOR HUMAN RIGHTS

Adam Bodnar

Warsaw, 7 January 2020

VII.510.176.2019/MAW/PKR/PF/MW/CW

Mr Tomasz Grodzki
Speaker of the Senate
of the Republic of Poland

Dear Mr Speaker,

In connection with the passing by the Sejm of the Republic of Poland, on 20 December 2019, of the *Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts*, and the submission thereof to the Senate of the Republic of Poland, I am hereby putting forward, pursuant to Article 16(1) of the Act of 15 July 1987 on the Commissioner for Human Rights (Journal of Laws of 2018, item 2179, as amended), comments of **the Commissioner for Human Rights regarding the Act, and I am requesting that they be taken into account during the legislative process**. In my opinion, the Act should be rejected in its entirety by the Polish Senate. The reasons for this are set out in detail herein below. I would be grateful if you would forward this letter to the Senators.

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- In view of all the above reasons, the Commissioner for Human Rights, considering that the Supreme Court's Chamber of Extraordinary Control and Public Affairs, appointed under the said circumstances, does not constitute an independent and impartial tribunal established by law (Article 6(1) of the ECHR), and taking account of Article 91(2) of the Constitution of the Republic of Poland, sees no justification for extending the Chamber's powers.

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1. Introduction

The bill that preceded the Act adopted on 20 December 2019 was proposed to the Sejm of the Republic Poland by a group of 32 Sejm deputies on 12 December 2019 (Sejm paper no. 69). Then, in a meeting of the Parliamentary Committee on Justice and Human Rights, that was held during the night of 19/20 December 2019, a number of amendments were introduced, which in part took account of the objections raised by the Commissioner for Human Rights in his opinion presented to the Speaker of the Sejm on 18 December 2019. However, the Act still introduces far-reaching amendments, detrimental to the effective protection of civil rights, to the Acts on courts that apply to ordinary courts, the Supreme Court (**hereinafter: the SC**), military courts, administrative courts, the National Council of the Judiciary (**hereinafter: the NCJ**), as well as the Prosecution Service.

The Act provides for solutions that introduce tools which are unacceptable from the point view of the constitutional, international and European law, and which interfere with judicial independence as well as the freedoms of expression and of association of judges. The regime of disciplinary liability of judges has also been tightened. An even higher degree of arbitrariness has been introduced, which makes it possible to conduct proceedings

aimed not at improved functioning of the system of justice, but rather at disciplining judges in order to break their resistance to the forced legislative solutions that violate the principles of impartiality of judges and independence of courts. The Act reduces the participation of judges, judicial self-government bodies and courts' collegial bodies in decision-making on the functioning of the Polish system of justice. This is done by shifting further powers to presidents of courts, thereby increasing the influence of the Minister of Justice on the Polish judiciary.

In the opinion of the Commissioner for Human Rights, the Act directly violates a number of principles protected by the Constitution, including those of: the state ruled by law (Article 2); legality and the rule of law (Article 7); supremacy of the Polish Constitution (Article 8(1)); direct application of the provisions of the Polish Constitution (Article 8(2)); respect for international law (Article 9); separation of and balance between the powers (Article 10(1)); the right to a fair trial before an independent and impartial court (Article 45(1)); precedence of European Union law over the national laws (Article 91(2) and (3)); direct application of European Union law (Article 91(1) and (3)); autonomy and independence of the courts (Article 173), and impartiality of judges (Article 178(1)).

The Commissioner for Human Rights' assessment of the adopted Act is unambiguously negative as he considers the Act to violate the Constitution and the founding principles of the Polish legal order, to be in conflict with Poland's obligations towards the European Union, and to compromise the protection guaranteed by the European Convention on Human Rights. The entry into force of the Act, in the form adopted by the Sejm, will call into question the legal dimension of Poland's participation in the European Union and the Council of Europe, will subject Polish courts and Polish judges to ultimate political control by the legislative and executive authorities and, most importantly, will drastically reduce the level of judicial protection of individuals' rights.

2. Comments on the preamble to the Act

First of all, consideration should be given to the reasonability of introducing a preamble to the Act amending a number of other acts, as the content of the preamble will not be, in any way, incorporated into the amended regulations. This is an unprecedented situation in the history of Polish legislation. It should therefore be assumed that the preamble is, in fact, intended to replace a rationale of the Act. However, the analysis of the content of the draft regulations and of the text of the preamble leads to the conclusion that they are strongly divergent, and that the objectives set out in the preamble cannot be achieved through the proposed provisions, which is in breach of the principle of fair legislation that arises from Article 2 of the Polish Constitution. Similarly, in the case of Gillow v. United Kingdom (application no. 9063/80), the European Court of Human Rights expressed its view by stating that the indication of wrong or misleading objectives of introduced regulations is in breach of the European Convention on Human Rights (hereinafter: the **ECHR**).

It should, moreover, be emphasized that a significant part of the time (between 8:00 p.m. and 24:00 on 19 December 2019) during which the Parliamentary Committee conducted its works was devoted to discussing the preamble whose normative significance was small compared to that of the draft regulations. However, this remained without positive contribution to the correctness of the language (spelling and grammar) of the preamble. To a large extent, the phrases contained in the preamble constitute repetitions of selected constitutional norms. Notably, their selection seems subjective (emphasizing the role of the Constitutional Tribunal despite the remaining doubts as to its constitutionality; underlining the supreme power of the Nation; emphasizing the need to maintain balance between the powers; pointing to the constitutional prohibition for judges to conduct public activities that are against the principle of impartiality). Also, the reference to the "need to safeguard confidence in the appointment of judges by the President of the Republic of Poland" and, in particular, the emphasis on the role of the President in this area, that is highlighted twice, seems doubtful.

Furthermore, note should be taken of the penultimate recital of the preamble, which states that "effective procedures shall be ensured to prevent legally unfounded undermining of the status of a judge by any executive, legislative or judicial authority, or any person, institution or other judges." The wording is particularly controversial in the context of the judgment of the Court of Justice of the European Union of 19 November 2019 in *cases C-*

585/18, C-624/18 and C-625/18 A.K. and others, the judgment of the Supreme Court of 5 December 2019, ref. no. III PO 7/18 regarding the status of the Supreme Court's Disciplinary Chamber and of the National Council of the Judiciary, and in the context of the existing doubts as to the legality of appointment of certain judges, including ones holding positions in the Constitutional Tribunal.

3. Limitation of the full effectiveness (*effet utile*) of EU law and judgments of the Court of Justice of the European Union

The Act inserts negative provisions regarding inadmissibility of applications for verifying whether a given body is a court or whether a given person is a judge (Article 1 of the Act, in so far as it inserts the new Article 42a into the Law on the System of Ordinary Courts). Thereby, the Act seeks to **intentionally exclude, from the scope of judicial review, the issue of legality of appointment and operation of judicial bodies, as well as the legality of appointment of judges**.

The admissibility of and necessity for such review arises both from the Constitution of the Republic of Poland (the principle of the state ruled by law, Article 2; the principle of legality and the rule of law, Article 7; the right to a fair trial, Article 45(1); the principle of independence of courts and impartiality and independence of judges, Article 45(1) and Article 178(1) of the Constitution of the Republic of Poland), from the European Union law (the principle of effective legal protection, Article 19(1)(2) of the Treaty on the European Union; the right to a fair trial before an independent and impartial court, Article 47 of the Charter of Fundamental Rights of the European Union), and from the European Convention on Human Rights (Article 6(1) and Article 13). All the indicated sources of law take precedence over statutory norms, which the promoters of the bill failed to take into account. Yet, those principles have been confirmed a number of times in the jurisprudence of the Constitutional Court, the Court of Justice of the European Union and the European Court of Human Rights.

The first of the proposed clauses provides that within the activity of courts or their bodies it is not permissible to call into question the empowerment of courts and tribunals, of state authorities established under the Constitution, or of law control and safeguarding bodies (Article 42a(1) of the LSOC, Article 29(4) of the ASC, Article 23a(2) of the LSMC, Article

5(l)(a) of the LSAC). It should be noted that in the course of the works of the Parliamentary Committee, the phrase “or its bodies” was inserted into the provision, which should be interpreted as an action that directly seeks to make it impossible for assemblies of judges to take resolutions critically assessing unconstitutional changes in the system of justice. The second of the clauses provides that there shall be no possibility to determine or assess the lawfulness of appointment of a nominated judge, or his/her powers to perform duties in the area of administration of justice (Article 42a(2) of the LSOC, Article 29(4) of the ASC, Article 23a(3) of the LSMC, Article 5(lb) of the LSAC).

The clauses have been formulated separately for public authorities (including not only courts, but also other public authorities), and separately for individuals (in which case, only judges are mentioned, and there is no mention of other persons who may be members of the aforementioned bodies). The Act sets out different scopes of entities covered by the two clauses. In the case of the first clause, these are only relevant courts: ordinary courts, the Supreme Court, military courts or administrative courts, as appropriate. In the case of the 'personal' clause, the entities covered are not only courts but also “other authorities”. As regards the negative obligations of “other authorities”, the Act repeats the same prohibition four times. This demonstrates that the works on drafting the provisions of the Act were carried out unusually hastily, disregarding the standards of correct legislative techniques and not seeking to maintain precision and clarity of the regulations. As a consequence, the adopted Act fails to meet even minimum requirements under the principle of correct legislative process, provided for under Article 2 of the Constitution of the Republic of Poland.

The fundamental issue relating to the above-mentioned regulations is, however, their absolute inadmissibility in national laws, as their aim is to disregard both constitutional and European standards, including those arising from European Union law and the jurisprudence of the EU Court of Justice. The adoption of the Act is obviously and directly connected with the judgment of the Grand Chamber of the Court of Justice of the European Union of 19.11.2019 in Joined *Cases C-585/18, C-624/18, 625/18 AK and others*, in which the Court set out the criteria and procedure for assessing the independence of the judicial body of the Disciplinary Chamber of the Supreme Court, and of the National Council of the Judiciary as a body that takes part in the appointment of judges holding positions in the Chamber. Having regard to the CJEU binding guidelines, the Supreme Court, in its judgment

of 5 December 2019, ruled that the National Council of the Judiciary is not an impartial and independent body, and that the Disciplinary Chamber of the Supreme Court is not a court within the meaning of the national law and EU law (case ref. no. III PO 7/18). The proposed amendment to the Acts on courts is therefore a legally unacceptable attempt to "rescue" and maintain the unlawful solutions previously introduced by the legislator and challenged by the abovementioned judgments of the CJEU and of the Supreme Court.

The intentional character of preventing the implementation, by the national bodies, of the ruling of the Court of Justice of the EU is also confirmed by the radically increased scope and tightened regime of disciplinary liability of judges, as introduced by the Act in question (see detailed comments herein below).

Already, under the currently binding regulations, certain state authorities are trying to exert systematic unjustified pressure on judges, with the aim to bring about a national-scale chilling effect blocking the implementation of the preliminary ruling of the CJEU. In the opinion of the Commissioner for Human Rights, the legislator has intentionally structured the current system of disciplinary liability in ordinary courts in this way, in order to use it as a tool for extending political control over judges. The subject is, besides, covered by proceedings currently pending before the CJEU and initiated by the European Commission pursuant to Article 258 of the TFEU (Case C-791/19). Such actions clearly demonstrate the pressure exerted on judges by the ruling politicians, as well as violate the principle of the separation of powers and destroy the public perception of courts as independent bodies.

Under the adopted Act, repressions will be possible against judges who comply with the law, apply the Constitution of the Republic of Poland, are guided by European Union law, enforce judgments of the Court of Justice of the EU and remain mindful of judicial independence, and those repressions may take the form of ungrounded and, in fact, fictitious disciplinary proceedings. Such proceedings will be initiated by disciplinary officers appointed based on political criteria, and will be conducted by the Disciplinary Chamber of the Supreme Court, which has been classified, by the Supreme Court itself, as an entity which does not constitute a court. The new Act is intended to appear to be based on provisions of law. Yet, in fact, the mechanism behind it is focused on refraining from the performance of obligations

within the European Union, by acting based on a legally unacceptable mechanism of pressure exerted on judges, causing their fear of losing their judicial positions.

According to the jurisprudence of the European Court of Human Rights, the right to court and the right to a fair trial, guaranteed under Article 6 of the European Convention, can be exercised only when independence and impartiality of judges are ensured. Furthermore, disciplinary proceedings concerning judges also have to comply with the European standard arising from Article 6(1) of the ECHR. In the case of *Olujić v. Croatia* (application no. 22330/05), the Court found that the lack of independence of members of the Croatian National Judicial Council which had participated in disciplinary proceedings violated the judge's right to a fair trial.

Another tool included in the Act with the intention to preserve the formerly introduced normative changes in the system of justice, to prevent the enforcement of the judgments of the Court of Justice of the EU and to prevent control over the appropriateness of appointment and work of courts and judges is the entrusting, to the Supreme Court's Chamber of Extraordinary Control and Public Affairs, of exclusive jurisdiction over claims regarding lack of independence courts or lack of impartiality of judges of the Chamber of Extraordinary Control and Public Affairs (Article 26(2 - 6) of the ASC, as amended). The Chamber, established simultaneously with the Supreme Court's Disciplinary Chamber, sharing the same basic shortcomings, and, moreover, constituted in gross violation of the law, during the defective process of appointing Supreme Court judges, is intended to have exclusive competence to examine charges regarding the Chamber itself. In this situation , there is an obvious conflict of interests, and persons appointed as the Chamber's judges are not, in this context, ones who safeguard its impartiality and independence. Therefore, their actions under the new provisions of the Act will be glaringly against the principle of *nemo iudex in causa sua* that is a fundamental principle in civilized countries.

The legislator has incorrectly assumed that a national act of parliament may contradict the effectiveness of European Union law and the binding force of the CJEU judgment, and may reverse the legal consequences that the judgment bears. However, the legislators have failed to take account of the mechanisms of autonomy of European Union law, the principle

of primacy of that law, its direct effects and the effective court protection of the rights provided for under EU law and confirmed in the jurisprudence of the EU Court of Justice.

The mechanism based on the principle of primacy of EU law applies, in particular, to general and abstract national legal norms. Therefore, it would also apply to the amending Act. The said principle of primacy requires all authorities of a Member State, including its national courts, to disregard legal acts that are non-compliant with EU law. **The adopted Act, in so far as it is not compliant with European Union law, will therefore be disregarded by the authorities that apply law.** This effect occurs automatically, and in particular it does not require prior annulment of any of the national procedures, including those before the Constitutional Tribunal. The legal classification of a normative act within the national law system is of no significance. Each authority in the Member State, and in particular each court, is required to disregard such a normative act and rule s if it were non-existing. The authority does not need to wait for an instruction to do so from an external legal entity. Instead, it should do so on its own initiative, as if the lack of a national legal basis for the refusal to apply the Act were not an obstacle. The specific legal basis for such competence and obligation to disregard such an act is grounded in EU law.

The adopted Act is going to increase the divergences between the Polish legal order and European Union law. It will inevitably lead to the commencement of further proceedings by the European Commission with regard to violation of EU law, pursuant to Article 258 of the TFEU, and may even give new impetus to the procedure of protecting the European Union's values, carried out by the Council of the EU under Article 7 of the TEU.

In the opinion of the Commissioner for Human Rights, the conflict cannot be resolved in any other way than by amending the Acts on courts, in particular on the Supreme Court and on the National Council of the Judiciary, with proper account taken of European Union law and the guidelines arising from the existing jurisprudence of the EU Court of Justice. The Act adopted on 20 December 2019 not only does not improve the situation but also aggravates it further, thus leading Poland towards its marginalization in the European Union, the withdrawal from European-level judicial cooperation, and the occurrence of a risk of imposition by the CJEU of temporary measures and large financial penalties on Poland. As a

consequence, all negative effects of introducing the legislative changes will adversely impact primarily the situation of Polish citizens.

It should also be pointed out that two cases pending before the European Court of Human Rights have been communicated to the Polish government. The cases directly concern the procedure of appointing judges, and its impact on the exercise of individuals' right to a fair trial under Article 6 of the ECHR (*Jan Grzęda v. Poland*, application no. 43572/18; and *Xero Flor v. Poland*, application no. 4907/18). The European standard regarding the Polish legal order will therefore be clearly determined in the coming months and should be taken into account when amending the regulations.

Definition of "judge" as per the Act

The Act contains a legal definition of "judge". It provides that a judge of an ordinary court shall be a person who has been appointed to the position by the President of the Republic of Poland and who has taken the oath before the President of the Republic of Poland (proposed Article 55(1) of the LSOC). The other three acts on courts will contain equivalent definitions of: a judge of the Supreme Court (proposed Article 29(2) of the ASC), a judge of a military court (proposed Article 23a(1) of the LSMC), and a judge of an administrative court (proposed Article 5(1) of the LSAC). Furthermore, in the transitional and final provisions, another legal quasi-definition has been included, according to which a judge shall be a person who has been appointed to serve in his/her judicial position by the authority empowered to appoint judges under the laws in force on the appointment date, and whose employment in that position has not expired and has not been terminated by the date on which the amending Act enters into effect (Article 7 of the Act).

The definitions to supplement the acts on courts point only to two formal criteria for holding a position of a judge, which criteria have to be met jointly: firstly, being appointed by the President of the Republic of Poland, and secondly, taking the oath before the President. There is no reference to any other criteria, in particular substantive and procedural requirements for being appointed as a judge. According to these definitions, the appointment, by the President of the Republic of Poland, of a person who does not meet such requirements, including a person who has been appointed in blatant violation of the law, does not constitute an obstacle and pursuant to the Act such a person may serve as a judge. According to the

definitions included in the Act, if the President of the Republic of Poland appoints, as a judge, a person who is not a citizen of Poland, who has no clean criminal record, who is a minor or has no high school diploma, the person will still be a judge, and according to the intention of the drafters of the Act his/her status as a judge may not be called into question. The adopted Act assumes that the President's prerogatives are unlimited and fully arbitrary, and anyone who is a "person" may be appointed as a judge.

For these reasons, the definition is unacceptable. It creates a legislative chaos and disregards the existing legal order, in particular the regulations on the appointment of judges, including in particular the Polish Constitution, as well as European standards confirmed in numerous judgments of the Court of Justice of the EU and the European Court of Human Rights.

The real purpose of the Act and of the definition in question is to legalize the legal status of persons who have been appointed as judges, even if their appointment was in gross violation of the law. Such situations happened, in particular, during the appointment of the Supreme Court judges – members of the Supreme Court's Chamber of Extraordinary Control and Public Affairs, and the Supreme Court's Disciplinary Chamber:

(1) the nomination procedure was initiated based on an act that was non-compliant with the Polish Constitution (approval of the President of Poland, but no required countersignature of the Prime Minister);

(2) the National Council of the Judiciary took part in the nomination process although it is a body constituted in a manner non-compliant with the Constitution, that fails to guarantee impartiality and independence;

(3) intentionally, judicial review of the nomination acts was made impossible; in particular, the NCJ forwarded the motions for the appointment of judges to the President of the Republic of Poland before the expiry of the statutory deadline for their challenging by competent entities; neither the NCJ nor the President of Poland complied with the decision of the Supreme Administrative Court suspending the implementation of the resolution of the NCJ until the consideration of the filed appeals that challenged them.

In conclusion, it should be emphasized that **a person who has been appointed in gross violation of the law and who fails to safeguard impartiality and independence may not be a judge, and, similarly, a body that fails to meet the requirements of independence may not be a court**. If the provisions containing a definition of "judge" in the wording contained in the new Act entered into force, they would have to be disregarded as ones that determine a person's status as a judge in a manner that is in breach of European Union law, as explained in the jurisprudence of the EU Court of Justice as well as the Supreme Court.

Jurisdiction of a judge

In the second reading, a new concept of judge's jurisdiction was introduced, which is new to the Polish legal order (the adopted Article 55(4) of the LSOC reads as follows: *A judge may adjudicate on all cases at his/her place of professional work, and may adjudicate in other courts in the cases determined under the Act (jurisdiction of a judge). The regulations on the assignment of cases and on determining and changing the composition of courts shall not limit the jurisdiction of judges, and shall not constitute grounds for considering that the composition of a court is inconsistent with law, that a court is not correctly constituted, or that a court panel includes a person not authorized or having no capability to adjudicate during the issuance of a judgment).* The objective of the introduced statutory regulation is to prevent the exclusion of judges who have not been duly appointed (and the consequent changes in the composition of courts), although this is against the recent jurisprudence. Under the provision in question, a judge will have the possibility to adjudicate on any case, also in a situation of doubt as to his/her independence or impartiality. Moreover, it will not be possible to change the composition of a court in the event it has been established that a given person has not been duly appointed or assigned to the position.

This provision should be assessed in the context of the judgment of the Court of Justice of the European Union of 19 November 2019 in cases *C-585/18, C-624/18 and C-625/18 A.K.* and others. The Court found that a violation of Article 47 of the European Union Charter of Fundamental Rights (right to court) takes place when *the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law,*

as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. According to the said judgment, the possibility of changing the composition of courts in certain situations is necessary in order to protect individuals' rights to court and to an impartial and fair trial.

It should be clearly emphasized that proceedings are currently pending before the ECHR in the case *Xero Flor v. Poland* (application no. 4907/18) which directly consider the examination of whether the issuance of a judgment and the inclusion, in the court composition, of a person appointed as a judge in a manner that has been in breach of national law constitutes a violation of Article 6 of the Convention (the right to court). The standard set by the ECHR should be taken into account by the legislator, and this would require at least refraining from adopting amendments to laws, until the date of issue of the Strasbourg Court judgment.

Assessment of Article 42a inserted in the *Law on the System of Ordinary Courts* (LSOC)

Pursuant to Article 1(19) of the Act assessed herein, in the Act - Law on the System of Common Courts, after Article 42, Article 42a has been inserted which reads as follows: "*Article 42a(1). Within the activity of courts it shall not be permissible to call into question the empowerment of courts and tribunals, of state authorities established under the Constitution, or of law control and safeguarding bodies. (2) It shall not be permissible for an ordinary court or other authority to establish or assess the legality of the appointment of judges or their consequent empowerment to perform duties in the area of administration of justice*."

In the opinion of the Commissioner for Human Rights, the above regulation constitutes an unacceptable interference with the constitutional right to court (Article 45(1) of the Constitution of the Republic of Poland) and the consequent right to an adequately structured court procedure. Article 45(1) of the Constitution of the Republic of Poland, contained in the chapter focused on the freedoms and rights of individuals and citizens, establishes subjective

rights of individuals. Its place in the structure of the Constitution of the Republic of Poland points to the autonomous nature of the right to court. It is not only a tool for exercising other constitutional rights and freedoms but is an independent entity that is subject to protection regardless of any violations of other subjective rights (judgment of the Constitutional Tribunal of 15 May 2012, ref. no. P 11/10). The right to court is a basic right of individuals and a fundamental safeguard of the rule of law (judgment of the Constitutional Tribunal of 23 May 2018, ref. no. SK 15/15).

Article 178(1) of the Constitution of the Republic of Poland provides that judges, in the exercise of their functions, shall be independent and subject only to the Constitution and acts of parliament. The doctrine indicates that independence incorporates the following elements: impartiality in relation to parties to proceedings; independence of extrajudicial bodies (institutions); independence of ruling authorities and of other judicial authorities; independence of the impact of political factors including, in particular, of political parties; judge's internal independence. Notably, the principle of independence relates to the constitutional role of judges as leaders in court proceedings, in the exercise of the aforementioned right to court, and thus, pursuant to Article 45 of the Constitution of the Republic of Poland, in safeguarding *"a fair and public hearing, without undue delay, before a competent, impartial and independent court."*

Furthermore, in its jurisprudence the European Court of Human Rights has developed a four-stage test to establish whether national safeguards meet the judicial independence requirements set out in Article 6 of the Convention (see: *Langborger v. Sweden, no. 11179/84, point 32; Kleyn and Others v. The Netherlands, nos. 39343/98, 39651/98, 43147/98 and 46664/99*). The Court found that in every case an examination should be carried out of: a manner of appointing judges; their term of office; the existence of safeguards against external pressures; and whether the body at issue presents an appearance of independence.

The prohibition to examine the empowerment of courts and tribunals, of state authorities established under the Constitution, and of law control and safeguarding bodies, and to examine the legality of appointment of judges should be viewed from the point of the right to a fair trial before an independent and impartial court, safeguarded in Article 45(1) of the Polish Constitution (cf. judgment of the Constitutional Tribunal of 2 June 2010, ref. no.

SK 38/09), which is also safeguarded under Article 6(1) of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights, in particular in conjunction with Article 19(1)(2) of the TEU. Therefore, this right should not be subject to any restrictions and the courts as bodies established for the purpose of administration of justice, including interpretation of legal norms set out by the legislator, should be free to establish whether a given body meets the requirements laid down under national laws and European legal norms.

The judgment of the European Court of Human Rights in the case of *Henryk Urban and Ryszard Urban v. Poland* (application no. 23614/08) emphasized that an individual's right to court can be respected only if the court is independent and impartial. In this case, judicial independence is thus a condition of respecting human rights and freedoms. Moreover, the right to an effective remedy, safeguarded under Article 47 of the Charter of Fundamental Rights of the European Union precludes the examination of disputes regarding the application of European Union law by bodies other than independent and impartial courts. A court, in the course of case examination, should assess whether the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. This reasoning path may be applied in verifying the correctness of the appointment of judges if so required in a given situation for the purpose of safeguarding citizens' trust in the system of justice, as the necessary condition for exercising the right to court (cf. judgment of the CJEU of 19 November 2019 in cases *C-585/18, C-624/18 and C-625/18 A.K.* and others.).

In the opinion of the Commissioner for Human Rights, no regulations may be developed that restrict the principle of effective legal protection by a court established under an act of parliament, which principle arises from Article 19(1)(2) of the TFEU, and thus no situations may be provided for in which the court is not capable of exercising its powers strictly linked to the role entrusted to it under applicable laws, because this would block the

right to adequately structured court procedure, and lead to a situation of parties' incapability to exercise their right to effective judicial protection which is safeguarded under the Constitution of the Republic of Poland, the Treaty on the European Union, the EU Charter of Fundamental Rights and the Convention on Human Rights.

Furthermore, the adopted Act is in contradiction with the provisions of other acts, inter alia of the Act of 17 November 1964 - Code of Civil Procedure (Journal of Laws of 2019, item 1460, hereinafter referred to as the CCP) and the Act of 6 June 1997 - Code of Criminal Procedure (Journal of Laws of 2018, item 1987, as amended; hereinafter: the CCRP). According to Article 379(2) of the CCP, in the event a party had no legal or procedural capacity, no entity appointed to represent them or no statutory representative, or if the party's representative was not duly authorized, or if the composition of the adjudicating panel was not consistent with the law, or if among the adjudicating judges there was a judge who should have been excluded under an act of parliament (point 4), the proceedings shall be null and void. Moreover, according to Article 439(1) of the CCRP, absolute reasons for appeal include, inter alia, the issuance of a judgment by a court including a person who was not authorized or capable to adjudicate or who was subject to exclusion (point 1), and the fact that the adjudicating panel was not correctly constituted (point 2).

If courts, according to the amendments provided for in the adopted Act, are to refrain from examining whether the bodies referred to in Article 42a of the LSOC are duly empowered, consideration should be given to the fact that courts will e.g. not be empowered to determine, neither by penal or civil procedure, the correctness of the composition of courts, or to verify whether court panels included any judges who should have been excluded. As a result, courts will not be capable of making any findings in this area. **Therefore, the Act's provision in question brings up a legal chaos that is dangerous for a democratic state and compromises the correctness of all court proceedings.**

4. Tightening of the disciplinary liability regime

The Act drastically changes the principles of disciplinary liability of judges. The disciplinary liability of judges, as an instrument of law, aims to guarantee the independence of the courts and the impartiality of judges by safeguarding the constitutional rights to an

impartial court, to minimize the influence of the legislature and the executive on judges, and to protect them against the "chilling effect" generated by ungrounded proceedings conducted in relation to them.

Yet, **the statutory mechanism of disciplinary liability will be used to undermine judicial independence, to exercise political control over court judgments, to force judges to adjudicate in line with the intention of the ruling politicians, and to refrain from expressing any critical comments regarding legislative instruments and their application practice.**

The Act analysed in this opinion provides for numerous amendments relating to the disciplinary liability of judges (Article 1(33)). Similar amendments are also foreseen in the acts that relate to the Supreme Court, military courts, administrative courts as well as prosecutors. The Act provides for amending Article 107 of the LSOC by expanding the definition of disciplinary tort through amending its description contained in the Act. It should be noted that the legislator has limited that description only to references to certain examples (the word "including") of disciplinary torts that may be committed by judges. Yet, the jurisprudence of the Constitutional Tribunal demonstrates that the standards set out in Articles 2 and 42 of the Constitution of the Republic of Poland also apply to the system of disciplinary liability. The characteristics of a disciplinary offence do not need to be set out as precisely as in the case of acts prohibited under penal law provisions, but the legislator should, in disciplinary regulations, provide an outline of such an offence, in a manner predictable for the addressees, bearing in mind the penal nature of disciplinary liability. With regard to the proposed Article 107 of the LSOC it should be concluded that those minimum constitutional requirements have not been met. The legislator, having proposed the open character of disciplinary torts and having decided to codify merely some examples of such torts, had the actual intention of delegating the full scope of powers to disciplinary bodies that will be authorised to determine, in a manner not controllable by law, and in fact independently, without being subject to any statutory restrictions, whether a given behaviour constitutes a disciplinary tort or not. Such a high degree of legal uncertainty should be considered as unacceptable in a democratic state ruled by law and as a type of trap for judges who will not be able to determine, based on the Act, what types of behaviours are prohibited and are subject to disciplinary sanctions.

The points below explain that a disciplinary tort consists in:

1) obvious and blatant violation of law,

2) act or omission that may prevent or significantly impede the functioning of a judicial body,

3) action that calls into question the existence of a judge's employment relationship or effectiveness of his/her appointment as a judge, or the empowerment of a constitutional body of the Republic of Poland,

4) public activity that is against the principle of independence of courts and judges,

5) breach of office dignity.

The amendments should be disapproved. The current Article 107(1) of the LSOC provides that a judge shall be subject to disciplinary liability for professional misconduct, including an obvious and blatant offence in breach of law, or for breach of office dignity. The provision therefore specifies three categories of actions for which a judge may be held liable under disciplinary regulations: an obvious and blatant violation of law, breach of office dignity and other professional torts. At present, the catalogue of disciplinary torts is determined in a manner that makes it possible to classify, under the abovementioned categories, various torts that may be committed by judges in connection with their judicial positions held. Therefore, there are no reasons for expanding the existing catalogue, particularly in the manner that has been proposed in the bill.

It should be reminded that the Constitutional Tribunal, in its judgment of 27 February 2001, ref. no. K 22/00, has already explained that deontological ethics of disciplinary proceedings is different than that of criminal proceedings. It is primarily related to the specificities of performing certain professions and to the principles of operation of specific professional corporations. Deontology rules developed within them are focused, primarily, on defending the dignity and the good of the profession. They can thus refer to the ethical aspects of coexistence and action. Professional deontology must therefore be viewed also from the point of imperative practical solutions in the area of performance of professional duties. Hence, disciplinary liability may be associated with acts that are not subject to criminal

liability. Such principles of professional liability apply, in particular, to professions of high social prestige, in which an important element is due care for maintaining their dignity.

The Constitutional Tribunal has found that with regard to disciplinary torts (as opposed to offenses determined under the Penal Code), precise categorisation of prohibited actions is not possible. They are, therefore, not set out in any acts of parliament, as it is objectively impossible to develop a catalogue of behaviours that pose a threat to the correct performance of professional duties or to maintaining the dignity of a profession. Thus, it is not possible to make simple comparisons between criminal proceedings and disciplinary proceedings with regard to regulations that provide for safeguards. Disciplinary torts must be assessed not only on the normative level but also on the professional and ethical level. As a consequence, in their case it is not possible either to approach the issue of guilt solely from the point of legal realism, and definitely not solely from the point of view of criminal law and criminal proceedings.

Although disciplinary torts cannot be precisely categorized into individual types, as is the case in substantive criminal law, **the provision, by the legislator, of a catalogue of disciplinary torts in such a form raises serious doubts as to the compliance with the principles of clarity and predictability of law, which should be reflected by commonly applicable legal acts, as required, in particular, by Article 2 of the Constitution of the Republic of Poland. The catalogue of disciplinary torts** as provided for in Article 107 of the LSOC may be considered to apply to judges' all **behaviours which, for some reason, have not been assessed positively by representatives of the legislative power, the executive power, other state authorities, or disciplinary officers**.

In general, a positive opinion should though be expressed with regard to the deletion, in the course of the legislative works, of a disciplinary tort consisting in the refusal to apply a provision of an act of parliament which, with a prior consent under an act of parliament, has been found by the Constitutional Tribunal non-compliant with the Constitution or an international agreement, as well as with regard to the replacement of the tort of "activity of political nature" with the term included in the Constitution "public activities incompatible with the principles of independence of the courts and judges" (Article 178(3) of the Constitution of the Republic of Poland). Doubts, however, may be raised by the fact that the

definition has been directly copied from the Constitution into the Act. There are two reasons for this. Firstly, unnecessary repetition, in legislative instruments, of already existing standards raises objections as to the principle of correctness of legislation. Secondly, the legislator of ordinary acts is expected to fill the general constitutional norms with specific normative content, making the general guidelines of the constitutional legislator more particular, primarily in the penal legislation area in which the predictability of law (of responsibility) is a requirement arising not only from Article 2 of the Constitution of the Republic of Poland but also from Article 42 of the Constitution.

Therefore, the amendments introduced by the Act serve the actual purpose of legitimizing activities of disciplinary officers, which activities have raised many doubts formulated, inter alia, in the Commissioner for Human Rights' numerous letters of intervention.

It was also surprising that a decision to propose the bill in question was made, given that the Court of Justice of the European Union is soon going to consider the Commission's complaint against Poland regarding the new system of disciplinary measures applicable to judges (*Commission v. Poland, C-791/19*). The Commission argues that Poland has failed to meet its obligations under Article 19(1)(2) of the TEU, as well as its obligations under Article 267(2-3) of the TFEU. In support of the complaint the Commission argues that the challenged provisions regarding the new regulations on the system of disciplinary liability of judges allow for the consideration of the content of court judgments as disciplinary offenses, and fail to ensure the independence and impartiality of the Supreme Court's Disciplinary Chamber which controls decisions issued as a result of disciplinary proceedings. The provisions also grant the President of the Supreme Court's Disciplinary Chamber the discretionary power to designate disciplinary courts of first instance as courts competent to issue decisions regarding judges of ordinary courts, which does not ensure that disciplinary cases are resolved by courts "established under an act of parliament". The provisions do not ensure that cases in disciplinary proceedings concerning judges will be recognized in a reasonable time, and do not safeguard defendants' right to defence. Furthermore, as regards the violation of Article 267(2-3) of the TFEU, the Commission has raised that the national legislation at issue permits the restriction of courts' right to refer questions to the Court of Justice for a preliminary ruling, by introducing the possibility of instituting disciplinary proceedings.

Earlier, in its reasoned opinion of 17 July 2019, the European Commission pointed out that the new system of disciplinary measures applicable to judges in Poland aims at creating a "chilling effect" to discourage judges from referring questions for a preliminary ruling. All the circumstances confirm that the problem regarding disciplinary proceedings applicable to judges is systemic in nature rather than incidental. In this context, the drawing up of provisions that tighten the existing disciplinary liability regime for judges should be considered as undermining the obligation to conduct loyal cooperation with the European Union and its bodies, that arises from Article 4(3) of the Treaty on the European Union.

Another change introduced by the Act and raising serious doubts is the amendment of Article 112 of the LSOC. The amendment consist in the insertion of a provision that makes it possible for the disciplinary officer for judges of ordinary courts, and for his/her deputies, to take and conduct actions in all cases concerning judges. In this way, the legislator has probably intended to eliminate doubts regarding competences of disciplinary officers to conduct explanatory activities and disciplinary proceedings in relation to judges, because judges have raised doubts as to the empowerment of the disciplinary officer for judges of ordinary courts, and his/her deputies, to take actions with regard to judges who, in connection with adjudicating in their specific courts, should rather be covered by the jurisdiction of a disciplinary officer from their regional court or court of appeal.

Furthermore, according to the Act, the disciplinary officer for judges of ordinary courts got unlimited influence on the appointment of other disciplinary officers working in ordinary courts. This is because the legislator decided to eliminate the necessity for candidacies being proposed to the officer by general assemblies of judges.

The change should be disapproved because the disciplinary officer for judges of ordinary courts, who is appointed by a representative of the executive, i.e. the Minister of Justice, gains unlimited influence on the selection of disciplinary officers in regional and appellate courts and on the procedure of conducting disciplinary proceedings.

Moreover, the provision of Article 114a which is to be inserted to of the LSOC (the possibility of imposing a fine of up to PLN 3,000 in the event of a witness's unjustified failure to appear before the officer) may not be assessed in any other way than as an ad hoc reaction

to the announcement of judges' refusals to appear as witnesses during explanatory proceedings.

It should also be indicated that Article 114 of the LSOC has been reworded under Article 108(22) of the Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2018, item 5, as amended). From the point of view of the hearings of judges, of greatest significance is the fact that the term "disciplinary actions" that are undertaken by disciplinary officers has been replaced with the term "explanatory actions". The two terms certainly have different scopes and are not synonymous, as will be demonstrated below.

Currently, in accordance with Article 114(1) of the LSOC, a disciplinary officer undertakes explanatory actions after preliminary establishment of the existence of circumstances suggesting features of a disciplinary offense. Such actions should be carried out within thirty days of the day of taking the first action by the disciplinary officer. As part of explanatory actions, a disciplinary officer may request a judge to provide written explanations relating to the subject of these activities, within fourteen days of receiving the request. A disciplinary officer may also accept verbal explanations provided by judges. A judge's failure to provide explanations does not suspend the course of the proceedings (Article 114(2) of the LSOC). Furthermore, Article 114(3) of the LSOC provides that if the explanatory actions indicate the existence of grounds for instituting disciplinary proceedings, the disciplinary officer should commence disciplinary proceedings and draw up a written statement of disciplinary charges.

The above-mentioned provisions certainly do not imply the competence of disciplinary officers to hear judges as witnesses during explanatory proceedings. According to the Commissioner for Human Rights, this competence cannot be grounded in the fact that issues not regulated elsewhere are governed by relevant provisions of the Code of Criminal Procedure (Article 128 of the Law on the System of Ordinary Courts). Explanatory actions are not, in terms of their scope, equivalent to disciplinary steps whose scope was broader i.e. covered all steps taken by disciplinary officers within the framework of disciplinary proceedings regulated by the Law on the System of Ordinary Courts; those actions covered both procedural ones and non-procedural ones. Explanatory actions, in turn, consist only in confirming the information on the possible commitment of a disciplinary tort. Thus, they

serve the sole purpose of preventing the commencement of unnecessary disciplinary proceedings. Therefore, because of their nature, explanatory actions cannot be turned into procedural actions such as hearing of witnesses. Appropriate application, pursuant to Article 128 of the LSOC, of provisions of the Code of Criminal Procedure to explanatory actions (instead of to disciplinary actions, as formerly) entails, primarily, appropriate application of Article 307 of the CCRP that regulates verifying proceedings. As a consequence, this means that explanatory proceedings do not contain actions that require drawing up of written records (Article 307(2) of the CCRP). Moreover, only a person who has reported the tort in question may be heard as a witness (Article 307(3) of the CCRP).

According to Article 27(la) of the LSOC, inserted to the Act during the second reading, the Disciplinary Chamber of the Supreme Court will become the sole body authorized to take decisions to hold liable under penal law, or to detain on remand: judges, trainee judges, prosecutors and trainee prosecutors. During the legislative works it was also determined that disciplinary courts are competent to adjudicate with regard to immunity of judges, trainee judges and prosecutors, and prosecutors (Article 110(2)(2) of the LSOC). It should again be emphasized that the centralization of the procedure of disciplining judges and of taking possible decisions to hold them liable is a dangerous solution, in particular in the context of the last judgment of the Supreme Court of 5 December 2019, in which the Court ruled that the Disciplinary Board of the Supreme Court does not constitute a court within the meaning of European Union law, and that the current NCJ is not an impartial and independent body.

5. Comparative analysis of judicial independence safeguards in Poland and in France

Given that both in the written explanatory memorandum to the proposed Act, and in the verbal statements during the works on the bill in the Sejm of the Republic of Poland the bill drafters have referred to legislative solutions in force in other European Union member states in the field of disciplinary proceedings concerning judges, and, among others, to French legislation, the Commissioner for Human Rights has found it justified to present a concise comparative analysis of this subject to demonstrate the inaccuracy of the assumptions underlying the act.

Independence of the judiciary in the Fifth French Republic

According to the French constitution, the head of state is the guarantor of the independence of the judiciary. Yet, over time, this competence of him/her has become rather marginal. After the constitutional reform of 2008, the President of the Republic no longer chairs the Supreme Council of the Judiciary. The function was taken over by the First President of the Court of Cassation (*Cour de cassation*), in accordance with the new wording of Article 65 of the Constitution[1]. Under the French Constitution, the judicial power (*autorité judiciaire*) should be fully independent of the other power (*pouvoirs*), as confirmed by the Constitutional Council (*Conseil constitutionnel*) in its decision of 22 July 1980 (no. 80-119 DC), which emphasized that "the legislature and the government shall refrain from censoring court decisions, subjecting them to injunctions, or substituting their decisions in the judging of disputes falling under their authority". Judges, as clearly indicated in Article 64 of the Constitution, are irremovable, and according to the provisions of the organic law may be delegated to a new place only with their consent, also in the event of their promotion. As the Constitutional Council emphasized in its decision of 9 July 1970 (no. 70-40 DC) on the *Organic law on the status of judges and prosecutors* (*loi organique relative au statute des magistrats*), Article 64 "aims, in particular, to ensure that judges appointed to adjudicate in courts of law enjoy the independence necessary for exercising their judicial powers."

Indeed, among the exceptions to the rule of irremovability of judges, that constitute sanctions in disciplinary proceedings (Article 45 (2 and 7) of the organic law, there are: the transfer of a judge to a different place (*déplacement d'office*) and even the dismissal from office. In France, irremovability is defined as a principle rather than a rule[2]. However, from the very beginning of the French Republic, the definition describes the nature of independence as the protection of judges against arbitrary sanctions that may affect their adjudication and that are not really related to a strictly disciplinary offense understood in its narrow meaning[3]. This principle is intended to protect the judicial power particularly against the influence of

[1] D. Chagnollaud de Sabouret, *Droit constitutionnel contemporain. La Constitution de la Ve Republique*, the seventh edition, Editions Dalloz, Paris 2015, p. 488 et seq.
[2] Ibid, p. 27
[3] See: *O. Pluen, L'Inamovibilite des magistrats: un models?,* Universite Pantheon-Assas, 2011, p. 720 et seq.

political authorities, mainly the executive power, and disciplinary proceedings comply with the constitutional requirements only when the restriction of the principle of irremovability of judges is done pursuant to provisions of the law as well as a ruling of "an independent judicial institution"[4].

It is emphasized that judges with regard to whom disciplinary charges have been raised should enjoy at least judicial protection equivalent to that referred to in Article 6(1) of the European Convention on Human Rights. An important guideline for disciplinary proceedings concerning judges is also the so-called *European Charter on the Statute for Judges* of 1998, whose general rule no. 1.3 provides that *In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers.*[5]

It is also worth noting that the possibility to assess the application of legal norms by judges, including the fulfilment of their obligations under the laws, generally remains outside the scope of disciplinary proceedings. A definition of disciplinary offense is contained in Article 43 of the organic law as "any failure by a judge to perform his/her duties, or any action against a judge's honour, caution or dignity". The explicitly mentioned disciplinary tort concerning the application of law consists in "gross and deliberate violation of any of the proceeding rules that constitute an important safeguard of the parties' rights, which has been established by a final judgment of a court". Further restrictions in this regard arise from the recommendations published by the Supreme Council of the Judiciary. In its publication of 2010 entitled "*Independence*" the Council sets out the principles of judicial ethics, which relate to respecting and protecting the independence of the judiciary[6]. Article 2 thereof provides that "judges shall defend the independence of the judiciary because they are aware that it constitutes a guarantee that they adjudicate and act in accordance with the laws, in accordance with the applicable rules of conduct, in a manner depending solely on the circumstances that are presented to them, free from any external influence or pressure, and

[4] Ibid, p. 767 et seq.
[5] *European Charter on the statute for judges* (1998), Council of Europe, DAJ/DOC (98) 23
[6] http://www.conseil-superieur-magistrature.fr/publications/recueil-des-obligations-deontologiques/lindependance (access: 18.12.2019)

without fear of sanctions or hope for any personal benefit". However, according to the rule set out in Article 8 thereof "judges may not be prosecuted or disciplined on the basis of decisions taken by them in conducted court proceedings". Furthermore, in Article 11, in the section *Comments and recommendations* it is recognized that "a judge as a guardian of individuals' freedom shall apply the rules of law according to the circumstances of the proceedings, without fear that it may be disapproved by the executive, parliamentarians, the judicial hierarchical bodies, the media or the public, and without trying to please them."

The status of judges is governed by the *Organic law on the status of judges and prosecutors* of 1958[7]. Notably, the reform of that instrument, as an organic law, is in every case subject to the mandatory procedure of *a priori* review of compliance with the constitution, that is conducted by the Constitutional Council pursuant to Articles 46 and 61 of the Constitution. Therefore, any change regarding the status of judges requires not only an absolute majority of votes in the National Assembly (*Assemblée nationale*) in the absence of consent by the Senate, but also a confirmation by the Constitutional Council of the constitutionality of the reform in question.

The Constitutional Council has repeatedly emphasized in its jurisprudence that the role of the judiciary is special in nature, and therefore the legislator, the government or any other state authority may not encroach on their powers (Decision no. 2007-551 DC of 1 March 2007). The principle of independence in the French constitutional law is "inseparable from the exercise of the functions of ordinary courts (Decision no. 92-305 DC of 21 February 1992) and the operation of the entire system of justice (Decision no. 2002-461 DC of 29 August 2002). The Council has also recognized the applicability of the principle of independence to non-professional judges, pursuant to Article 16 of the *Declaration of the Rights of Man and of the Citizen* of 1789.

Supreme Council of the Judiciary (*Conseil supérieur de la magistrature*)

[7] *L 'ordonnance no 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature*

The constitutional reform introduced in 2008 was aimed at ensuring greater independence of the Supreme Council of the Judiciary from the executive. After the reform, the Council is composed of 15 members: the First President of the Court of Cassation, five judges, one prosecutor, one representative of the Council of State (*Conseil d'Etat*), one attorney at law and six qualified members who may not be members of Parliament or of ordinary courts or administrative courts, and who are elected (two each) by the President of the Republic, the President of the National Assembly and the President of the Senate. Notably, the Minister of Justice may participate in meetings of the Council, except of those on disciplinary matters (*matière disciplinaire*), as explicitly set out in Article 65 of the constitution.

As a result of one of the reforms, also citizens may lodge disciplinary complaints against judges. Yet, as emphasized, "they may not, however, lead to the challenging of issued decisions, and are closely related to the performance by a judge of his/her function in a particular case of a given citizen"[8].

It should be emphasized that the direct adoption of French solutions for the purposes of analysis of Polish laws is against the basic principles of comparative legal analysis which should take into account the broad historical and social contexts in which the norms of the constitutional law are functioning. In France, there indeed exists the possibility to remove a judge from his/her judicial position. Yet, this fact is, firstly, a result of the strongly legi-centric mode of the French legal culture, in which, since the times of the First Republic, there has been some "fear of the judiciary", and secondly, this possibility is strongly restricted by the principles developed in the jurisprudence of both the Constitutional Council and the Council of State which adjudicates as a cassation body on disciplinary case judgments of the Supreme Council of the Judiciary, as well as by the 200 years of work of French law theorists and constitutionalists who emphasized the importance of *de facto* full independence of the judiciary from other constitutional authorities.

[8] D. Chagnollaud de Sabouret, op. cit., p. 49

6. Restriction of the freedom of expression and the freedom of association of judges

The bill initially provided that "subjects debated by court boards and judicial self-government bodies shall not include political matters, in particular it shall be prohibited to adopt resolutions that express hostility towards other authorities or constitutional bodies of the Republic of Poland, or that express criticism of the founding principles of the system of state of the Republic of Poland" (proposed Article 9d of the LSOC). In the course of the legislative works, the provision was modified and the change should be in part assessed positively: **"**subjects debated by court boards and judicial self-government bodies shall not include political matters, in particular it shall be prohibited to adopt resolutions that call into question **the principles of the functioning of the authorities of the Republic of Poland and its constitutional bodies."**

However, the provision finally adopted continues to seek to deprive judges of the natural instrument of referring to changes introduced into the Polish judicial system. Persons who, in connection with their education and professional experience, have in-depth specialist knowledge of the functioning of the system of justice and who are able to see the influence of introduced changes on the status of a judge, on the possibility to adjudicate independently, and on the possibility to exercise the right to a fair court - are to be deprived, by the Act in question, of their right to publicly express critical opinions. It may also be expected that the so-formulated provision of the Act will be used as grounds for instituting disciplinary proceedings concerning judges.

The provision of the Act is imprecise, is formulated with the use of unclear and very general terminology. It is based on general clauses (e.g. "subjects debated… shall not include political matters ") and assessing terms. The scope of the provision will be subject to free interpretation by authorities reluctant to hear critical voices of the judicial community. It is not possible to determine the precise scope of the statutory prohibition, which directly violates the principle of predictability of law and fails to provide protection against arbitrariness and abuse of power.

Freedom of expression

Judges and prosecutors, similarly as other citizens have the right to the constitutionally guaranteed freedoms of: expression, belief, association and assembly, and may form or join associations in order to represent their interests, increase their qualifications and defend their status[9]. It is also recognized that, given their specific duties and responsibilities, judges should maintain control and restraint in exercising these rights, and should always act so as to protect the dignity of their office and the impartiality and independence of the judiciary.

Judges and prosecutors, when taking part in public debates (including through social media) should be mindful of the good of the function they hold. Their freedoms of expression and of association may be limited, which does not mean that judges or prosecutors may not speak out in such debates, in particular ones that concern matters relating to the functioning of the system of justice. Any limitations in this regard, according to jurisprudence of international tribunals, should be provided for by law, necessary and proportionate.

The Consultative Council of European Judges in its opinion no. 3 indicates that "the judicial system can only function properly if judges are in touch with reality (...). As citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc).) (...).However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties."[10]

[9] See, *inter alia*, Independence of judges and lawyers: report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Human Rights Council, 29.04.2019, A/ HRC/41/48, paras 11-15; The UN Basic Principles on the Independence of the Judiciary, principles 8 and 9; The Bangalore Principles of Judicial Conduct, principles 4.6, 4.13; The Guidelines on the Role of Prosecutors (UN), principles 8-9; Council of Europe Recommendation CM / Rec (2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Article 25; the Magna Carta of Judges (Consultative Council of European Judges, 2010), Article 12; Guarantees for the Independence of Justice Operators (Inter-American Commission of Human Rights, 2013), paras 168-183.

[10] Translated by the author hereof; Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.

The UN Special Rapporteur on the Independence of Judges and Lawyers Diego Garcia-Sayan in his last report emphasized that in the event of a constitutional crisis and constitutional doubts it can be considered that judges have the moral obligation to speak out in defence of democracy and the rule of law. Some disciplinary proceedings against judges and prosecutors may be seen as intentional punishment of persons for expressing their opinions or performing their duties[11].

Solutions limiting the freedom of expression

The Act's provisions which, in practice, limit the possibility for judges to speak out in public debates by taking resolutions of court boards and judicial self-government bodies (the inserted Article 9d of the LSOC) raise serious doubts as to their constitutionality, and as to their compliance with international standards. Undoubtedly, significant values such as the transparency of public life and the independence of judges and prosecutors may not, however, lead to disproportionate limitation of a number of fundamental rights and freedoms arising from the Constitution of the Republic of Poland, including the freedom of expression (Article 54) and the freedom of association (Article 58), the principle of social dialogue, or the principle of the democratic state ruled by law (Article 2). The provisions of the Act may significantly impact the possibility to exercise the freedom of expression and the freedom of association by judges and prosecutors.

For over 30 years, the jurisprudence of the highest European courts has been maintaining the view that it is not in the interests of the state and not in the interest of the society to have uncritical judges (as did e.g. the Federal Administrative Court of Germany - Bundesverwaltungsgericht in its judgment of 29 October 1987). A judge may express, in a matter-of-fact way and with some distance, his/her views on any subject, including legal and political issues, as long as this does not directly relate to specific matters on which he/she adjudicates, and is not to the detriment of the office held.

[11] See: Independence of judges and lawyers: report about f the Special Rapporteur on the Independence of Judges and Lawyers, UN Human Rights Council, 29/04/2019, A/HRC/41/48.

The freedom of expression of judges and prosecutors may be limited in connection with the roles performed by them. The freedom of expression of a judge is limited because of the duties and the status a judge has in the Polish system of law. Of fundamental significance in this regard are the regulations included in Articles 66 and 82 of the LSOC. Article 66 of that act requires judges, inter alia, to remain impartial. The wording of the oath that is taken by judges and that contains the essence of their professional ethics provides a model of proper conduct of a judge. The provision of Article 82(1) of the LSOC explicitly requires judges to follow the oath. Article 82(2) of the LSOC provides that judges, in the performance of their service and outside of it, shall safeguard the dignity of the judicial profession, and shall avoid anything that may discredit the dignity of a judge or may impair the confidence in his/her impartiality[12].

However, there exists a category of judges' public statements that should be classified and treated in a different manner by allowing judges to enjoy a significant margin of freedom of expression, conditioned though by the need to protect the public and social interests in safeguarding the independence of courts and judges (Article 173 and Article 178(1) of the Constitution of the Republic of Poland) and the principle of the separation of powers (Article 10(1) of the Constitution of the Republic of Poland).

Similarly, the commentary on the Bangalore Principles developed by the UN[13] points to a number of situations in which the freedom of speech of judges should not be restricted, and indicates that in particular: judges may speak out on matters that impact the system of justice,

[12] See: M. Wróblewski, *Granice ekspresji i wypowiedzi sędziego* [*Limits of expression and statements of judges]*, Krajowa Rada Sądownictwa. Kwartalnik [National Council of the Judiciary. Quarterly magazine] 1/2017, pp. 29-34, and M.A. Nowicki, Wprowadzenie nowych przepisów konstytucyjnych oznaczających przedwczesne zakończenie kadencji prezesa Sądu Najwyższego w reakcji na krytykę z jego strony przeprowadzanych reform prawnych Baka przeciwko Węgrom *[Introduction of new constitutional regulations resulting in premature termination of the term of office of the President of the Supreme Court, as a reaction to his criticism of legal reforms, Baka v. Hungary* (judgment of 23 June 2016, Grand Chamber, application no. 20261/12, accepted for consideration on request of the Government), overview available at:
https://www.hfhr.pl/wpcontent/uploads /2016/07/Omowienie_orzeczenia_Baka_przyżko_Wegroml.pdf, last access date: 18.10.2018, D. Bychawska-Siniarska, *Ile wolności słowa dla sędziego?* [*How much freedom of expression for judges]*, 3. Judgment of the Supreme Court of 22/06/2015 (SNO 34/15), LEX No. 1747852.

[13] Bangalore Principles of Judicial Conduct, 2002 (adopted by the Judicial Integrity Group and recognized inter alia by UN resolutions ECOSOC 2006/23 and 2007/22, and resolution 35/12 (2007) of the Human Rights Council); Commentary on the Bangalore Principles of Judicial Conduct (UNODC / Judicial Integrity Group, 2007).

may take part in debates concerning law, and may speak out when they feel the moral obligation to express their views on the matter.

Case law of the European Court of Human Rights

The jurisprudence of the European Court of Human Rights (hereinafter: ECHR) has established a number of standards concerning the exercise of freedom of expression, including by judges. Firstly, it is worth stressing that statements and opinions of public interest and of a political nature (political debate) are more widely protected under the Convention. In particular, questions pertaining to the operation of the judiciary fall within the scope of public interest, and thus a debate which generally enjoys a high degree of protection under Article 10 (see ECHR judgment in Baka v. Hungary, application No 20261/12, § 165). The debate on the tripartite separation of powers is crucial in democratic societies and therefore the public has a legitimate interest in obtaining such information, including the opinions of judges and prosecutors.

In the Baka v. Hungary judgment, the ECHR indicated in particular that the status enjoyed by the applicant as President of the Supreme Court did not deprive him of the protection under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court noted that "having regard in particular to the growing importance attached to the separation of powers (…) and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court". **The Court emphasised that even if an issue under debate has political implications, this is not in itself sufficient to prohibit a judge from making a statement on the matter (*Baka v. Hungary*, § 165; *Wille v. Liechtenstein*, application No 28396/95, § 67). Furthermore, in the *Baka v. Hungary* judgment, the Court stressed that judges have not only the right but also the duty to express their opinion on issues relating to the judiciary or its reform.**

The Court recognised that certain restrictions on the freedom of expression of judges and prosecutors may be introduced in accordance with the doctrine of Member States' margin of appreciation. In particular, it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where

the authority and impartiality of the judiciary are likely to be called in question (see *Wille v. Liechtenstein*, § 64; *Kayasu v. Turkey*, application No. 76292/01, § 92; *Kudeshkina v. Russia*, no 29492/05, § 86 and *Di Giovanni v. Italy*, application No. 51160/06, §71).

In any case, however, these restrictions must meet the proportionality and necessity test in a democratic state governed by the rule of law. The Act prohibits judges from expressing their opinions on political matters, which certainly include issues relating to reforms of the justice system, and therefore prevents them from fulfilling their moral and professional duties.

The solution adopted in the Act, in the context of ongoing disciplinary proceedings concerning judges who have expressed critical opinions on cases concerning changes in the judiciary, would significantly limit the freedom of expression of judges and prosecutors, as it would lead to the "chilling effect" in judges and prosecutors, with a specific future impact in terms of discouraging judges and prosecutors from participating in public debate through their associations and conducting any public or social activities.

The chilling effect has a direct impact on the exercise of the right of association and freedom of expression, particularly in the context of ongoing disciplinary proceedings concerning judges who have actively exercised their constitutionally guaranteed freedom of expression. As ECHR points out, the "chilling effect" has impacts not only on the profession as such *(Kayasu v. Turkey* § 106), but in particular on other judges wishing to participate in the public debate related to the administration of justice and the judiciary *(Baka v. Hungary*, § 167; Kudeshkina, §§ 99-100).

Freedom of association with regard to judges

The adopted Act provides for the obligation of the judges of ordinary courts (Article 88a of the LSOC), administrative courts (Article 8(2) of the LSAC), military courts (Article 70 of the LSMC), Supreme Court justices (Article 45(3) of the ASC) and prosecutors (Article 103a of the Law on Prosecution Service) to submit declarations of membership in associations and foundations. These declarations are public and subject to publication in the Public Information Bulletin.

By imposing on judges and prosecutors the obligation to publicly disclose information on membership of associations and foundations, while in most cases making this information widely available on the Internet (in the Public Information Bulletin), the Act deeply interferes with the constitutionally protected freedom of association and the right to privacy. In the Commissioner's view, these reservations lead to the conclusion that the aim of the legislator was not to strengthen transparency and apolitical approach in relation to judges, **but in fact to carry out general vetting of social and public activity of judges and prosecutors**. In many cases, the publicized information about judges and prosecutors could lead to the disclosure of their worldviews, beliefs and even their sexual orientation. In protecting their privacy, judges and prosecutors may decide to limit their social activities, especially if they are not in line with government policy. It should be added that declarations of assets of judges and prosecutors have been made public beforehand. **This means that, compared to other public officials - such as deputies or senators - judges and prosecutors will enjoy the narrowest sphere of privacy.** It is difficult to find a justification for such a state of affairs, in the context of the constitutional principle of the balance of the legislative, executive and judicial powers (Article 10 of the Constitution of the Republic of Poland).

Freedom of association for judges is specifically restricted by the Constitution through Article 178(3) of the Constitution, which states that a judge may not belong to a political party, a trade union or carry out public activities incompatible with the principles of independence of courts and judges. In other respects, judges and prosecutors enjoy the same protection as other citizens, guaranteed by Article 58 of the Constitution of the Republic of Poland and Article 11 of the European Convention on Human Rights.

Therefore, once again, it should be stated that the adopted statutory regulation is primarily aimed at discouraging judges and prosecutors from social and public activity, and thus limiting their freedom of association. As the Consultative Council of European Judges (CCJE) indicates in the Opinion no. 3, judges should remain generally free to engage in the extra-professional activities of their choice[14]. With regard to any potential conflicts, the Council recommends "establishment within the judiciary of one or more bodies

[14] Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (November 2002), *in fine* para 27

or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge" [15].

The general rules for the membership of judges in different organisations have been defined in the Bangalore Principles[16]. A judge may be a member of a trade union or non-profit organization; however, it would not be appropriate for a judge to hold membership in any organization that discriminates on the basis of race, religion, gender, national origin, ethnicity or sexual orientation, because such membership might give rise to the perception that the judge's impartiality is impaired[17].

It should be emphasised that judicial associations serve public purposes and their membership is subject to personal data protection[18]. The applicable standard of protection in this respect has been established by the Inspector General for Personal Data Protection, who concluded that an employer's demand for a trade union to provide a collective list of employees benefiting from union protection is inconsistent with the Act on Personal Data Protection[19]. Since associations of judges perform functions that are in certain respects similar to those of trade unions, it should be considered whether membership of such associations is not currently covered by personal data protection under Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (OJ EU L 119.1, corrigendum).

It should be added that the requirement to inform superiors about membership in associations and foundations was imposed in the Polish legal order on officers of uniformed services, among others the Internal Security Agency, the Military Counterintelligence Service Intelligence Agency, as well as professional soldiers. However, even in case of the officers of these state services, such information is not made public. The new statutory regulation,

[15] Ibid., para 28
[16] Commentary on the Bangalore Principles of Judicial Conduct (UNODC/Judicial Integrity Group, 2007), paras 127, 135, 167-168 and 176
[17] Independence of judges and lawyers: report of the Special Rapporteur on the Independence of Judges and Lawyers, United Nations Human Rights Council, 29.04.2019, A/HRC/41/48, para. 60
[18] See Ł. Piebiak, *Stowarzyszenia i związki zawodowe sędziów [Associations and trade unions of judges],* IUSTITIA 4(14)/2013
[19] GIODO [IGPDP] Decision of 13 January 2009, DOLiS/DEC-21/09

however, leads to more far-reaching consequences with regard to judges and prosecutors, due to the disclosure of information submitted in declarations and their publication via the Public Information Bulletin. Therefore, it is difficult to positively assess the ratio legis of the adopted legislation, which assumes that the civil rights of judges and prosecutors would be protected to a lesser degree than the rights of officers of the above mentioned state services.

The Commissioner for Human Rights would like to emphasize that the obligation to submit declarations of membership in social organizations and making them public may have a chilling effect, which will violate the constitutionally and conventionally protected right of association of judges and prosecutors. Such a situation would be unprecedented on a European scale. The statutory solutions adopted do not meet the proportionality test and cannot be considered necessary in a democratic state governed by law.

However, the European standard of protection in this respect should also not be lower than that established by the Inter-American Court of Human Rights. In the López Lone et al. v. Honduras case, the American Court noted that the dismissal of three judges as a result of their participation in public protests against the coup d'état led to a violation of their right of association (membership of the Association of Judges for Democracy). As a result, that Court found an unjustified restriction on the applicants' right to freedom of association. In the López Lone et al. v. Honduras judgment, the American Court stressed that in democratic crises, judges have not only the right but also the duty to speak out in favour of restoring democratic order, alone and in cooperation with other judges, and that standards which normally limit the right of judges to participate in politics do not apply to their actions in defence of the rule of law[20].

[20] *López Lone et al. v. Honduras,* judgment of 5 October 2015, paras, 158, 153 and 160

7. Other amendments to the Act of 27 July 2001 - Law on the System of Ordinary Courts (LSOC)

Limiting the role of collegial bodies and judicial self-government bodies

The changes concerning the structure and functioning of judicial self-government bodies and court authorities, introduced in Article 1 of the Act which concerns amendments to the LSOC, should be assessed negatively. The legislators decided to thoroughly alter the nature and structure of these bodies, replacing the existing general assemblies of judges of appellate court area of jurisdiction, general assemblies of judges of the regional court area of jurisdiction and general assemblies of judges of the individual courts with general assemblies of judges of the appellate court, general assemblies of judges of the regional court and general assemblies of judges of the district court. Contrary to the objectives of the Act, this solution will not improve the representation, but will in fact lead to the elimination of the joint self-government bodies of judges of the given appellate court area and of the given region. Moreover, the bill does not demonstrate how the proposed solution would improve the efficiency of judicial self-governments.

The Act abolishes the terms of office and the elections of the boards of appellate courts and of the boards of regional courts (proposed Article 28 and Article 30 of the LSOC). The board of an appellate court will consist only of the president of the appellate court and presidents of regional courts from the area of jurisdiction of the given appellate court, while the board of a regional court will consist only of the president of that court and presidents of district courts from the area of jurisdiction of the given regional court. The judges of the appellate and regional courts, respectively, lose the currently existing right to elect the members of the board for a three-year term. The boards will be composed exclusively of persons appointed by the Minister of Justice. At the same time, the powers of these bodies are increased by entrusting them with the task of giving opinions on candidates for judicial posts in ordinary courts of all levels (proposed Article 29(1)(la) and Article 31(1) (la) of the LSOC), taking this competence away from the judicial self-government bodies (general assemblies).

The Act interferes with judicial self-government, changing the composition of self-government bodies and their mode of operation, and limiting their competences. The existing general assemblies of judges of appellate court's area of jurisdiction and general assemblies of region's judges are to be replaced by general assemblies of judges of the appellate court or regional court respectively (proposed Article 33(1) and Article 35(1) of the LSOC). The assemblies will no longer include representatives of lower-level courts (regional and district courts, respectively) elected for three-year terms. Instead of the current procedure of general assemblies adopting resolutions by absolute majority of votes, the authors of the bill propose an ordinary majority (proposed Article 33(5) and Article 35(5) of the LSOC). In all matters of membership, the assemblies shall vote by roll call and the lists of votes shall be public. The existing legislation provides, however, for a secret ballot on certain issues. Under the proposed law, the general assemblies are also stripped of some of their existing powers, in particular the right to give an opinion on the annual information on the activities of the courts (proposed new wording of Article 37h(1) of the LSOC). General assemblies in appellate courts are also stripped of the right to give opinions on candidates for judicial posts. Some existing competences are transformed from mandatory to optional, e.g. expressing opinions on annual reports on the activity of courts.

Administrative tools to influence judges

The Act amends the content of the introduction to the enumeration in Article 22a(1) of the LSOC concerning the determination of the division of tasks in a court, which includes: the assignment of judges to departments, including their transfer, the scope of their duties, the assignment of cases, the schedule of on-call duty and substitutions. The change, which in fact amounts to the deletion of the words "by the end of November each year at the latest" from the current wording of the provisions, increases the arbitrariness of the power of the president of the court, who will no longer be bound by the time limit existing in the current law. This exposes judges to a high degree of discretion in the determination of their professional situation by court presidents and thus allows additional pressure to be exerted on them.

The Act also increases the scope of supervision of the president of the appellate court (and, respectively, the president of the regional court) over presidents of lower courts. The president of a higher court may recommend changing the scope of the division of tasks (proposed Article 37e(2) of the LSOC). Until now, he could not violate a resolution of the appellate court board (respectively - the regional court board) adopted as a result of an appeal by the judge concerned. The project proponents abandon this solution, while introducing a firm competence for the National Council of the Judiciary, which at the request of the president of the appellate (regional) court decides on a change in the scope of division of tasks.

8. Other amendments to the Act of 8 December 2017 on the Supreme Court (ASC)

Amended procedure of electing the First President of the Supreme Court

The change concerning the election of the First President of the Supreme Court cannot be deemed positive either. The statutory solution assumes that the internal process of selecting candidates for this position will be subordinated to the President of the Republic of Poland, even though the President of the Republic of Poland's powers regarding the appointment of the First President of the SC are limited by the Constitution of the Republic of Poland to the act of appointment, from among the candidates presented to him. The legislative amendment adopted de facto extends the powers of the President of the Republic of Poland in this respect and allows to circumvent the provisions of the Constitution. Therefore, it is difficult not to conclude that the legislators, in one place of the Act state that the Constitution of the Republic of Poland is the supreme act and should have absolute precedence, while in another place they see no contraindications to circumvent the principles laid down in it.

Extended powers of the Supreme Court’s Chamber of Extraordinary Control and Public Affairs

With regard to the Supreme Court's Chamber of Extraordinary Control and Public Affairs, the Act significantly broadens the scope of its jurisdiction so as to include

consideration of motions or statements concerning the exclusion of a judge or a court before which proceedings are to be conducted, including the plea of lack of independence of the court or lack of independence of the judge. It was also stated that the resolution of the entire Chamber of Extraordinary Control and Public Affairs of the Supreme Court, adopted in these cases, is binding for all the formations of the Supreme Court.

The adopted legislative solutions, in the opinion of the Commissioner for Human Rights, lead to the Chamber of Extraordinary Control and Public Affairs being another separate and independent court operating within the organizational framework of the Supreme Court. Adopting such a solution will lead to a violation of the principle of independence and autonomy of the Supreme Court resulting from its systemic position as defined in the Constitution of the Republic of Poland.

The doctrine of law states, among other things, that "among the constitutional principles which determine the way in which detailed constitutional norms are to be interpreted and which determine the content of ordinary laws concerning SC, one should mention in particular:

- the principle of independence of the judiciary (...), and
- the principle of autonomy of the Supreme Court, resulting from its position in the system of state as a separate supreme constitutional body of the state"[21].

The principle of autonomy of the Supreme Court is reinforced in view of the constitutional principle of independence of the judiciary. "The clear proclamation of the separation of powers and the distinctiveness and independence of the courts and tribunals unequivocally establishes the systemic position of the Supreme Court. Its constitutional placement (Articles 175 and 183), as well as the status conferred by the Act of [...] 2002 on the Supreme Court, warrant a statement that the Supreme Court - which of course cannot be said of ordinary courts - has been clearly and definitively separated from other powers. This is demonstrated not only by budgetary autonomy (Article 6 of the Act on the Supreme Court and Article 139 of the Act of [...] 2009 on public finance), the right to establish internal

[21] Cf. L. Garlicki, comment no. 3 on Article 183 of the Constitution [in:] „Konstytucja Rzeczypospolitej Polskiej. Komentarz" [*Constitution of the Republic of Poland. Commentary*], ed. L. Garlicki, Warsaw 2005, p. 3

organisation and rules of internal conduct, including administrative supervision (Article 3(2) and (3) of the Act on the Supreme Court), and the principles of attachment of a judge to the office, non-transferability and incompatibility (Article 180 of the Constitution of the Republic of Poland and Article 39 of the Act on the Supreme Court), but also broad personnel and self-government competencies (including the designation of candidates for judges and presidents, including the first president)[22]. As J. Gudowski rightly points out, there is "(...) a thin line, which, according to sound political custom, cannot be crossed in mutual relations. It should be remembered that the tripartite separation of powers stems not only from legal regulations, but also from practice, including political practice. The tripartite division delineates specific competences and limits of freedom of the authorities, but at the same time requires that these competences and freedoms be exercised with caution. Therefore, since "the Sejm can do a lot but not everything", it should not interfere with the affairs of the judiciary without a real need, and especially in clear violation of the Constitution"[23].

Bearing in mind above all the content of Articles 10 and 173 of the Constitution of the Republic of Poland, it should therefore be recognised that the principle of independence of the judiciary and the autonomy of the Supreme Court requires that the First President of the Supreme Court and the other bodies of the Supreme Court have a real influence on the shape and organisational structure of the Supreme Court.

In view of the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18 and the judgment of the Supreme Court of 5 December 2019. (ref. no. III PO 7/18), issued following an interpretation of the law by the CJEU, there are also serious doubts about the functioning of the entire Chamber of Extraordinary Control and Public Affairs of the SC and the judges appointed to that Chamber.

In the aforementioned judgment of 19 November 2019, the CJEU held that Article 47 of the Charter of Fundamental Rights of the European Union and Article 9(1) of the Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment

[22] Cf. J. Gudowski, „Sąd Najwyższy. Pozycja ustrojowa, funkcje i zadania (spojrzenie sędziego cywilisty)"[Supreme Court. Systemic position, functions and tasks (view of a civil law judge)], *Przegląd Sądowy* [*Judicial Review*] 2015/11-12 /7-31, p. 18)
[23] Cf. J. Gudowski, ibid.

in employment and occupation must be interpreted as precluding disputes relating to European Union law from falling within the exclusive jurisdiction of a body which does not constitute an independent and impartial tribunal within the meaning of the first of those provisions. The latter situation arises in the case where the objective circumstances in which such a court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it. Those factors may thus lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. The CJEU also pointed out, that it is for the referring court to determine, in the light of all the relevant factors established before it, whether that does in fact apply to such a body as the Disciplinary Chamber of the Polish Supreme Court. Consequently, in its judgment of 5 December 2019 (ref. no. III PO 7/18), the Supreme Court held that Disciplinary Chamber of the SC is not a court within the meaning of European Union law and is therefore not a court within the meaning of national law.

According to the Commissioner for Human Rights, these findings should also apply to the Supreme Court's Chamber of Extraordinary Control and Public Affairs as the Chamber competent in this case to handle extraordinary complaints (Article 26 of the Act on the Supreme Court), as it was established and staffed in similar legal and factual circumstances as the Disciplinary Chamber of the Supreme Court. Article 47 of the CFREU in its content (cf. judgment of the CJEU of 30 June 2016, Tom and Biroul Executorului Judecatoresc Horatiu-Vasile Cruduleci, C-205/15, EU:C:2016:499) corresponds to Articles 6(1) and (13) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR). This means that also in cases not involving EU law, it is up to the Supreme Court to determine whether the newly established Chamber of Extraordinary Control and Public Affairs of that Court, consisting exclusively of new members, provides the level of protection guaranteed by Articles 6(1) and 13 of the ECHR and equivalent to Article 47 of the CFREU. The normative basis for such an assessment is Article 91(2) of the Constitution of the Republic of Poland, according to which an international agreement ratified

with prior consent given in the Act takes precedence over the Act if the Act is incompatible with the agreement.

According to the Commissioner for Human Rights, there are justified concerns that the Chamber of Extraordinary Control and Public Affairs does not meet the criteria required by Article 6 (1) of the ECHR sufficient to deem that this extraordinary appeal would be heard by an "independent and impartial court established by law". According to the case-law of the European Court of Human Rights, when assessing whether a body can be regarded as independent of the executive, the legislature and the parties to proceedings, account must be taken of the manner in which its members are appointed, the duration of their term of office, the existence of safeguards against external pressure and whether the body is perceived as independent (Cf. the direction of judgments, as initiated by the judgment of the European Court of Human Rights of 28 June 1984 in the case Campbell and Feli v. the United Kingdom, application No. 7819/77; most recently the judgment of 6 November 2018 in the case Ramos Nunes de Carvalho e Sa v. Portugal, applications Nos 55391/13, 57728/13 and 74041/13).

The Supreme Court itself also has fundamental doubts in this respect, as evidenced by its hitherto judicial activity (a legal question submitted to the panel of seven judges in the case ref. no. III KO 154/18, the proceedings in this case were discontinued as devoid of purpose by the decision of 15 October 2019, ref. no. I KZP 4/19, due to the loss of the status of a Supreme Court justice by the person appointed with the participation of the new NCJ; applications for preliminary ruling covered by the decisions of 21 May 2019, ref. no. III CZP 25/19 and 12 June 2019, ref. no. II PO 3/19).

For all these reasons, considering that the Chamber of Extraordinary Control and Public Affairs of the Supreme Court established under the circumstances outlined above is not an independent and impartial court established in accordance with the Act (Article 6(1) of the ECHR), and mindful of Article 91(2) of the Constitution of the Republic of Poland, the Commissioner for Human Rights sees no justification for extending its powers.

Amended provisions on proceedings that concern declaring a final judgment to be unlawful

In the course of the legislative works, within the framework of the submitted amendments, it was specified that the competence of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court (SC) is also to consider applications to declare unlawfulness of a final judgment of the Supreme Court, ordinary courts, military courts and administrative courts, including the Supreme Administrative Court, if the unlawfulness consists in challenging the status of a person appointed to hold office as a judge who issued a judgment in the case (adopted Article 26(4) of the Act on the Supreme Court). In particular, the attempt to extend the institution of the application to declare unlawfulness of a final judgment so as to encompass the administrative courts, including the Supreme Administrative Court, is a cause for concern. Pursuant to Article 183 of the Constitution of the Republic of Poland, the Supreme Court supervises the activities of ordinary and military courts. The Supreme Administrative Court, however, is indicated separately in Article 184 of the Constitution of the Republic of Poland as the supreme body of the administrative judiciary. The intention of the legislator was therefore to separate the powers of jurisdictional control of the SAC and the SC. The proposed provision of Article 26(4) of the Act on the Supreme Court seems to be an attempt to restore the institution of extraordinary review, previously removed from the Polish legal system (a legal remedy against SAC rulings directed to the SC) and, more importantly, the unconstitutional subordination of the administrative judiciary, whose task is to control the activities of public authorities, to the politically constituted Chamber of Extraordinary Control and Public Affairs of the SC, whose independence and legitimacy is currently in doubt for the reasons indicated above.

The above reservations are amplified by the fact that, according to further provisions added by the amendment (in particular Article 26(5) and (6) of the Act on the Supreme Court), an application to declare unlawfulness of a final judgment based on an plea challenging the status of a person appointed to hold office as a judge who issued the judgment in the case will in many respects be less stringent in terms of formal requirements for its filing compared to complaints based on other pleas. First of all, it will not be necessary to establish any prima facie evidence or cause any damage resulting from the judgment to which the application

refers. However, in case of the application in its current form, occurrence of damage is not only necessary to prove, but also an obligatory construction element of the application (cf. Article 4245(1)(4) of the Code of Civil Procedure). Secondly, such an application may be filed outside the court that issued the contested judgment, as well as in the event that a party fails to exercise its legal remedies, including an extraordinary appeal to the Supreme Court.

The proposed amendments concerning the application for a declaration of unlawfulness of a final judgment presented above raise doubts as to their compatibility with the Constitution of the Republic of Poland, including the distribution of competences in the field of administration of justice between the ordinary courts, headed by the Supreme Court, and the administrative courts, headed by the Supreme Administrative Court. There is also a concern that, given the far-reaching de-formalization of the complaint in the event of a plea challenging the status of a person appointed to hold office as a judge and the fact that the Chamber of Extraordinary Control and Public Affairs of the SC is to be competent to hear it, this legal institution may be used for political purposes.

The principle of the impartiality of judges and the motion for exclusion of a judge *(iudex suspectus)*

In the course of legislative works in the Sejm of the Republic of Poland, an amendment was proposed, according to which the Act on the Supreme Court, in Article 26 defining the jurisdiction of the Chamber of Extraordinary Control and Public Affairs, inserts a provision into paragraph 2, which provides that the jurisdiction of this Chamber is to examine motions or statements concerning the exclusion of a judge or the designation of the court before which proceedings are to be conducted, including the plea of the lack of independence of the court or the lack of independence of the judge. The court examining the case will be obligated to immediately forward the motion to the President of the Chamber of Extraordinary Control and Public Affairs in order to further the proceedings in accordance with the rules specified in separate regulations. As provided further down in the proposed provision, forwarding the motion does not interrupt the ongoing proceedings.

The above provision of the Act should be criticised. Firstly, the statutory designation of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court as having

exclusive jurisdiction to hear motions for exclusion of a judge (iudex suspectus), including pleas of lack of independence of the court or lack of independence of the judge, which may be brought in specific proceedings before all courts in Poland, may result in paralysis of the hearing of these motions and, as a consequence, in the actual impossibility of exercising the right to an impartial court, which is granted to all citizens under Article 45(1) of the Constitution of the Republic of Poland. It should be emphasized that, given the fact that according to the proposed changes, the competence of the Supreme Court's Chamber of Extraordinary Control and Public Affairs is to be expanded to include also several other areas, the complete centralization of handling motions for exclusion of a judge based on the plea of lack of independence of the court or lack of independence of the judge, raises serious objections from the perspective of the need to guarantee the best possible execution of individual rights in the judicial process.

Secondly, the adopted statutory regulation raises all the more doubts since, in accordance with Article 26(2) in fine of the Act on the Supreme Court, forwarding a motion to exclude a judge to the President of the Chamber of Extraordinary Control and Public Affairs of the SC will not interrupt the course of the ongoing proceedings. Exercising the right to an impartial court requires that such a motion be examined quickly, preferably at the initial stage of the proceedings, which is reflected, inter alia, in the provision of Article 42(3) of the Code of Criminal Procedure, according to which examination of a motion to exclude a judge "shall take place immediately". This prevents many of the negative consequences for the party of the case being heard by the wrong judge who does not meet the criterion of impartiality. A centralised examination of such motions by the Supreme Court's Chamber of Extraordinary Control and Public Affairs, combined with the lack of statutory suspension of the proceedings for the time of examination of the motion, with the already high influx of cases and the planned extension of that Chamber's competences, will surely lead to the ineffectiveness of the right to have a case heard by an impartial court. In the opinion of the Commissioner for Human Rights, this provision in its current form should be unequivocally assessed negatively and rejected because of the serious threat to citizens' constitutional rights and freedoms in the area of administration of justice.

Transitional provisions

According to Article 10(2) of the Act, "the court examining the case referred to in paragraph 1 shall immediately, however, no later than within 7 days from the date of this Act's entry into force, transfer the case to the Supreme Court's Chamber of Extraordinary Control and Public Affairs, which may abolish the previous actions if they prevent further examination of the case in accordance with the Act". This provision is purely instrumental in nature, serving the fastest possible implementation of the idea of concentrating the competences of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, while at the same time granting this Chamber of the Supreme Court the ultimate competence to abolish any and all actions undertaken in the proceedings to date. The aim of such a statutory solution may be to immediately take over the proceedings conducted so far in other chambers of the Supreme Court, to render the conducted procedural activities ineffective and, as a consequence, to take decisions which may hinder, among others, implementation of the judgments of European courts.

9. Other amendments to the Act of 25 July 2002 - Law on the System of Administrative Courts (LSAC)

Article 4 item 7 of the Act provides that the President of the Republic of Poland, after consulting the Board of the Supreme Administrative Court, shall determine, by way of regulation, the rules of procedure of the SAC, which shall determine the number of seats of SAC justices, no fewer than 120.

The current law - the Law on the System of Administrative Courts - stipulates that the rules of procedure of SAC shall be adopted by the General Assembly of SAC Justices. This, due to the systemic position of SAC, is an important safeguard of the independence of courts and the independence of administrative judges, as well as a guarantee of the right to a court trial referred to in Article 45(1) of the Constitution of the Republic of Poland. It should be remembered that the determination of SAC rules of procedure by the President of the Republic of Poland requires, in the light of Article 144(2) and (3) of the Constitution of the Republic

of Poland, a countersignature of the Prime Minister. Thus, the Prime Minister will gain an overwhelming influence on the content of the rules of procedure.

The ability to determine the number of justices in the Supreme Administrative Court (no fewer than 120), including the number of vice-presidents of that Court and the number of justices in individual chambers, the internal structure of the SAC and the rules of internal procedure, will lead to a situation where the President of the Republic of Poland and the Prime Minister, as executive bodies, have a significant influence on the organisation and operation of that court.

Therefore, the adopted legislative solutions in this respect should be assessed critically from the point of view of the protection of the citizen's right to an independent and impartial court (Article 45(1) of the Constitution of the Republic of Poland), as reducing the independence of administrative courts.

Extraordinary Disciplinary Officer

In the course of the legislative works in the Sejm of the Republic of Poland, an amendment was added to the Act under review, under which into the Law on the System of Administrative Courts Article 48(5) was inserted, establishing the function of Extraordinary Disciplinary Officer for administrative judges. Appointment of such an Officer is to fall within the competence of the President of the Republic of Poland. An Extraordinary Disciplinary Officer, appointed from among judges of administrative courts, will be able to initiate disciplinary proceedings or join the proceedings already in progress. Importantly, the appointment of an Extraordinary Disciplinary Officer shall entail an ex lege exclusion of the Disciplinary Officer of the Supreme Administrative Court, competent under regular circumstances, or their deputy, from the proceedings. According to the proposed content of the provision, same provisions concerning actions taken by the Disciplinary Officer of the Supreme Administrative Court or their deputy are to apply to the Extraordinary Disciplinary Officer, so they will have an equivalent range of competences in conducted disciplinary proceedings. The President of the Republic of Poland, who is to appoint the Extraordinary Disciplinary Officer, shall also retain the right to appoint another administrative court judge

to replace the appointed person, where this right shall be exercised on the basis of a general "justified case" clause.

The above mentioned amendment, providing for the function of Extraordinary Disciplinary Officer in disciplinary proceedings concerning judges of administrative courts, should be unequivocally assessed negatively. The proposed way of appointment to this function by the President of the Republic of Poland is in clear contradiction to the principles of the separation of powers and of the independence of the judiciary. The introduction of the function of the Extraordinary Disciplinary Officer in the proposed form would create the possibility of direct interference by the President of the Republic of Poland - an executive body - with the disciplinary control over the system of justice administration by administrative courts, including justice administration within disciplinary proceedings already in progress. In line with the requirements of the democratic state ruled by law and the constitutional right to a court, referred to in Article 45(1) of the Constitution of the Republic of Poland, all judges, including judges of administrative courts, should be independent from other public authorities, and the law should provide for safeguards of such independence. Any attempt to introduce regulations allowing the executive, including the President of the Republic of Poland, to influence the disciplinary proceedings concerning judges should be criticised.

It should be added that the amendment introduced in this way manifestly goes beyond the limits of the original bill, thus constituting a gross violation of Article 2 of the Constitution of the Republic of Poland (as referred to in more detail in the Supreme Court's position of 23 December 2019, document no. PP 1-0131-2935/19).

10. Other amendments to the Act of 28 January 2016 - Law on the Prosecution Service (LPS)

According to one of the amendments adopted by the Sejm of the Republic of Poland and provided for under Article 6(7)of the Act, into Article 155 of the Act of 28 January 2016 Law on the Prosecution Service the provision of paragraph 4 has been inserted, according to which "The disciplinary court shall conduct proceedings despite the justified absence of the notified defendant or his defence counsel, unless the good of the conducted disciplinary

proceedings precludes it". It should be noted that this amendment introduces a very important alteration of provisions on disciplinary proceedings of prosecutors concerning the possibility to conduct proceedings despite the justified absence of the defendant and his defence counsel. While the amendment enacted in Article 6(8), introducing a provision excluding the application of Article 117(2) of the Act of 6 June 1997 - The Code of Criminal Procedure, is already in force for disciplinary proceedings of judges (Article 113b of the Law on the System of Ordinary Courts), the proposed provision allowing proceedings to be conducted in spite of the justified absence of the defendant or his defence counsel raises serious objections from the point of view of the rights and freedoms set out in the Constitution of the Republic of Poland.

The amendment adopted in Article 6(7) of the Act will lead in practice to complete exclusion of the principle of internal transparency in prosecutors' disciplinary proceedings, allowing the disciplinary court to proceed despite the justified absence of the defendant or his defence counsel. It should be emphasized that everyone has the right to a public trial under Article 45(1) of the Constitution of the Republic of Poland. Judgment of the Constitutional Tribunal of 11 June 2002 (ref. no. SK 5/02) emphasised that internal transparency, the essence of which is the right to participate in proceedings in one's own case, is an intrinsic element of the constitutional right to a fair trial laid down in the aforementioned provision. Excluding this rule in the disciplinary proceedings of prosecutors constitutes a significant downgrading of the standard of protection of the defendant in disciplinary proceedings. In the opinion of the Commissioner for Human Rights, this amendment should be assessed as violating the constitutional standard stemming from Article 45(1) of the Constitution of the Republic of Poland. However, being aware that a similar standard is already in force with respect to disciplinary proceedings of judges under Article 115a of the Law on the System of Ordinary Courts, consideration should be given to amending this provision or removing it in the course of legislative works in the Senate of the Republic of Poland, as that law falls within the scope of the bill under review, in the event that the Senate does not reject the act in its entirety.

11. Amendments to the Act of 12 May 2011 on the National Council of the Judiciary (ANCJ)

The Act on the National Council of the Judiciary is of fundamental importance from the perspective of exercising the right to a court trial expressed in Article 45 of the Constitution of the Republic of Poland. Article 5 of the Act proposes another amendment to this Act by adding Articles 45a-45c and introducing transitional provisions to the Act on the National Council of the Judiciary in Article 10 of the bill. **In fact, the legislative changes are aimed at completely eliminating from the Polish legal system any possibility of affecting the appointment of judges whose appointment procedure was carried out on the basis of provisions which may be called into question in terms of their compliance with EU law.**

It seems unambiguous that the authors of the bill proposed an amendment in this particular form in connection with the judgment issued by the Court of Justice of the European Union on 19 November 2019 (in cases C-585/18, C-624/18 and C-625/18), on the basis of which on 5 December 2019 the Supreme Court examined the appeal of a judge of the Supreme Administrative Court against the resolution of the National Council of the Judiciary of 27 July 2018 (ref. no. III PO 7/18). The Supreme Court, in applying the responses given to it by the CJEU, stated that the National Council of the Judiciary in its current composition is not an impartial body independent of the legislative and executive power, and every court in Poland, including the Supreme Court, is ex officio obliged to examine whether the standard provided in the CJEU judgment is ensured in the case being examined.

The Commissioner for Human Rights notes that at present judges take decisions bearing in mind the possibility that the National Council of the Judiciary in its current form may be deemed to be unduly constituted. Inter alia, on 25 November 2019, the President of the Supreme Court in charge of the work of the Civil Chamber published a statement in which, referring to the content of the ruling, he expressed his conviction that the National Council of the Judiciary is likely to be recognized by the Supreme Court as a body lacking the attribute of independence and decided that until such time as appropriate judgments are issued, no panels of judges with the participation of persons affected by the Court's ruling would be appointed for the cases.

In the opinion of the Commissioner for Human Rights, the enacted legislative changes significantly limit the constitutional right to a court trial and of judicial control over the activities of public administration, and even seek to completely deprive qualified entities of the possibility of exercising their rights. The process of appointing judges, like any other action of public authorities, must be carried out on the basis of the law and within its limits, and compliance with these rules should in all cases be subject to the assessment of an independent court. The court should always independently assess whether and to what extent a provision continues to produce legal effects despite its derogation. The cases referred to in Articles 45a to 45c and Article 10 of the ANCJ were filed under the law applicable at that time and within its limits. Concluding these cases in connection with the adopted Act would constitute depriving the parties of their right to a court trial in the course of its execution.

The legislator seeks to exclude the possibility to control the appointment procedure of candidates for judicial posts by anybody. The decision on the nomination of judges is to be made only by the executive body - the President of the Republic of Poland on the basis of a resolution of the NCJ - a body whose appointment is subject to serious reservations regarding compliance with the rule of law. In the view of the Commissioner for Human Rights, the legislative amendments constitute not only an unacceptable interference of the legislature with the fundamental competence of the judiciary, which is to administer justice, but also with the constitutional right to a court trial of those citizens who are parties to those proceedings, including those which are the subject of proceedings in cases concerning EU law, initiated under existing legislation.

Polish courts are a part of the European/EU justice system. It is clear from the judgment of the CJEU in case C-64/16 Associaęao Sindical dos Jidzes Portugueses v Tribunal de Contas that via Article 19(1)(2), the TEU entrusts the task of ensuring judicial review within the legal order of the EU also to national courts (i.e. ordinary courts, administrative courts and the SC). Therefore, these courts have common tasks in cooperation with the CJEU, serving to ensure that in the interpretation and application of the Treaties the law is observed. EU Member States are required to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Failure to ensure the possibility of challenging the appointments as a result of errors in the appointment procedure constitutes in fact

deprivation of the right to effective legal protection, which infringes the provision of the second subparagraph of Article 19(1) of the TEU.

In its judgment in case C-619/18 - Commission v Poland, the CJEU emphasised that as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law. (paragraphs 48-49). In its judgment in case C-556/17 *Torubarov* the CJEU pointed out that any provision of a national legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law [right to effective legal remedy] by withholding from the national court with jurisdiction to apply that law the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules from having full force and effect are incompatible with requirements, which are the very essence of EU law (see, to that effect, judgments of 9 March 1978, Simmenthal, 106/77, EU:C:1978:49, paragraph 22, and of 24 June 2019, Popławski, C-573/17, EU:C:2019:530, paragraphs 52 to 62).

The claim of prospective judges for judicial protection is relevant in this context if the State by its actions interferes with the appointment process in a way that may involve a subsequent challenge to the independence of the judge. As the CJEU found in its judgment in case T-639/16: “Indeed, it is not only essential that judges are independent and impartial, but also that the procedure for their appointment appears to be so. It is for that reason that the rules for the appointment of a judge must be strictly adhered to. Otherwise, the confidence of litigants and the public in the independence and impartiality of the courts might be eroded (see, to that effect, decision of the EFTA Court of 14 February 2017, Pascal Nobile v DAS Rechtsschutz-Versicherungs, E-21/16, paragraph 16)”.

Also the European Court of Human Rights, in its judgment in Guðmundur Andri Ástráðsson v. Iceland (ref. no. 26374/18), held that the process of appointing judges should safeguard public confidence in the judiciary and that the process of shaping the judiciary should be based on normative acts that meet the requirements of a democratic state governed by law. This means that the requirement for judicial review of resolutions on the appointment of prospective judges can be derived from the jurisprudence of both the CJEU and the ECHR.

It should be noted that the procedure for appointment to the position of a judge is covered by the principle of effective judicial protection and as such is subject to judicial review. According to the jurisprudence of the CJEU, in the light of the standard of Article 47 of the CFREU, the aim of the principle of effective judicial protection is to grant the right to one judicial instance in order to pursue one's rights. This means that a Member State is under an absolute obligation to establish at least one judicial instance fulfilling all the requirements of Article 47 of the CFREU (and thus also the second subparagraph of Article 19(1) of the TEU).

12. Course of the legislative works on the Act

The Commissioner for Human Rights has been monitoring the state of the legislative process for many years with great commitment, with particular emphasis on those stages of the process which are carried out by the government, as proper conduct of legislative activities is crucial for the drafting of legislation that complies with the constitutional standard of protection of human and civil rights and freedoms. A particularly important requirement with regard to the shape of this process is the necessity to base the law-making system on the principle of social participation and dialogue of all interested groups and entities. Proper rationalisation of the legislative process in this scope should result in full identification of social problems and appropriate selection of legislative measures to solve these problems. Representatives of the constitutional law academic community also note that a properly rationalised legislative process should result in such organisation of its course as to ensure that the legality and purposefulness of the declared legislative activities can be verified at a later stage[24].

In light of the above, the very pace of work on the bill concerning the constitutional bodies of the state raises doubts. These doubts are compounded by the fact that the content of the project concerns the area of judicial independence and independence of judges, i.e. issues

[24] *P. Radziewicz,* Pojęcie sejmowej kontroli legalności ustawy,[The concept of parliamentary control of the lawfulness of an act] *[in:]* Kontrola legalności ustawy w Sejmie,[Control of the lawfulness of an act in the Sejm] *ed. P. Radziewicz, Warsaw 2015, pp. 30-31.*

of a systemic nature. Although the bill was presented as a parliamentary bill, it should be assumed that it was in fact prepared within the framework of the work carried out in the government, and the procedure followed is the same as the urgent procedure. Article 123(1) of the Constitution of the Republic of Poland provides that the Council of Ministers may classify a bill adopted by itself as urgent, with the exception of tax bills, bills governing elections to the office of President of the Republic of Poland, to the Sejm, to the Senate and to organs of local government, bills governing the structure and jurisdiction of public authorities, and also drafts of law codes. *Ratio legis* of the Article 123(1) of the Constitution of the Republic of Poland referring to the Council of Ministers should also be taken into account when assessing the pace of work on the parliamentary bill, as the intention of the constitutional legislators was that parliamentary work on draft legislation concerning fundamental regulations in the area of individual rights and freedoms as well as democratic rules should be carried out in such a way as to prevent hasty adoption of the legislation.

Both the time of introduction of the bill, the night work mode in the parliamentary committee (work was completed before 6 a.m.) and the immediate voting on the bill by the Sejm lead to an unambiguous conclusion that in this case, the pace of legislative work imposed by the parliamentary majority was contrary to the intention of the constitutional legislators, as expressed in Article 123(1) of the Constitution of the Republic of Poland and exposed such constitutionally protected values as the constitutional principle of citizens' trust in the state and law stemming from Article 2 of the Constitution of the Republic of Poland, or the principle of social dialogue stemming from the preamble to the Constitution of the Republic of Poland, to harm. The principle of citizens' trust in the state and the law assumes that the law concerning the foundations of the operation of a democratic state governed by the rule of law would be enacted after considering all the arguments (including those of the parliamentary opposition, those of the representatives of civil society and those of the entities called upon by the law to express their position on the subject of the proposed regulation). This is the only way to build trust in the enacted legislation, otherwise the enacted legislation becomes only a dictate of the majority, not an emanation of the reasons for its adoption. The principle of social dialogue, in turn, assumes that final legislative decisions would be preceded by a dialogue with all representative actors involved in society, i.e. that their views would be

heard beforehand. These rules of law-making in a democratic state of law have been violated in the course of passing the bill under review.

Pursuant to Article 119(1) of the Constitution of the Republic of Poland, the Sejm examines a bill in the course of three readings. As the Constitutional Tribunal pointed out in its judgment of 24 March 2004 (ref. no. K 37/03), this principle should not be understood in a purely formal manner, i.e. as a requirement to examine the same designated bill three times. Following the Constitutional Tribunal, it should be stated that "the purpose of the three-readings principle is to examine the bill as thoroughly and conscientiously as possible and, consequently, to eliminate the risk of underdevelopment or randomness of the solutions adopted in the course of legislative works. This solution should also be viewed in the context of the endeavour to ensure greater efficiency of the Sejm's activities. On this assumption, it should be stated that the principle of three readings means that the Sejm has to examine the same no. three times in terms of its substance, and not just the technical aspects." This view was upheld by the Constitutional Tribunal in its judgment of 16 May 2009 (ref. no. P 11/08).

A thorough examination of bills in three readings, referred to in Article 119(1) of the Constitution of the Republic of Poland, is therefore not only a formal ritual, necessary to fulfil the content of this constitutional norm. The term "Sejm shall examine" means that during these readings the Sejm of the Republic of Poland listens to and takes into account all representative views on the proposed legislative matter. Otherwise, the legislative decision of the Sejm of the Republic of Poland cannot take into account all aspects of the problem under consideration and is not based on arguments of rightness and rationality, but only on the argument of the will of the majority and its current voting power. In the course of the legislative works on the bill under review, despite numerous concerns, including those of a constitutional nature, submitted with regard to the bill, no opinions or expert opinions were sought and no in-depth reflection on the matter of the law being made was undertaken.

No constitutional reasons have justified such a rush to pass the bill (nor have they been indicated in the explanatory memorandum of the bill). Moreover, the matter in question concerned a judiciary body which is not under the authority of the legislature. Article 10(1) of the Constitution of the Republic of Poland provides in this scope that the system of state of the Republic of Poland is based on the separation of and balance between the legislative,

executive and judicial powers (vested in courts and tribunals – Article 10(2) of the Constitution of the Republic of Poland). Balance as a systemic feature assumes dialogue between the individual branches of power, but does not assume the domination and dictate of one of the branches.

13. Summary

In the opinion of the Commissioner for Human Rights, the Act of 20 December 2019 should be rejected in its entirety by the Senate of the Republic of Poland. An analysis of the content of its provisions leads to an unequivocal conclusion that the real purpose of the regulation is not, in fact, to "organize systemic issues related to the status of a justice of the Supreme Court, ordinary, military and administrative courts, as well as judicial self-government bodies and court authorities", as it is declared in the explanatory memorandum of the bill, but solving the immediate obstacles that have appeared in the jurisprudence of the Polish and European courts on the basis of the existing regulations and that prevent or hinder the implementation of political intentions which are contrary to the Constitution of the Republic of Poland, the European Convention on Human Rights and the law of the European Union.

Unfortunately, the work of the parliamentary committee and the amendments to the Act only slightly (as indicated above) actually improved the Act, many of them introduced additional solutions which only exacerbated the defectiveness of its provisions.

Particular concerns of the Commissioner for Human Rights relate to the consequences for the protection of civic rights that would result from the Act's entry into force in the wording adopted by the Sejm. Preventing implementation of the judgment of the Court of Justice of 19 November 2019 will in fact constitute a refusal to carry out in loyalty the obligations arising from membership of the European Union (Article 4(3) of the Treaty on European Union), including, in particular, a refusal to ensure effective judicial protection of citizens' rights stemming from Article 19 (1)(2) of the Treaty on the Functioning of the European Union and Article 47 of the Charter of Fundamental Rights of the EU. At the same

time, it will constitute a blatant violation of the Constitution of the Republic of Poland due to the disregard of its provisions which assume respect for international law, by which the Republic of Poland has chosen to be bound.