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dr hab. Krzysztof GRAJEWSKI, prof. UG
https://orcid.org/0000-0002-8691-5150
University of Gdansk
e-mail: krzysztof.grajewski@ug.edu.pl

prof. JUDr. PhDr. Jan WINTR, Ph.D
https://orcid.org/0000-0001-7368-1749
Charles University in Prague
e-mail: wintr@prf.cuni.cz

# Changes in the regulation of the constitutional position of the judiciary in the Czech Republic and in the Republic of Poland

## 1. Constitutional regulation of the judiciary in the Czech Republic and Poland

The regulation of the constitutional position of the judiciary in the Czech Republic is essentially stable. The basis for these norms is found in the 1992 Constitution[1], in the 2002 Law on Courts and Judges[2] and in its main 2008 amendment[3]. This text will first examine the guarantees of judicial independence and the independence of judges, and then the dispute over the appointment and dismissal of court presidents from 2002 to 2010.

In the Czech Republic, judicial power is exercised by independent courts (Article 81 of the Constitution). The principle of independence of the judiciary is one of the basic constitutional principles; it can be systematically classified under both the principle of separation of powers and the principle of the rule of law. The independence of the judiciary, as one of the key elements of the idea

[1] Constitution of the Czech Republic of 16 December 1992, no. 1/1993 Sb.
[2] Law on courts and judges (zákon o soudech a soudcích), No. 6/2002 Sb.
[3] Act No. 314/2008 Sb. Cf J. Grygar, *Zákon o soudech a soudcích. Komentář*, Praha 2018; D. Zemanová, *Zákon o soudech a soudcích. Komentář*, Praha 2022.

of separation of powers, prevents the accumulation of power, in particular the possible exercise of judicial power by the legislature or the executive. The idea of a legislator, judge and executioner in one person is the greatest threat that the system of separation of powers is designed to counteract. However, the independence of the judiciary is also an important condition of the rule of law. For there is no rule of law without impartial judges, deciding disputes between citizens or adjudicating criminal cases. And the main guarantee of a judge's impartiality is his/her independence. A judge cannot rule according to political dictates and must be independent of the parties to a dispute.

The independence of the courts and the independence of judges is generally guaranteed by Articles 81 and 82(1) of the Constitution of the Czech Republic. One of the most important guarantees of this principle is the non-removal and non-transferability of judges, which is provided for in Article 82(2) of the Constitution. It stipulates that a judge may not be removed or transferred to another court against his or her will; exceptions arising, in particular, from disciplinary liability are determined by law. The performance of a judge's function may be terminated only for the reasons set forth in Section 94 of the Courts and Judges Act; these reasons are, in particular, the commission of a crime or serious disciplinary offense, long-term adverse health condition and reaching the age of 70. Disciplinary misconduct is a culpable violation of a judge's duties or culpable behaviour that undermines the dignity of a judge's office or threatens the courts' confidence in independent, impartial, professional and fair decision-making (§ 87 of the Law on Courts and Judges). Disciplinary cases are decided by the Supreme Administrative Court (*Nejvyšší správní soud*), with a six-member panel consisting of a judge of the Supreme Administrative Court, a judge of the Supreme Court (*Nejvyšší soud)*, a judge of another court, a prosecutor, a lawyer and a member of another legal profession (the last three are selected from a list to which they are nominated by the Prosecutor General (*nejvyšší státní zástupce*), the President of the Czech Bar Association and the deans of law faculties[4]. As a sanction, the disciplinary court may decree a reprimand, a reduction in salary by up to 30% for up to one year (up to two years in the case of repeat offenders), removal from the position of chamber president and removal from office as a judge (§ 88(1) of the Courts and Judges Act). The Courts and Judges Act permits, if the proper administration of justice cannot be otherwise ensured, the transfer or temporary assignment of a judge to another court without his/her consent (§§ 69 and 72).

In turn, Article 82(3) of the Constitution establishes the principle of incompatibility of offices (*incompatibilitas*) - a judge may not be a deputy, senator, President of the Republic or public administration official, and according to § 85 of the Law on Courts and Judges, he may not hold a paid position or engage in gainful occupation, except for scientific, pedagogical, literary, journalistic, artistic

[4] Cf. § 3 of the Act No. 7/2002 Sb. on proceedings in cases involving judges and prosecutors.

and management of his/her own property. The possibility of temporarily assigning a judge to the Ministry of Justice has been repeatedly challenged by the Constitutional Court as contrary to Article 82(3) of the Constitution (cf. judgments Pl. ÚS 7/02, No. 349/2002 Sb., and Pl. ÚS 39/08, No. 294/2010 Sb.).

Judges of common courts are appointed by the President of the Republic without term limits (Article 93(1) of the Constitution). The act of appointment by the President requires the countersignature of the Prime Minister or a member of the government authorized by the Prime Minister and is the responsibility of the government. A Czech citizen of good character with a university degree in law may become a judge (Article 93(2) of the Constitution). Law No. 6/2002 Sb. on Courts and Judges also requires that a person be at least 30 years of age, have passed the judicial exam (or a substitute exam, such as the bar or notary exam), and have successfully passed the selection procedure for the position of judge. The termination of a judge's mandate can only take place on the grounds set forth in § 94 of the Law on Courts and Judges. These prerequisites include, in particular, the commission of a crime or serious disciplinary offense, long-term ill health, and the end of the year in which the judge turned 70.

The President of the Republic appoints the presidents of the courts from among the judges, the president of the Supreme Court on his/her own accord for a ten-year term, the president of the Supreme Administrative Court with the co-signature of the Prime Minister (also for a ten-year term), and the presidents of the highest courts (i.e. the Supreme Court and the Supreme Administrative Court) and the presidents of the regional courts at the request of the Minister of Justice for a seven-year term. Presidents of district courts are appointed for a seven-year term by the Minister of Justice on the proposal of the president of the relevant regional court (§ 102-105 of the Law on Courts and Judges). Presidents of supreme, regional and district courts are appointed based on the results of the qualification procedure. The Constitutional Court, in a key ruling on the issue of judicial officers (Pl. ÚS 39/08, No. 294/2010 Sb., see below), declared the multiple appointment of the president of the same court unconstitutional, and the Courts and Judges Act explicitly prohibits this in § 105a. A judicial officer can only be dismissed prematurely in disciplinary proceedings.

Although judges' salaries are set by law (i.e. by the legislature; in particular, in Law No. 236/1995 Sb., on salaries and other emoluments related to the performance of the functions of public officials and certain state bodies, as well as judges and members of Parliament), the Constitutional Court's jurisprudence brings the legal situation closer to the old American constitutional principle that judges' salaries cannot be reduced during their service (Article III, paragraph 1 of the US Constitution) . The Constitutional Court has on several occasions prevented the application to judges of reductions or freezes in the salaries of public officials, arguing in particular the constitutional principle of separation of powers and independence of the judiciary. In other rulings, however, the Constitu-

tional Court has not found unconstitutionality and has allowed judges to be deprived of additional pay, provided that it is not arbitrary, but the will of the Constitutional Court to protect the independence of judges and against interference with their salaries prevails.

The Constitutional Court has defended the independence of judges in a number of other rulings, the most important of which is Pl. ÚS 7/02, No. 349/2002 Sb., which repealed a number of provisions of the newly issued Law No. 6/2002 Sb. on Courts and Judges, including those that provided for periodic tests of judges' professional competence with the possibility of removing them from office, and mandatory training of judges at the Judicial Academy.

The courts are bound by the law, but unlike the executive branch, they are bound only by the law and not by normative acts of a lower order. According to Article 95(1) of the Constitution, a judge is bound by a law and an international agreement when making decisions and has the authority to assess the compatibility of another legal provision with a law or international agreement. On the other hand, if he doubts the constitutionality of a law, he is obliged to suspend proceedings and refer the case to the Constitutional Court (Article 95(2) of the Constitution). The requirement of the rule of law and separation of powers requires, on the one hand, that the courts also be bound by the law, and, on the other hand, that judges be independent of any other regulation or order except the law.

According to Article 82(1) of the Constitution of the Czech Republic, the impartiality of judges may not be violated by anyone. Interference with judicial independence by petition is prohibited (Article 18(2) of the Charter of Fundamental Rights[5]). The independence of the court is also protected by criminal law (cf. in particular, the crime of interference with judicial independence under Article 335 of the Criminal Code).

As for the constitutional regulation of the constitutional position of the judiciary in the Republic of Poland, as in the Czech Republic, it is stable and based on the same assumptions that are characteristic of modern democratic states. According to Article 173 of the Constitution of the Republic of Poland, courts and tribunals are a separate and independent authority from other authorities. Thus, this provision establishes two principles: in addition to the principle of independence of the courts, it also proclaims the separateness of the third authority from other authorities, which makes it possible to look for elements of separation of powers in this provision, which the constitutional legislator, to such a broad extent, decided only with regard to the judicial power. Polish judges are independent in the exercise of their office and are subject only to the Constitution and the laws (Article 178 of the Constitution). They are also irremovable (Article 180(1)), and a judge's removal from office, suspension from office, or transfer to another court or to another position can only occur by court

[5] Charter of Fundamental Rights (Listina základních práv a svobod), No. 2/1993 Sb.

decision and only in cases specified by law (Article 180(2)). They have formal immunity and inviolability (Article 181). All judges, with the exception of judges of the Constitutional Court and the State Tribunal, are appointed by the President upon the proposal of the National Judicial Council. Appointments are for an indefinite period (Article 179).

The constitutional regulation of the constitutional position of judges and courts in Poland has not been changed throughout the life of the current Constitution. However, this does not mean that the situation of the judiciary has not changed at all during this time. In Poland, this issue has become particularly important since the Zjednoczona Prawica camp took power in 2015, with Prawo i Sprawiedliwość (hereinafter: PiS) playing a dominant role, a grouping that, for the first time in the history of Polish parliamentarism after the 1989 political breakthrough, won an absolute majority of seats in both houses of parliament and also won the presidential election. Since then, the ruling majority's actions with regard to the third power have become one of the symbols of the destruction of the constitutional system order and the basis for the thesis of the degradation of democracy[6]. "Friction" between different segments of state power, insofar as it takes place essentially within the constitutional order or incidental in nature, is in a sense a characteristic feature of democratic states. In Poland, however, since 2015, they have transformed into a kind of offensive of the legislative and executive powers, aimed directly against the third power and aimed at its subordination to the broader political power[7] using various legal and political tools, among which one can primarily point to overtly anti-constitutional legislation, but also a number of actions of a factual nature (e.g. judicial appointments made by groups subordinated to political factors). It is worth emphasizing that these aspects cannot be viewed as isolated events. They should be analysed as a "holistic system whose individual elements are interconnected and mutually reinforcing. […] For example, the deprivation of the Constitutional Court […] of real significance […] should not be viewed as a negative, but a separate phenomenon"[8], but as part of a larger whole. As is known, the indicated phenomena in the literature have been called "hostile takeover of the constitutional order," under which M. Wyrzykowski understands the process of "obtaining by the parliamentary majority […] control over the systemically key bodies of the state and the mechanisms of their functioning through the use of extra-constitutional and anti-constitutional methods."[9]

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[6] Cf. W. Sadurski, *Polski kryzys konstytucyjny*, Łódź 2020, p. 54.

[7] K. Grajewski, P. Uziębło, *Podstawowe założenia projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustawa z 2020 r.*, „Państwo i Prawo" 2021, No. 6, p. 43.

[8] W. Sadurski, *Polski…*, p. 94.

[9] M. Wyrzykowski, *„Wrogie przejęcie" porządku konstytucyjnego*, http://konstytucyjny.pl/wrogie-przejecie-porzadku-konstytucyjnego-miroslaw-wyrzykowski/ [retriever on: 14.09.2023].

The systemic nature of the actions taken by the legislative and executive branches against the judiciary over the past eight years also means that they have affected almost all bodies of the third power. They began with an attack on the Constitutional Court shortly after PiS took power. In the following years, they were directed against the Supreme Court, common courts and administrative courts. An important role in taking control of the judiciary was played by the de facto takeover of the National Council of the Judiciary, a body whose primary constitutional task is to propose judicial appointments (Article 179 of the Polish Constitution), which took place in 2018. This gave it virtually unlimited influence over all judicial appointments in Poland.

## 2. Czech Republic - dispute over appointment and dismissal of court presidents

The power to appoint judges and court presidents in the Czech Republic has traditionally been vested in the President of the Republic and the Minister of Justice. The 2002 Law on Courts and Judges also contains such provisions. According to Section 106 of that law, a court president could be dismissed by the person who appointed him if the president seriously or repeatedly violated his/her duties. Politicians and the Constitutional Court clashed over this rule in a dispute between 2002 and 2010.

At the beginning of the line of rulings is Pl. ÚS 7/02 (No. 349/2002 Sb.), in which the Constitutional Court invalidated dozens of provisions of the newly issued Law No. 6/2002 Sb. on Courts and Judges. Some of the motives from this ruling are repeated in later judgments. In some simplistic terms, it can be said that in a democratic state under the rule of law, two points of view clash over how an independent judiciary should be governed. The Czech Constitutional Court was more inclined toward a far-reaching separation of the judiciary and court administration from the executive branch, preferably in the form of an independent judicial council[10], while the government continued to look for ways to allow the Ministry of Justice and other executive bodies to, for example, check the professional competence of judges or dismiss incompetent judicial officials to ensure judicial efficiency. The extent to which the legislative and executive branches of government can interfere in the broader administration of the judiciary was a theme that also appeared in numerous rulings on judges' salaries and

[10] It is worth noting that the government's draft amendment to the 2000 Constitution (parliamentary print No. 549), concerning the Supreme Judicial Council, was not enacted. Cf. K. Šipulová, M. Urbániková, D. Kosař, *Nekonečný příběh Nejvyšší rady soudnictví: Kdo ji chce a proč ji pořád nemáme*? „Časopis pro právní vědu a praxi", Brno: Masarykova univerzita, 2021, roč. 29, č. 1, pp. 87-122. Cf. also J. Kysela (ed.), *Hledání optimálního modelu správy soudnictví pro Českou republiku*. Praha: Kancelář Senátu, 2008.

in Supreme Administrative Court rulings on the appointment of judges by the President of the Republic.

In Pl. ÚS 7/02 (No. 349/2002 Sb.), the Constitutional Court tended to favour the greatest possible separation of the judiciary and judicial administration from the executive branch, stating, among other things, that

> it is not the task of the Constitutional Court to decide how the issue of court management should be resolved, since this is the task of the legislature. However, the latter should consistently observe the principle of separation of powers when choosing a model for judicial administration.

At the time, the Constitutional Court, among other things, repealed Section 106(1) of the Law on Courts and Judges, which allowed the removal of a court president or vice president by the Minister of Justice, and in the case of the Supreme Court, by the President of the Republic, if he or she did not properly perform his or her duties. The Constitutional Court said that

> the function of the president and vice-president of the courts should be treated as a professional advancement of a judge […] and therefore even the president and vice-president of a court should not be removable except for a reason specified in the law and through disciplinary proceedings, i.e. by a court ruling.

In addition,

> the state of affairs, in which the central state administration body of the courts is the Ministry of Justice, and the judiciary itself does not have its own representative body at its level (which could be the body set up to take over the Ministry's role in personnel matters, including supervision of the professional level of judges, and possibly in other areas of judicial management and administration), does not sufficiently preclude the possibility of indirect influence on the judiciary by the executive branch (e.g. through the allocation of budget funds and control of their use).

The legislator, however, left personnel decisions in the hands of the President of the Republic and the Minister of Justice, and only in §106 (1) of the Law on Courts and Judges did it tighten the prerequisite for dismissal of a court president or vice president by stipulating that dismissal is possible "if, in a serious or repeated manner, [the president or vice president] violates the duties established by law in the exercise of state management over the courts." This wording of § 106(1) was abolished by the Pl. ÚS 18/06 (No. 397/2006 Sb.) ruling on the dismissal of Supreme Court President Iva Brožova by the President of the Republic. The Constitutional Court reiterated its 2002 opinion, stating that

> the principle of separation of the judiciary and the executive within the current constitutional framework and in accordance with standards arising from the European and international environment means requiring that a judicial official be dismissed only within the framework of the procedure implemented in the judiciary.

With the judgment II. ÚS 53/06 of 12 September 2006 the Constitutional Court also overturned the decision of 30 January 2006, by which the President

of the Republic dismissed the President of the Supreme Court, Iva Brožová. By its Pl. ÚS 17/06 judgment of 12 December 2006 Constitutional Court overturned the decision to assign Judge Jaroslav Bureš to the Supreme Court. On the other hand, by the Pl. ÚS 87/06 judgment of 12 September 2007 the Constitutional Court annulled the President's decision of 8 November 2006 to appoint Jaroslav Bureš to the position of Vice President of the Supreme Court. According to the Constitutional Court, the President may appoint Vice Presidents of the Supreme Court only "from among judges appointed to the Supreme Court by a valid decision of the Minister of Justice, with the prior approval of the President of the Supreme Court." Following these rulings, the power of the President of the Republic to appoint Vice Presidents of the Supreme Court at his/her discretion based on the literal wording of Article 62(f) of the Constitution has been challenged.

After the repeal of § 106(1) of the Law on Courts and Judges, court presidents became non-removable. The legislator still had no intention of establishing an independent judicial council with personnel powers. Accordingly, it introduced special disciplinary responsibility for court presidents to meet the Constitutional Court's requirement that a judicial official be removed through a procedure implemented in the judiciary. According to § 87(2) of the Law on Courts and Judges, disciplinary misconduct is "culpable violation of duties related to the office." In addition, Law No. 314/2008 Coll. introduced the tenure of court presidents and vice presidents, which makes it possible, after a certain period, to replace court presidents even if they have not committed culpable violations of the duties associated with their office.

The government's bill to amend the Law on Courts and Judges (Parliamentary Document 425 of 2008) aimed at at least enabling the dismissal of court presidents and vice presidents by introducing a special disciplinary offense for court officials. The law was passed in the Chamber of Deputies and the Senate as a comprehensive amendment (de facto replacing the law with another text) by the Constitutional Law Committee and was published in the Collection of Laws on 21 August 2008 under Sb. 314/2008.

On 15 December 2008, a group of 21 senators filed a motion to invalidate for unconstitutionality parts of the law and the provisions amending the Law on Courts and Judges. The senators objected to the manner in which the law was passed through a comprehensive amendment and the following solutions:

a) the possibility of temporary transfer of a judge to the Ministry of Justice;
b) the possibility of disciplinary dismissal of a judicial official;
c) the indefinite number of vice presidents of the Supreme Court;
d) the introduction of a term of office for court presidents and vice presidents;
e) reappointment of court presidents and vice presidents;
f) specification in the transitional provisions of the end of the term of office of court officials holding their positions on the effective date of the law;

g) disparities in the transitional provisions relating to the end of the term of office of those then holding the positions of presidents of the two highest courts (i.e. the Supreme Court and the Supreme Administrative Court)[11].

In its judgment of 6 October 2010 (Pl. ÚS 39/08, No. 294/2010 Sb.)[12] the Constitutional Court granted (or partially granted) the request in (a), (b), (c), (e) and (g). Judges Janů, Kůrka, Musil and Rychetský disagreed with the majority opinion on the unconstitutionality of multiple appointments of court presidents and vice presidents, while Judge Holländer disagreed with its reasoning. Judge Musil also did not find the temporary assignment of a judge to the Ministry of Justice unconstitutional. Judge Wagnerová found the transitional provisions unconstitutional if the period of office from the effective date of the law was set for a shorter period than the newly introduced terms.

The most important part of the ruling was the question of the constitutionality of the terms of office of court presidents and vice presidents. The legislature introduced a tenure of 10 years for the presidents and vice presidents of the two highest courts and seven years for the presidents and vice presidents of the other courts (§§ 102-105). The group of senators regarded the introduction of tenure as an unconstitutional circumvention of the legal opinion of the Constitutional Court, since, in their view, "in place of the model of dismissal of a judicial official, the law introduces a new model of appointment of a judicial official for a fixed term with unlimited freedom for the executive to reappoint the same person to the same position," with the proviso that "what can be tolerated in the decision-making process of a collegial body involving the judiciary should not be tolerated in the decision-making process of the political bodies of the executive."

However, the Constitutional Court did not consider the principle of tenure of court presidents and vice presidents to be unconstitutional per se, but only specified three conditions for it:

a) "a fixed-term appointment must be […] inversely proportional to the difficulty of early removal from temporary office. The shorter the term of office, the greater the requirements for the possibility of early removal from office" (paragraph 63 of the judgment);
b) "the proportionality of setting the length of the term of office […] corresponds to the fact that judicial officials are appointed to office by the executive branch in the case of presidents and vice-presidents, and not by election by the judiciary (in which case in other countries the term of office is shorter)." Moreover, "the fixed term of office of 10 years for presidents and

[11] The transitional provisions set out a much shorter remaining term of office for the Chief Justice of the Supreme Court than for the Chief Justice of the Supreme Administrative Court, even though both started in office at approximately the same time.

[12] Cf. J. Wintr, *Tečka za nálezy o organizaci soudnictví a o legislativním procesu?*, „Jurisprudence" 2010, No. 8, pp. 22-31.

vice presidents of the Supreme Court and 7 years for presidents and vice presidents of other courts is comparable to the status of officials of other bodies or institutions (the Banking Council of the Czech National Bank - 6 years, the president and vice president of the Supreme Audit Office - 9 years), to whom the Constitution guarantees the independence of their position," and "exceeds the length of the term of office of the appointing authority, so that in this way the executive does not create 'its own' set of officials" (paragraphs 63 and 64 of the judgment).

However, it should be noted that:

c) "the problem … lies in the very possibility of reappointment, which could lead to judicial officials acting in a way that creates conditions for their reappointment, or their individual actions, including the way they make decisions (judicial officials are first and foremost judges), being perceived and judged in this way by the outside world. In the absence of a system of checks and balances against the executive branch with its exclusive decision-making powers in the field of personnel, this possibility cannot be ruled out." It also said that "legal regulation cannot create conditions for the emergence of personnel corruption that would threaten the constitutionally mandated independence and impartiality of judges" (paragraph 65 of the judgment).

In principle, the law met two conditions (points a and c), providing for a relatively long term of office and tying the possibility of removing a judge to disciplinary proceedings in which the judiciary is substantially involved. However, the law did not meet the third condition (point c).

Allowing the tenure of court presidents is a reasonable balance of the constitutional principles of democratic legitimacy and efficiency in the exercise of state power, on the one hand, and the separation of powers and independence of the courts, on the other. The independence and impartiality of the judiciary is so fundamental to the protection of citizens' rights and freedoms that it outweighs the value of strong democratic legitimacy. But not completely. Even the efficiency of the judiciary is, in a sense, the political responsibility of the government and its justice minister, since no one else can bear this political responsibility. With all due respect to the independence of the judiciary, it is reasonable to apply elementary democratic principles to the judiciary as well. One is the appointment of judges and, above all, judicial officials, through a legitimizing chain at the beginning of which is the nation (the nation elects the parliament, which elects the president and grants a vote of confidence to the government, and these two bodies then participate in the appointment of judges and judicial officials). The second is the principle of holding office for an indefinite period, which, in the case of judges, is superior due to the issue of their independence, but, in our view, does not necessarily apply to senior officials. The president of the Supreme Court, in his/her position of leadership, is responsible for the proper functioning of the court, and in a system of permanence and non-removability, there would be no possibility of drawing consequences from this responsibility.

On the other hand, there is a clear risk that the management of the courts will pass into the hands of the executive branch. This danger is prevented by two conditions formulated by the Constitutional Court, namely, the removability of a judicial official only in disciplinary proceedings and the establishment of a term of office so long that it exceeds that of political representatives. It can be added that the Constitutional Court, in favour of the principle of democracy, gave the legislature space to determine the organization of the judiciary, including resolving the dilemma of the position of the independent Judicial Council in relation to the Ministry of Justice and considering whether to introduce the tenure of court presidents.

The most controversial part of the ruling, against which there were also four dissenting opinions and one dissenting opinion concerning justification, is the aforementioned prohibition on the reappointment of the president or vice president of the court to the same position.

The Constitutional Court's argument in paragraph 65 of the judgment, which includes a phrase emphasizing the risk of "personal corruption," has already been presented. Judge Holländer, in his/her competing opinion, points out (here in agreement with Judge Kůrka) that such a risk is comparable to the same risk before the first appointment, and states the unconstitutionality of reappointment elsewhere: a long-serving court official is already so entrenched in his/her managerial and administrative functions that his/her basic function as an independent judge may already be undermined. Judges Janů, Kůrka and Rychetský, who filed a dissenting opinion, argued against the ban on judicial reappointment on the grounds of confidence in the moral integrity of judges, the unjustified exclusion of proven judicial officers, the parallel with the Constitutional Court, whose judges can be reappointed, and the contradiction with the Constitutional Court's earlier view that the positions of presidents and vice presidents are seen as career advancement, which contradicts the "once and done" principle.

The question of the appropriateness of allowing or prohibiting reappointment is indeed difficult to assess, and indeed it can be argued that it could have been left to the legislator or respected its decision. The relatively parsimonious justification of the Constitutional Court in paragraph 65 will not convince the reader of the obvious unconstitutionality of reappointment. However, the Constitutional Court emphasizes that the appointment of court presidents is solely within the discretion of the executive branch. This is the main argument. In the context of eight years of jurisprudence, the Constitutional Court's tendency to create institutional safeguards to protect the judiciary from arbitrary executive power seems more understandable. The resulting decision can be explained as a compromise, in which the Constitutional Court considered unjustified interference in the sphere of the legislature, the abolition of the term of office as such, but on the other hand wanted to tie the hands of the executive to some extent in personnel matters.

## 3. Republic of Poland - Constitutional Court

The crisis related to the Constitutional Tribunal (hereafter: CT) began at the end of 2015, right after PiS took power. Wojciech Sadurski rightly notes that two stages of this crisis can be distinguished. In the first, there was a successful effort to paralyze the body by replacing the composition of the CT, an action that was even aided by the wholesale enactment of successive amendments to laws regulating the functioning of the body and the refusal to announce some of its decisions[13].

Since the events surrounding the filling of positions in the Constitutional Tribunal are widely known and described in detail[14], it is not appropriate to report on them in detail here. Suffice it to recall that on the basis of Article 137 of the new Law on the Constitutional Tribunal[15], the Sejm of the ending seventh term elected five new judges of the Constitutional Tribunal, with two of those elected to take up the positions of judges whose terms were not due to expire until December 2015, i.e. after the beginning of the next, eighth term of the Sejm. It is clear that the election of these two judges did not comply with the constitutional conditions formulated in Article 194(1) of the Polish Basic Law[16]. Indeed, the granting in this provision to the Sejm of the right to elect fifteen judges of the Constitutional Tribunal on an individual basis does not mean that this power is vested in the Sejm of any term. If this were the case, it would mean that the Sejm of a particular term could even elect a dozen new judges who will assume functions in the Constitutional Tribunal in the near or distant future. In an extreme case, a situation could arise in which parliaments of at least two consecutive terms would be deprived of the right to elect judges whose mandates expire during their terms. This, of course, would be a state of affairs that directly contradicts the Constitution, since the individual election (individual term of office without the right to re-election) of members of the Constitutional Tribunal is intended to serve the gradual renewal of this body.

The election of two redundant judges of the Constitutional Court in 2015 provided an excuse for the parliamentary majority of the eighth-term Sejm to pass resolutions declaring the election of these judges "legally invalid." Even leaving aside the issue of the Sejm's lack of competence to make such a decision, it should be noted that these resolutions were passed even before the CT ruling, which declared the scope unconstitutionality of Article 137 of the 2015 CT Law.

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[13] W. Sadurski, *Polski…*, p. 100 et seq.

[14] Ibidem. See also tabular *Kalendarium wydarzeń*, [in:] P. Radziewicz (ed.), P. Tuleja (ed.) *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego czerwiec 2015 – marzec 2016*, Warszawa 2017, pp. 23-27; K. Grajewski, *Trybunał Konstytucyjny czy trybunał dublerów?*, [in:] *Między prawem a polityką. Księga jubileuszowa dedykowana profesor Hannie Suchockiej*, eds. B. Kaniewska, T. Wallas, K. Urbaniak, Poznań 2023, pp. 300-302.

[15] This refers to the law of 25 June 2015 on the Constitutional Court (original text: Journal of Laws of 2015, item 1064), adopted by the Sejm of the 7th term of office.

[16] Cf. CT judgment of 3 December 2015, K 34/15, OTK-A 2015, No. 11, item 185.

Most importantly, however, is the fact that the Sejm passed not two, but five such resolutions. The other three resolutions stated that the selection of three judges to take up positions in the Constitutional Tribunal after judges whose terms were still ending during the seventh (previous) term of the Sejm was "not legally valid." This obviously anti-constitutional maneuvre was intended to allow the Eighth Term Sejm to elect five (rather than two) new judges to the CT. This selection was made on 2 December 2015. The President took the oaths of office from the judges so elected, while the judges duly elected by the Seventh Term Sejm have still not taken the oath of office. It should also be added that in subsequent years (the entire eighth and ninth terms of the Sejm) only candidates proposed by the parliamentary majority were elected to the Constitutional Tribunal. Thus, over time, the body was completely staffed by persons recommended by the ruling party.

The election of five new judges in 2015 did not then result in the nominees of the parliamentary majority gaining the upper hand in the CT. As a result, a kind of legislative offensive was undertaken in parliament to block the functioning of the constitutional court. An excellent example of such ad hoc changes to statutory regulations aimed at paralysing or at least significantly hampering the functioning of the Constitutional Tribunal is the Law of 22 December 2015 amending the Law on the Constitutional Tribunal[17]. It amended, among other things, Article 87(2) of the Law on the Constitutional Tribunal by significantly extending the deadline for holding a hearing. Originally, the hearing could not be held earlier than after the expiration of 14 days from the date of delivery of a notice of the hearing to the participants of the proceedings. After the amendment, the deadline was extended to 3 months as a standard, and to 6 months for cases adjudicated by a full panel. The same amendment changed Article 99, paragraph 1, whose original wording, reiterating the constitutional norm, established the principle of making decisions by the Constitutional Tribunal by a simple majority. After the amendment, rulings by the full CT were to be made by a two-thirds majority. It is difficult to find a more glaring example of violation of the constitutional regulation[18]. Incidentally, the regulation of the requirement for the minimum presence of CT judges when the full court is sitting was changed. Thus, the original requirement for the presence of at least 9 judges, was changed to a requirement for the participation of 13 judges (Article 44, paragraph 3), which in practice was to allow "new" judges to block the work of this

[17] Journal of Laws, item 2217.

[18] It is worth mentioning that according to the current regulations, a hearing may not be held earlier than 30 days from the date on which notice of the hearing is served on the participants, and CT decisions are made by majority vote. See, respectively, Articles 93(2) and 106(1) of the Act of 30 November 2016 on the organisation and procedure before the Constitutional Tribunal ( consolidated text: Journal of Laws of 2019, item 2393). A detailed analysis of the legislative changes made in 2015 and 2016 is presented by W. Sadurski, Polski..., pp. 112-121.

body, especially since full adjudication was to become the rule, and in other formations - the exception[19].

The second stage of the fight against the Constitutional Tribunal is the transformation of a body controlled by judges recommended by PiS into a kind of ally of the government (parliamentary majority). The Tribunal ceased to play the role of an independent constitutional court that controls the legislative activity of bodies with legislative competence, and transformed into a bizarre body that gives the appearance of legal legitimacy to the actions of those in power. Motions referred to it were not motivated by constitutional doubts, but were aimed at legitimizing primarily unconstitutional laws passed in parliament[20]. A characteristic example of this type of situation is the justification of the planned legislative changes regarding the election of judges to the National Council of the Judiciary (hereinafter: NCJ or Council). It was found in the CT judgment of 20 June 2017, issued by a panel staffed exclusively by judges recommended by PiS[21]. In it, the CT declared, among other things, the unconstitutionality of the existing statutory provisions providing for the election of fifteen judges to the NCJ by assemblies of judges. This ruling was intended to justify the planned regulations, which were to entrust the competence for the election of judges to the Sejm. In this way, not only were the hitherto constitutionally unquestionable statutory solutions and the jurisprudence of the Tribunal itself challenged[22], but the established interpretation of Article 187(1) of the Constitution was directly abstracted[23], in order to justify only the possibility of extreme politicization of the judicial part of the composition of the NCJ.

The election of five judges (including three to already filled seats) at the end of 2015 by the Eighth Sejm warrants an analysis of yet another issue, i.e. the problem of the status of judges currently sitting in the CT. Already after the aforementioned election of five judges by the Eighth Sejm, a thesis was formulated in the public space, and later also in the literature, according to which there are three so-called "duplicate judges" sitting in the CT. These are those

[19] All the indicated amendments to the CT Act have been declared unconstitutional by this Court. See the judgment of the Constitutional Tribunal of 9 March 2016, K 47/15, Journal of Laws 2018, item 1077. The date of publication of this judgment in the Journal of Laws is noteworthy. This is one of the CT rulings made in the period under analysis, which the Prime Minister refused to officially publish in the Journal of Laws, despite the explicit constitutional regulation providing for immediate publication of CT rulings (Article 190(2) of the Constitution) and the statutory regulation in the light of which it is the President of the CT who is the body ordering the publication of CT rulings.

[20] W. Sadurski, *Polski…*, p. 126 et seq.

[21] K 5/17, OTK-A 2017, item 48. The judgment was delivered in the following composition: M. Warciński, G. Jędrejek, L. Morawski, M. Muszyński, J. Przyłębska.

[22] CT ruling of 18.07.2007, K 25/07, OTK-A 2007, No. 7, item 80.

[23] Cf. A. Rytel-Warzocha, *Ochrona suwerenności Narodu w czasie kryzysu konstytucyjnego*, [in:] ed. K. Grajewski (ed.), J. Jirásek (ed.), *Zasada suwerenności – fakt czy mit (doświadczenia polskie i czeskie)*, „Gdańskie Studia Prawnicze" 2023, No. 2, pp. 91-92.

persons who were elected to seats legally filled by the Sejm of the previous term or their later successors. The participation of these persons in the bench is even an argument found in case law questioning the correctness of the court's composition[24]. However, the issue of judges appointed to the CT in subsequent years is not a matter of reflection.

Meanwhile, the matter is not clear-cut. Indeed, since the end of 2015, we have been dealing with a situation in which the de facto CT consists of 18 judges, including 3 judges legally elected by the Sejm of the 7th term and 3 judges elected to their seats at the beginning of the 8th term of the Sejm. As mentioned above, at a later time (after December 2015), the Eighth Sejm and the Ninth Sejm elected more judges to the CT for the seats that became vacant during those terms. However, it cannot be overlooked that when successive judges were elected to the CT in the Eighth and Ninth Sejm terms,

> the parliament each time made this election in a situation where seventeen elected judges (if one does not count the outgoing judge) were actually in office. According to Article 194(1) of the Constitution, the CT consists of fifteen judges. The question then arises, when the number of judges of the Constitutional Tribunal exceeds the value indicated in this provision, does the Sejm even have the right to elect another eighteenth judge? It seems that the question posed in this way should be answered in the negative. Against the background of Article 194(1) of the Constitution, no argument can be found that would support the permissibility of electing another eighteenth judge, and this in a situation where the election is made when there are judges in the Tribunal elected in violation of the law. On the contrary, the election of further judges of the CT when three duly elected persons are still awaiting the opportunity to accede to their judicial duties is the perpetuation of a state of affairs that is clearly unconstitutional. The legal resolutions on the election of judges adopted by the Seventh Sejm still have no legal effect […] while the resolutions adopted without any legal basis and directly contrary to the Constitution

on declaring "no legal force" of the election of judges made by the Seventh Sejm and on the election of five judges of the Constitutional Tribunal in December 2015 still "determine the actual personnel status of the Constitutional Tribunal For these reasons, it must be concluded that the election of the said judges is legally flawed"[25].

## 4. Republic of Poland - National Council of the Judiciary

In 2017, significant changes were made to the laws governing the National Council of the Judiciary. Two draft amending laws were submitted to the Sejm,

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[24] See for example pt 263 judgment of the European Court of Human Rights of 22 July 2021., 43447/19, https://hudoc.echr.coe.int/eng?i=001-211127. See also K. Grajewski, *Trybunał Konstytucyjny…*, pp. 302-303 and literature cited therein.

[25] K. Grajewski, *Trybunał Konstytucyjny…*, pp. 303-304.

with the first being vetoed by the President after being passed[26]. The changes were finally implemented by the law of 8 December 2017, which took effect in January 2018.[27]

The fundamental novelty of this regulation was the change in the method of electing to the Council the fifteen judges referred to in Article 187(1)(2) of the Constitution. As already indicated, both in the literature and the case law, it was uncontested that, despite the absence of an explicit indication in Article 187(1) of the entity making the selection of judges to the Council, they are selected by the judges. Arguments for such a thesis included a systemic interpretation of this provision, but also a number of constitutional principles defining the position of the bodies of judicial power (including Articles 10, 173, 178 and 186 of the Constitution)[28]. The amendment under review granted this power to the Sejm (see Article 1(1) of the amending law). In practice, this means that persons elected by both houses of parliament have won an overwhelming majority in the Council: of the 25 members of the Council, 15 judges are elected by the Sejm, and in addition, the Council includes 4 deputies elected by the Sejm and 2 senators elected by the Senate (Article 187(1)(3) of the Constitution). Thus, persons elected by the Parliament currently make up 84% of this body. Since the main competence of the NCJ is to submit proposals to the President for appointments to judicial positions (Article 179 of the Constitution), there is no doubt that judicial appointments made on the basis of a proposal from a body acting in an unconstitutional composition result in the improper staffing of the court within the meaning of the procedural rules when the panel includes a person appointed to the office of judge in such a manner[29].

Political pressure aimed at quickly shaping the composition of the NCJ according to the new rules also had the effect of depriving members of the Council, elected to it on the basis of previous regulations, of their mandates (Article 6 of the amending law). Such a solution was introduced into the law despite the clear wording of Article 187(3) of the Constitution, in light of which the term of office of elected members of the NCJ lasts four years. It should be added that the applicant did not see the problem of violating the Constitution. Indeed, the justification for the bill included a statement that despite the expiration of the terms

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[26] Parliamentary paper No. 1423/VII cad. For more on this project see K. Grajewski, *Zmiany statusu prawnego Krajowej Rady Sądownictwa*, [in:] Z. Witkowski (ed.), J. Jirásek (ed.), K. Skotnicki (ed.), M. Serowaniec (ed.), *Współczesne problemy sądownictwa w Republice Czeskiej i w Rzeczypospolitej Polskiej*, Toruń 2017, p. 100 et seq.

[27] Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws 2018, item 3).

[28] Cf. M. Matczak, *Opinia prawna w sprawie konstytucyjności prezydenckiego projektu ustawy o Krajowej Radzie Sądownictwa (druk sejmowy nr 2002)*, maszynopis, http://www.sejm.gov.pl/Sejm8.nsf/opinieBAS.xsp?nr=2002 [retrieved on: 19.09.2023], pp. 7-8.

[29] Cf. the resolution of the Supreme Court (Full Court - Civil, Criminal and Labour and Social Insurance Chambers) of 23 January 2020, BSA I-4110-1/20, OSNKW of 2020, No. 2, item 7.

of office of existing members of the NCJ, the principle of their four-year term of office was not violated, since the law still provides for a four-year term of office, and not, for example, a three-year term of office[30].

The takeover of the vast majority of the NCJ by the ruling party has had the effect, first and foremost, of gaining considerable influence over the filling of judicial positions. This phenomenon is revealed in two spheres. First, the Council, acting in an unconstitutional composition, filled the then newly created Extraordinary Control and Public Affairs Chamber and the Disciplinary Chamber[31] of the Supreme Court. The composition of both chambers was fully selected by the NCJ appointed under the new legislation. It is worth noting that among the powers of the new Supreme Court chambers were such powers as ruling on the validity of elections and deciding on matters of disciplinary responsibility and judicial immunity (see below).

Secondly, in the activities of the NCJ since 2018, one can see the same phenomenon mentioned above with regard to the CT. The Council, which is a constitutional body whose primary task is to uphold the independence of the courts and the independence of judges (Article 186(1) of the Constitution), seems to have never yet taken an action that would be a manifestation of the fulfilment of this function while functioning under the 2017 legislation. The NCJ overlooks legislation that directly violates the constitutional principles of judicial independence and the independence of judges, and polemicizes against the rulings of the Court of Justice of the EU and the European Court of Human Rights. It is perceived as a body completely dependent on politicians, and for its lack of independence from the executive branch, blatant violations of the principle of upholding the independence of the judiciary and the independence of judges, and undermining the application of EU law in matters concerning the independence of the judiciary and the independence of judges, it was removed from the European Network of Councils for the Judiciary (ENCJ), of which it was a founding member, in 2021[32]. However, the NCJ finds for itself such fields of activity that have nothing to do with the constitutional role of this body. For example: at a meeting held on 5-8 September 2023, it decided to file a notice of suspicion of crime by Supreme Court judge Włodzimierz Wróbel, known for his speeches in defence of the independence of the courts and the independence of judges,

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[30] See Explanatory Memorandum to the Bill (Print No. 2002/VIII term), p. 9.

[31] In 2022, the Disciplinary Chamber was abolished. In its place, the Chamber of Professional Responsibility was created, the shape and method of appointment of which also raises serious constitutional questions. See Article 1(1)(a) of the Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts (Journal of Laws, item 1259).

[32] *ENCJ Votes to Expel Polish Council of Judiciary (KRS)*, https://www.encj.eu/index.php/node/605, [pobrano dn.: 19.09.2023]. Zob. też M. Jałoszewski, *Nowa, upolityczniona KRS wyrzucona z ważnej Europejskiej Sieci Rad Sądownictwa. To sygnał dla UE*, https://oko.press/nowa-upolityczniona-krs-wyrzucona-z-waznej-europejskiej-sieci-rad-sadownictwa-to-sygnal-dla-ue, [retrieved on: 19.09.2023].

a critic of the statutory changes introduced in recent years, who fined the president of the court who refused to release the personal file of another judge[33]. The person fined is at the same time, appointed by the Minister of Justice, on the basis of the amended regulations, the deputy disciplinary ombudsman of the common courts, who initiated disciplinary proceedings against judges protesting against violations of the constitutional position of the judiciary. A little earlier, at an extraordinary meeting convened on 28-29 August 2023, at the request of the Minister of Justice, the NCJ adopted a resolution in which, among other things, it declared that the prohibition established in Article 178 para. 3 of the Constitution, the prohibition on judges' affiliation with political parties, trade unions and the prohibition on conducting public activities that cannot be reconciled with the principles of judicial independence and independence of judges, is "permanently violated by some activists of judges' associations." The Council also stated that the authorities of judges' associations

> participate together with other non-judges' associations, such as the Committee for Defence of Democracy and organizations with a similar profile in gatherings promoting certain political and worldview demands, such as abortion policy, LGBT+, gender ideology. This activity goes beyond Poland and also takes place in the European Parliament. Some judges even boast of contacts with the European Commission and participation in initiating sanctions against Poland.[34].

The resolution was issued by the body, whose deputy chairman, in September 2023, attended a ceremony organized by the deputy minister of justice for the commissioning of a court building, during which the deputy minister praised the achievements of the current government, and then, with the words "let's show the strength of the Zjednoczona Prawica *[United Right Wing]*," lined up the judges present there for a joint photo.

## 5. Republic of Poland – Supreme Court

As with the legislation amending regulations on the Supreme Court, a new law on the Supreme Court was passed on 8 December 2017[35]. It entered into

[33] Notice of the meeting of the National Council of the Judiciary from 5 to 8 September 2023., https://krs.pl/pl/dzialalnosc/posiedzenia/2179-komunikat-z-posiedzenia-krajowej-rady-sadownictwa-w-dniach-5-8-wrzesnia-2023-r.html, [retrieved on: 19.09.2023].

[34] Notice from the National Council of the Judiciary on standards of judicial impartiality and independence and judicial public benefit organisations, https://krs.pl/pl/dzialalnosc/posiedzenia/2150-komunikat-krajowej-rady-sadownictwa-dotyczacy-standardow-bezstronnosci-i-niezawislosci-sedziowskiej-oraz-sedziowskich-organizacji-pozytku-publicznego.html, [retrieved on: 19.09.2023].

[35] Act of 8 December 2017 on the Supreme Court (original text: OJ 2018, item 5). It is noteworthy that - as in the case of the Supreme Court - this was the second law on the Supreme Court to be proceeded with in 2017. The first draft (see Sejm print No. 1727/VIII cad.) was passed on 20 July 2017 and subsequently vetoed by the President.

force at the beginning of April 2018. This normative act is another example of the legislative activity of the parliamentary majority, which was created virtually exclusively to go get control of the Supreme Court.

It is impossible to analyse at this point all of the significant provisions contained in the extensive law. However, one should begin not by pointing out the changes related to the structure of the Supreme Court, but the transitional provisions that related to the legal status of existing Supreme Court judges. Article 111 § 1 establishes that Supreme Court judges who have reached the age of 65 by the date of entry into force of this law, or who will reach the age of 65 within three months of the date of entry into force of this law, are to retire on the day following the expiration of three months from the date of entry into force of the law. One exception to such a rule was introduced. It concerned the situation where, within one month from the date of entry into force of the law, a judge submits a declaration of his or her willingness to continue to occupy his or her position and presents a certificate stating that he or she is fit, due to health, to perform the duties of a judge, and the President gives his or her consent to continue to occupy the position of Supreme Court judge. Thus, it was the executive branch, without the need for any justification, that was given the de facto power to decide on the resignation of legally appointed Supreme Court judges, and those judges who chose to remain in service would be forced to undergo a humiliating procedure. The subsequent amendment to the legislation making the President's decision conditional on obtaining the opinion of the NCJ was irrelevant to the assessment of this power, due to its unconstitutional composition, already indicated above, and its complete subordination to political factors.

Since, at the time the law came into effect, of the 73 Supreme Court judges, as many as 27 were over the age of 65, this meant that more than 35% of the court's judges could cease to rule. It is worth noting that some of the judges did not submit the required declarations and documents, but issued declarations in light of which they were to continue their service until they reached the age of 70, i.e. in accordance with the existing regulations[36]. The provision under review was also to be applied to the First President of the Supreme Court, who was turning 65 at the time. It is worth pointing out that according to Article 183(3) of the Constitution, the term of office of the First President of the Supreme Court is six years. Applying a statutory provision in this situation would, in practice, mean negating the constitutional ruling. It is not difficult to see that we are dealing with a situation similar to the "extinguishment" of the mandates of members of the legally operating NCJ, as mentioned above. Making de facto changes to the constitution by an ordinary law has become, as we can see, a kind of norm of legislative practice.

[36] W. Sadurski, *Polski kryzys…*, p. 166.

To complete the picture of the planned "purge" at the Supreme Court, it should also be mentioned that the legislator explicitly provided for the possibility that the need to elect a new First President would arise as a result of the application of the new regulations on the retirement of judges. Article 111 § 4 of the Supreme Court Law regulates this issue by requiring the General Assembly of the Supreme Court to elect five candidates for First President (instead of two, as before), with the selection of candidates to be made only after 110 judicial positions in the Supreme Court have been filled. It is not difficult to see that this regulation was intended to bring about a vote (election of candidates) only when the "new" judges, appointed at the request of the unconstitutionally filled Supreme Court, reach a majority in that court, or are able to elect at least one candidate[37].

The establishment of two new chambers, the Disciplinary Chamber (hereafter: DC) and the Extraordinary Control and Public Affairs Chamber (hereafter: ECPAC), should be considered the most significant systemic change at the Supreme Court. The appointment of these structures itself might not have been an extraordinary event, were it not for the fact that both of these chambers were fully staffed after the entry into force of the law amending the Law on the National Council of the Judiciary, and therefore by judges appointed with the participation of the unconstitutionally staffed NCJ. Thus, a situation arose in which judges with close ties to the faction in power were to rule on such important matters as adjudicating election protests, ruling on the validity of elections, considering extraordinary complaints (ECPAC - Article 26 of the Law on the Supreme Court), adjudicating disciplinary cases of Supreme Court judges and, among others, attorneys, legal advisors, notaries, prosecutors and judges of common courts (DC - Article 27(1) of the Law on the Supreme Court). It should be further emphasized that the Disciplinary Chamber bore the characteristics of an unconstitutionally created court of exception, the establishment of which is permitted only during wartime (cf. Article 175(2) of the Constitution). The special position of the President of the DC and, above all, his/her broad autonomy in relation to the First President of the Supreme Court (including in external relations), the DC's organizational separation, the DC's separate budget, and the determination of the substantive jurisdiction of this chamber in a special way indicate that it can be

> qualified as an exceptional court within the meaning of Art. 175(2) of the Constitution or, at the very least, as a judicial body not provided for in Article 175(1) of the Constitution of the Republic of Poland, which consequently leads to the conclusion that the delegation to this body of judicial powers in disciplinary matters and other matters relating to the status of Supreme Court judges is a clear violation of the Constitution. At the same

[37] It is also worth mentioning that Article 111 § 2 of the Act formulates a specific proposal in relation to existing judges of the Supreme Court, who - by making an appropriate declaration within 6 months of the entry into force of the Act - could retire.

time, it should be borne in mind that the competence of the Disciplinary Chamber, the composition of which was established in a special way, also includes specific acts committed before the establishment of the Chamber. In this sense, it meets the characteristics of an exceptional court also in the narrow sense, as a court created ex post to rule on specific individual cases[38].

## Summary

The introduction and respect for the tenure of court presidents became the basis for a stable form of judicial organization in the Czech Republic in the clear absence of political will to establish an independent judicial council with tenure powers.

The Constitutional Tribunal stuck to its concretely formulated rules (prohibition of temporary secondment of a judge to work for a ministry, appointment of the vice president of the Supreme Court only from among the judges of that court, prohibition of dismissal of judicial officials without the participation of the judicial community). The Constitutional Tribunal, by allowing the tenure of court presidents, *de facto* accepted the fact that the judicial self-government was not established.

The 6 October 2010 Constitutional Court ruling allowed for the introduction of the tenure of court presidents, thereby giving the executive branch the ability to periodically influence who will lead the courts and in a sense unblocking the administration of the courts. This ruling can therefore be seen as a compromise, so far the most favourable to the executive, which could also create a balanced, stable situation in this case. Thus, it can be considered that the ruling marked the end of a protracted eight-year conflict over the shape of the organization of the judiciary.

The constitutional legal regulation of the organization of the judiciary in the Czech Republic is relatively stable and is based on guarantees of judicial independence and the independence of judges, as well as the traditionally important role of the Ministry of Justice. Between 2000 and 2010, there was a growing debate about whether the role of the Ministry of Justice should be replaced by an independent judicial council. Judicial councils now exist in the vast majority of European countries, including France, Italy, Poland and Slovakia. However, the literature also points out the pitfalls associated with the existence of such bodies[39].

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[38] W. Wróbel, *Izba Dyscyplinarna jako sąd wyjątkowy w rozumieniu art. 175 ust. 2 Konstytucji RP*, „Palestra" 2019, No. 1-2, pp.29-30. The Disciplinary Chamber was later replaced by the Professional Responsibility Chamber - see Article 1(1) of the Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts (Journal of Laws, item 1259). It is no longer characterised by such far-reaching distinctions as the Disciplinary Chamber, but, inter alia, the manner of its appointment and the possibility for persons appointed by the unconstitutionally staffed NCJ to sit on it, continue to raise constitutional questions.

[39] Cf. D. Kosař: *Perils of Judicial Self-Government in Transitional Societies.* New York, NY: Cambridge University Press, 2016, pp. 389–432.

As far as the situation in Poland is concerned, the considerations presented, although showing only selected events related to the regulation of the constitutional position of the judiciary, confirm the thesis put forward above about the systemic attack of the ruling parliamentary majority, the government formed by it and the President supporting it on practically all bodies of the third power. In no way can one speak here of the incidental nature of the actions taken. They should be regarded as the implementation of a deliberate strategy to seize political control over these bodies, which was carried out mainly, though not exclusively, through the very frequent enactment of laws that are blatantly unconstitutional, which, from the point of view of the principle of the supremacy of the Constitution, means making substantive changes to the Basic Law in disregard of the procedure provided for in the Constitution (cf. Article 235 of the Constitution).

Exceptionally frequent changes in legal regulations, unconstitutional practice in judicial appointments, introduction of repressive solutions in the area of disciplinary responsibility of judges and the practice of initiating disciplinary proceedings for the content of rulings issued by judges, including for the application of EU law, repression of judges issuing rulings unfavourable to those in power (e.g., the casus of Judge I. Tulea), rapid careers (promotions) of persons clearly associated with or favourable to the camp in power, manipulation of the composition of the judiciary (e.g. in the Constitutional Tribunal), are just some of the phenomena currently occurring in Poland. To complete the picture, one should also add the chaos created by these phenomena, manifested primarily in the issuance of contradictory rulings in important cases by "old" and "new" judges. The latter very often, if not always, seek to legitimize changes made by those in power, which also means legitimization for their positions and functions. If one also mentions the new legal institution in the form of an extraordinary complaint, which makes it possible to appeal most of the final decisions of the courts, we obtain a peculiar state of emergency in the judiciary, which justifies asking the question about the state of realization of the right to a court, as defined in Article 45(1) of the Constitution and Article 6(1) of the ECHR[40].

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## Zmiany regulacji pozycji ustrojowej władzy sądowniczej w Republice Czeskiej i w Rzeczypospolitej Polskiej

### Streszczenie

Opracowanie jest poświęcone problematyce pozycji ustrojowej władzy sądowniczej w Czechach i w Polsce. Na początku autorzy przedstawiają konstytucyjną regulację władzy sądowniczej w obu krajach. Następnie analizują regulacje ustawowe i orzecznictwo Sądu Konstytucyjnego Republiki Czeskiej w sprawach związanych ze sporem dotyczącym powoływania prezesów sądów. W tekście przedstawiono najważniejsze elementy kryzysu konstytucyjnego w Polsce. W konkluzjach autorzy dochodzą do wniosku, że konstytucyjna pozycja ustrojowa władzy sądowniczej w obu krajach jest zasadniczo stabilna i odpowiada standardom państw demokratycznych. Jednak w Polsce głębokie i niekonstytucyjne zmiany ustawowe, wprowadzane od 2015 r., miały na celu podporządkowanie władzy sądowniczej wpływom politycznym.

**Słowa kluczowe:** władza sądownicza, niezależność sądów, niezawisłość sędziów, kadencyjność prezesów sądów, kryzys konstytucyjny w Polsce.