Themis Competition 2022
Semi Final D (Barcelona) - Judicial Ethics and Professional Conduct

CURE FOR CURIA

Proposal for the Amendment in Order to Heal the Judicial System in the Area of Assurances of Independence and Impartiality of Judges in Poland

Team Poland: Alicja Karmowska, Piotr Kaźmierski, Daniela Kohut
Tutor: Judge Katarzyna Milewska
Krajowa Szkoła Sądownictwa i Prokuratury w Krakowie
(National School of Judiciary and Public Prosecution in Kraków)

Introduction

The basic principle determining the position of the judiciary in the Republic of Poland is the principle of the tripartition of power. According to the Constitution of the Republic of Poland the judicial power is exercised by the courts and tribunals. The Constitution guarantees their separation and independence from other authorities. It is therefore intended that the judiciary, as one of the authorities, should be shaped in such a way as to be immune to any actions that could have a significant impact on judicial independence. The actions of the legislature and the executive described later in this paper clearly demonstrate that in recent years this system has not proved to be as stable as might have been expected in the past. The successive changes introduced to the legal system in Poland regarding the judiciary, considered to be more than controversial, have been in the centre of heated discussion for years. The main reason for such interest has been the fact that the amendments have brought about serious and questionable changes in the judicial system.

The problem was not the introduction of new solutions to a functioning model, but the uncertainties associated with it. The primary question is whether these changes have unbalanced the system by unlawfully disentangling it, particularly by violating the principle of separation of powers and subordinating the judiciary to other authorities by weakening the guarantees of judicial independence.

The purpose of this paper is to define the most important problems and to propose solutions that will make it possible to restore the systemic balance and at the same time eliminate the risk of questioning the independence of the judiciary. The system of justice should be consistent with the standards set by European case law. This is a legal challenge that must be confronted.

At the beginning of the study, it is appropriate to clarify the exact meaning of the adopted topic. The word '*curia*' was used in the context of the word 'court'. This is due to the former meaning of the word '*curia*' in Latin, as well as to its association with the name of the official website of the Court of Justice of the European Union. The connections identified were considered to inspire the wording of the topic of this thesis. Bearing in mind the objectives of the work, which are, on the one hand, to describe the problems of the judiciary currently faced by the Polish system of justice and, on the other hand, to attempt to propose a solution, the theme 'Cure for *Curia*' seems most adequate.

For the sake of comprehension and clarity, apart from the introduction, the text became divided into three chapters.

In the final part of the paper, we present a summary that can be considered as general conclusions, which is also a prelude to further in-depth discussion on the validity of the arguments raised and solutions proposed.

1. Part One - Symptoms of the Disease Called 'The Judiciary in Crisis'

A. Preliminary Description

In the first part of the paper, it is essential to present a short introduction to the legal framework of the structure of the judiciary in Poland. Outlining the layout of the system will be helpful in clarifying where the problems in the matter of judicial independence originated, what they involved and what their significance is. In order to introduce the situational context of the paper on which the issues in dispute have grown, the authors deemed it necessary to describe briefly the legal and factual background of the situation which is often called 'Crisis of the rule of law in Poland'.

B. Constitutional Legal Framework for the Judiciary

The Constitution of the Republic of Poland of 2 April 1997[1] (hereinafter: 'the Constitution') seems to mirror the theory of the separation of powers created by Montesquieu perfectly. This is stipulated directly in the Article 10th of the Constitution[2]. The legislative power is in the hands of the two-chamber parliament – the Sejm (lower house) and the Senate (upper house), the executive power belongs to the President of the Republic of Poland and the Council of Ministers and the judiciary power is exercised by courts and tribunals.

Chapter 7 of the Constitution establishes the principles of the functioning of the courts and tribunals as the third pillar of power in the state. In the context of judicial authority among several separated bodies which might be distinguished, the most important are the Constitutional Tribunal[3], the Supreme Court[4] and the National Council of the Judiciary[5] (hereinafter: 'the NCJ').

Judges to the Constitutional Tribunal are appointed by the Sejm for a term of office of 9 years. The President accepts the oaths of office of the elected judges. Judges directed to the Supreme Court and ordinary courts in Poland are evaluated and recommended by the NCJ and then officially appointed by the President. Regarding the importance of the NCJ for the entire system, it should be emphasized that, in accordance with Article 186 section 1 of the Constitution, it is the body

[1] The text of the Constitution has been translated into English and is available on the official website of the Sejm of the Republic of Poland via https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[2] Article 10 section 1 of the Constitution: The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers; section 2: Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

[3] The fundamental legal framework for the structure and functioning of the constitutional court is set out in Articles 188-197 of the Constitution. The provisions were made more specific in the act of 30.11.2016 on the organisation and procedure before the Constitutional Court (text available via https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160002072).

[4]The Supreme Court is listed in Article 175 section 1 as one of the types of authorities administering justice. The provisions were made more specific in the law of 8.12.2017 on the Supreme Court (text available via https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000005).

[5] The National Council of the Judiciary is referred to in Articles 186 and 187 of the Constitution. The regulation was made more specific by the act of 12.05.2011 on the National Council of the Judiciary (text available via https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20111260714).

guarding the independence of courts and judges. The law determines the composition of this Council – it should include 25 members chosen for the four-year term of office: the First President of the Supreme Court, the President of the Supreme Administrative Court, the Minister of Justice, one person chosen by the President of the Republic of Poland, six members of parliament (four from the Sejm and two from the Senate) and finally fifteen judges selected from the Supreme Court, common, administrative and military courts[6].

C. Appointing the Judges to the Constitutional Tribunal As the Source of the Crisis

There is no doubt that the legal crisis in Poland began in 2015 and continues. In 2015, there was a shift in the balance of political power in Poland. Law and Justice (Prawo i Sprawiedliwość) party won both presidential[7] (on 6 August 2015) and parliamentary[8] (on 12 November) elections. The Law and Justice with the other coalition parties - gathered in conservative political alliance - captured the absolute majority of seats. The party won 235 seats in the 460-seat lower chamber of parliament[9].

First signs of the crisis revolved around the procedure of the election of judges of the Constitutional Tribunal. The previous parliament decided to choose five new judges in advance, including not only the judges whose terms were to terminate but also two judges whose terms would begin after the first session of the new parliament. Recognizing the affect on the procedure of appointment the President of Poland refused to accept their oaths so that all five chosen judges were not appointed. Following the elections, the new parliament elected five judges whom the President immediately appointed to the Constitutional Tribunal. At the same time, the parliament amended the law on the Constitutional Tribunal[10]. In December 2015, the Constitutional Tribunal found the appointments of three judges, made by the previous parliament, to be lawful and the other two to be invalid, while finding the two appointments of judges chosen by the new parliament to be correct. Given that the President did not accept any oath taken by the judges from the first nomination, the question of whether or not they had become judges of the Constitutional Tribunal and whether or how the appointment procedure had been violated had to be answered.

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[6] Article 187 section 1 and 3 of the Constitution.

[7] The presidential election was held on 10 and 24.05.2015. The five-year term of presidency of Andrzej Duda began on 6.08.2015. Andrzej Duda was a candidate backed by The Law and Justice, however he resigned the party membership on 26.05.2015. Notwithstanding the above, in subsequent elections the party supported his candidacy and he won again in 2020. The term of office runs through 2025.

[8] The election of the parliament was held on 25.06.2015. The parliament started its term on 12.11.2015. What is worth mentioning, Law and Justice won again in the 2019 parliamentary election.

[9] Results of elections to the Sejm and Senate of the Republic of Poland in 2015 published by the State Election Commission; https://parlament2015.pkw.gov.pl/349_Wyniki_Sejm.html - access reached on the day of 10.06.2022.

[10] The law of 22.12.2015 amending the law on the Constitutional Court (available via https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150002217).

It seems that the new parliament tried to find a solution in a way that must be considered questionable under the rule of law. It was the beginning of introducing more and more changes in legislation related first to the Constitutional Tribunal (e.g., the law of 22 December 2015) and then to the judiciary in general. In January 2016 the Constitutional Tribunal declared that the appointment of five judges chosen by the new parliament was valid. Recognition of that judgment by the legislative and executive powers was the major embers of the conflict. On the contrary, on 9 March 2016, the Tribunal ruled that the new bill of 22 December 2015 on the Constitutional Tribunal was not constitutional. The above decision was declared non-binding by the Council of Ministers and publication of that judgment was refused. In explaining the reasons for the refusal, the Prime Minister pointed out that the ruling was based on new legislation that was subsequently declared unconstitutional, which was clearly contrary to the law.

By refusing to publish a final decision of the Constitutional Tribunal the executive power expressed the ignorance of judiciary, its importance and significance. The consequences of the above actions were extraordinary - not only were there rallies and demonstrations across the country in defence of the courts and the Constitution, but the European Union launched an investigation into Poland's violation of Article 7 of the Treaty on European Union.

Regardless of the internal debates, the external point of view was clear and rather uncompromising. The European Commission openly criticised these actions, considering them as a breach of European law, threat to rule of law and violation of human rights (right to fair trial referring to properly constituted court)[11]. On the other hand, The European Court of Human Rights ruled that the 'new' judges of the Constitutional Tribunal are not judges within the meaning of the ECHR and their appointment did not comply with legal provisions[12].

D. Aggravation of The Crisis - More Changes, More Doubts?

Amendments in Poland's legal system extend far beyond the procedure of the election of judges of the Constitutional Tribunal. For example, in 2017 the parliament made an attempt to pass a new law regarding the retirement of all judges of the Supreme Court[13]. According to its original wording the Minister of Justice was supposed to have a discretion to affect significantly on allowance for exemption relating to continuity to perform judge's duties despite reaching the retirement age.

On the same day, the bill on the NCJ was submitted. According to this bill the term of office of the NCJ was to be interrupted. The parliament was to obtain the right to elect new judges to the

[11]Rule of Law: European Commission acts to defend judicial independence in Poland (https://ec.europa.eu/commission/presscorner/detail/pl/IP_17_5367); access reached on the day of 20.05.2022.
ECtHR, Campbell and Fell v. The United Kingdom, Appl. no. 7819/77; 7878/77, Judgment of 28.06.1984 at para. 78
[12]ECtHR, Xero Flor w Polsce sp. z o.o v. Poland, Appl. no. 4907/18; judgment of 7.05.2021.
[13]The bill of 8.12.2017 on amending the Act on the National Council of the Judiciary and certain other acts; (available via https://eli.sejm.gov.pl/eli/DU/2018/3/ogl).

NCJ. After only nine days, the Parliament passed both bills and then brought it to the President for his signature in order to make the new law come into force. What was evident that time, there was no time for public debate. At the same time, in another bill, parliament passed a law giving the Minister of Justice the right to dismiss presidents and vice-presidents of the courts. Eventually, in July 2017 the President vetoed the bill on the Supreme Court and the bill on the NCJ but accepted the third one.

The effects of the President's objections and the fact that he exercised the right to veto did not ultimately stop the planned changes.

In order to emphasise the importance of the problem related to the composition of the NCJ and to clarify what causes that the status of the council members is currently questioned, it is necessary to refer to the current wording of Article 9a section 1 of the act of 12th of May 2011 on the NCJ. By amendments introduced in January 2018[14] there was a fundamental change in the procedure of selection of fifteen judges as members of the Council. According to the Article 9a section 1, election of these fifteen members is conducted by the Sejm[15]. The delegation of power to select the judges as members of the Council into the hands of legislative authority was a complete reversal of the previously binding model which envisaged that judges used to choose candidates to the council on their own on principles similar to self-government. Depriving of the competence of self-selection has been recognized as an expression of unlawful influence on the judiciary, an evident violation of guarantees of judicial independence, especially in the context of acting in accordance with the rule of law.

Having seen what has happened one can get the impression that most of these changes have been implemented instantly and in at least ill-conceived ways in the range of possible consequences. Introduced provisions might have been considered as an attempt to provide an effective control over judges to the other branches of government. Further reforms in the judiciary which encompassed common courts and the Supreme Court have encountered objections raised, in particular, through judges and other representatives of the field of law. Some judges faced undeniable consequences for reservations voiced.

Analysing the condition of the judiciary system and the scope of guarantees of the independence of the judiciary and the impartiality of judges a particular attention should be paid to

[14]The bill of 12.07.2017 on amending the Act – Law on the system of common courts and certain other acts (available https://eli.sejm.gov.pl/eli/DU/2017/1452/ogl).

[15]Article 9a of the act of 12.05.2011 on the National Council of the Judiciary, section 1: The Sejm shall elect from among the judges of the Supreme Court, common courts, administrative courts and military courts fifteen members of the Council for a joint term of four years; section.

the act of creating the Disciplinary Chamber of the Supreme Court[16] (hereinafter: 'the DC'). The legislation under which its creation occurred was introduced in 2018. The DC was created as a new Chamber of the Supreme Court, not subject to the supervision of the First President of the Supreme Court, with a separate budget and administrative facilities. Its judges received salaries 40% higher than those of other Supreme Court judges. The judges of the DC were also entirely appointed with the participation of the new NCJ, whose independence had already been questioned by the CJEU. The creation of the DC was an element of the new model of disciplinary responsibility of common court judges. The establishment of the DC was strictly connected to the judicial reforms and it should be viewed as a consequence of previous events. The aim of forming the DC was to exercise control over judges within the scope of rules of ethical conduct. The foregoing governance was notably linked to any activity which might be considered as related to political commitment - for example, undermining the legitimacy of other judges nominated by the NCJ, the lack of independence or criticising changes introduced to the legal order could be seen as infringements[17]. The issue which questions was also raised about was that the status of the President of the DC seemed to be privileged in comparison to heads of other Chambers. Consequently, taking into consideration such a change, it is hard to deny that the new disciplinary system was provided for stricter control over judges' behaviour, particularly their opposition to legal changes introduced to the system of judiciary. Regardless of the opposition from internal (e.g. national demonstrations) and external (e.g. statement of United Nations High Commissioner for Human Rights, guidelines from the European Commission to seek an opinion of the Venice Commission before introducing new law) sources the bill was passed and the DC started its activity.

E. The European Union Reacts

As a result of the above actions, this legislation has faced the reaction of the European Union authorities. On 7 September 2021 the European Commission took decisions regarding the previous decisions of the European Court of Justice. The implication of these measures were extremely serious – the Commission came forward with the request to impose financial penalties on Poland with the view of ensuring the elimination of internal activity which were affecting judicial independence. What is more, the Commission directed a formal indication to Poland that the newly-formed disciplinary system is not compatible with European Union law. Before that, in 2019

[16]The bill of 20.12.2019 on amending the – Law on the system of common courts, the act on the Supreme Court the Act – Law on the system of common courts and certain other act (available via https://eli.gov.pl/api/acts/DU/2020/190/text.pdf).

[17] Article 107 section 1 point 3 of the bill of 27.07.2001 – Law on the system of common courts as amended by the Act of 20.12.2019 described above (came into force on 14.02.2020); *A judge shall be disciplinarily liable for official (disciplinary) misconduct, including: actions that question the existence of a judge's official relationship, the effectiveness of his or her appointment, or the constitutional authority of the Republic of Poland.*

already, the European Commission launched a so-called infringement procedure against Poland over its disciplinary system for judges, stating that the new disciplinary system undermines the independence of Polish judges by not providing the necessary guarantees of protection against political control. Unfortunately, as time has shown, despite the indications from the European Union authorities the issues concerning the amendments introduced to the system of judiciary in Poland which caused a questioning of exercising the guarantees of judicial independence and impartiality have not been solved yet.

F. First Reflection

In conclusion, the judiciary, as a branch of power, has been facing a crisis caused by political conflict, which gradually evolved into multidimensional legal problems in Poland. System changes, even if based on efforts to make the judiciary more efficient and remove inefficiencies, were introduced without due consideration which resulted in substantial threat to the rule of law in Poland. Attempts to allow the legislature and executive branch to have a broader influence over the functioning of the judiciary has undermined the stability of the system and raised questions as to whether the guarantees associated with the administration of justice are enforced and enforceable in the current factual and legal environment.

The principle of the tripartition of power in its assumption gives the judiciary a separate position, independent of the legislature and the executive. Today, however, the role of the judiciary is not limited only to administering justice, but is also an indispensable element of public order, the balance of the political system and the guarantor of individual rights. However, in order for the judiciary to fulfil its duties, it is necessary to provide it with legal safeguards which will secure the proper position of the judges and courts so that the performance of these tasks becomes possible at national level but in accordance with the rule of law as one of the values on which the European Union is based. Guided by this conclusion and focusing on the issues indicated, in order to make an attempt to formulate appropriate proposals for solving the current situation in the country it seems to be necessary to refer to European models of functioning the administration of justice in the manner of exercising the guarantees of independence and impartiality.

2. Part Two - Picture of Health. The European Role Model of Assurances of Independence and Impartiality

A. Preliminary Description

European law, both EU and Convention law, attaches great importance to the protection of judicial independence and the independence of judges. It follows from Article 6(1) ECHR that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and

impartial tribunal established by law'. The case law of the ECtHR and the CJEU, in turn, clarifies what the 'independence' of a court is, as well as what a 'tribunal established by law' is. In this paper we will focus on the aspect of judicial appointments, the impact of disciplinary proceedings on the guarantees of a judge's independence and autonomy, and the procedure for appointing judges to the disciplinary court.

B. Institutional Independence

Already in the case of *Campbell and Fell v. the United Kingdom*, the ECtHR noted what features preclude a body from being considered an independent court. According to the Court, the Board of Visitors, which in 1976 sentenced two inmates to disciplinary penalties[18], was in fact an extension of the executive. The ECtHR held that a body lacking institutional independence is not a court within the meaning of Article 6(1) ECHR. If the members of the body are appointed by the Ministry and they are not irremovable and, moreover, in their daily work they are identified as prison staff which leads to the conclusion that they do not fulfil the condition of independence[19]. The conclusions of the *Campbell and Fell* judgment proved to be a milestone for further case law. The ECtHR pointed out that a judicial body should first and foremost be independent from the executive and from the parties to the case[20]. Independence should be manifested in the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the the question whether the body presents an appearance of independence[21]. The same criteria of independence were adopted by the CJEU in judgment C-506/04[22] .

C. Method of Appointment of Judges

The desirable procedure for the appointment of judges is described in the *Recommendation (CM/Rec (2010) 12) on Judges: independence, efficiency and responsibilities*. The Committee of Ministers clearly indicates that decisions on the appointment and promotion of judges should be taken by an independent body, at least half of whose members should be judges chosen by their peers[23]. However, it's a non-binding document so remains only a reference for further consideration.

The ECtHR, in numerous judgments, emphasises that it does not impose on states a particular method of appointing and promoting judges[24]. The CJEU makes a similar reservation[25]. It should

[18] ECtHR, Campbell and Fell v. The United Kingdom, Appl. no. 7819/77; 7878/77, Judgment of 28.06.1984 at para. 14.
[19] ECtHR, Campbell and Fell v. The United Kingdom, Appl. no. 7819/77; 7878/77, Judgment of 28.06.1984 at para. 77.
[20] ECtHR, Campbell and Fell v. The United Kingdom, Appl. no. 7819/77; 7878/77, Judgment of 28.06.1984 at para. 78.
[21] ECtHR, Campbell and Fell v. The United Kingdom, Appl. no. 7819/77; 7878/77, Judgment of 28.06.1984 at para. 78.
[22] C-506/04, *Wilson*, (EU:C:2006:587), at para. 53.
[23] Committee of Ministers of the Council of Europe on 17.11.2010, Recommendation CM/Rec(2010)12, Article 46.
[24] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 215; ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal,* Appl. nos. 55391/13, 57728/13 and 74041/13, at para. 144; ECtHR, *Henryk Urban and Ryszard Urban v. Poland,* Appl. no. 23614/08, Judgment of 30.11.2010 at para. 46.
[25] C-791/19, *Poland*, (EU:C:2021:596), at para. 56.

also be mentioned that the CJEU explicitly points out the need for Member States to take into account judgments of the ECtHR, which are also issued in cases resulting from complaints that are not brought against a given Member State[26].

There are systems in Europe where the executive is involved in the process of appointment and promotion of judges, e.g. the Minister of Justice[27], the Prime Minister and the President[28], and such systems, in light of European case law, do not per se violate the rule of law. Nevertheless, both ECtHR and CJEU jurisprudence have constructed requirements for the preservation of certain standards in the procedure for the appointment of judges, which will be described below.

1. Selection Criteria

In its jurisprudence, the ECtHR requires that judges are selected on the basis of merit[29], so the participation of the executive in the appointment of judges must not translate into the application of political criteria in the appointment or promotion procedure. In the *Guðmundur Andri Ástráðsson v. Iceland* case, the ECtHR refers to instruments of international law: the Dublin Declaration adopted in 2012 by the General Assembly of the European Network of Councils for the Judiciary[30] and to Opinion No 1 (2001) of the CCJE[31] to clarify what standards should be applied in European countries with regard to the appointment and promotion of judges. According to the ECtHR, the criteria for appointment and promotion should be: qualifications, integrity, ability and efficiency[32]. In terms of procedure, 'if the Government or the Head of State plays a role in the ultimate appointment of members of the judiciary, the involvement of a Minister or the Head of State does not in itself contend against the principles of independence, fairness, openness and transparency if their role in the appointment is clearly defined and their decision-making processes clearly documented, and the involvement of the Government or the Head of State does not impact upon those principles if they give recognition to decisions taken in the context of an independent selection process'[33] .

The discovery that factors other than substantive ones played a role in the appointment procedure results in that the person appointed in this way is not recognised as a judge[34]. Importantly, it is not necessary to show that the motivation of the appointing authority was strictly political. It is sufficient that the body of the executive power appointing a judge is unable to justify what criteria

[26] Joined cases C-411/10 C-493/10, *N.S. v. Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P. and E.H. v. Refugee Applications Commissioners, Minister for Justice, Equality and Law Reform,* Jugdment of 21.12.2011.
[27] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020.
[28] C-896/19, *Repubblika*, (EU:C:2021:311), at para. 71.
[29] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 220.
[30] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 147.
[31] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 124.
[32] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 221.
[33] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 147.
[34] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 290.

guided it[35]. This gives rise to a suspicion of politicisation, and the suspicion itself is detrimental to the administration of justice.

2. The Three-Stage Model

In *Guðmundur Andri Ástráðsson* case the ECtHR proposed an universal, three-tier test to examine the validity of the appointment of judges[36]: (1) whether there was a manifest breach of the domestic law, (2) whether the breaches of national law relate to a fundamental principle of the procedure for the appointment of judges, (3) whether the allegations regarding the right to a 'tribunal established by law' were effectively reviewed and remedied by the domestic courts.

3. Graduation of Infringements

The ECtHR emphasises that not every irregularity in the procedure for appointing a judge amounts to a violation of Article 6(1) ECHR[37]. For example, in the *Guðmundur Andri Ástráðsson* case, the Court indicated that a minor irregularity in the course of acceptance of judges by the parliament would not be treated as a violation of the ECHR. The mere fact that the nominations were voted en bloc, although the procedure called for an individual vote, is too minor to be recognised as a violation. Similarly, in a Polish case, the ECtHR held that the lack of countersignature when the President announced vacancies in the Supreme Court did not meet the threshold criteria of the test[38]. However, the arbitrary removal by the Minister of Justice from the list of recommended judges of four judges better rated by an independent commission and the inclusion in their place of four judges less well rated is a clear violation, and a judge so selected should not be considered a judge merely because of deficiencies in his nomination process, without examination of his impartiality in the case[39]. Similarly, the President's disregard of an administrative court ruling suspending the execution of the NCJ resolution is a manifest breach[40] .

It is worth bearing in mind that the ECtHR takes a cautious approach to errors in the appointment of a judge. In the *Guðmundur Andri Ástráðsson* judgment ECtHR stipulates that the lapse of time from the moment of appointment may be in favour of the preservation of legal certainty, and even an erroneously appointed judge may in time be considered a court within the meaning of Article 6(1) ECHR[41]. The ECtHR does not give a specific time frame. It merely notes, for the purposes of the present case, that the lapse of a few months from the date of appointment is too short period for the principle of legal certainty to outweigh the principle of correct appointment.

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[35] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 265.
[36] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 253.
[37] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 236.
[38] ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, Appl. nos. 49868/19, 57511/19, Judgment of 08.11.2021 at para. 339.
[39] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 285.
[40] ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, Appl. nos. 49868/19, 57511/19, Judgment of 8.11.2021 at para. 339.
[41] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. no. 26374/18, Judgment of 01.12.2020 at para. 252.

The ECtHR also notes that the fact that a judge is appointed by the President and begins to exercise judicial functions does not cure the serious errors in the earlier procedure.

D. Dismissal and Term of Office

The possibility of removing judges from office is not, in principle, accepted in the case law of the ECtHR and CJEU. In Poland, the removal of assessors by the Minister of Justice led to the abolition of the office of assessor in 2007[42]. The Constitutional Tribunal stated then, that the institution of the assessor does not guarantee independence arguing that 'independence does not have to mean lifetime appointment or appointment until retirement age', but the period of appointment 'must provide some stability'[43] . The ECtHR ruled similarly, stating that the prohibition on the removal of judges by the executive is such an important requirement that the ECtHR does not allow such a procedure even by way of exception. Although there was no case in Poland before 2007 where the Minister of Justice dismissed an assessor before the end of his or her term, the mere threat of dismissal is, in the ECtHR's view, a lack of independence[44]. The term of office of a judge should be long, as a rule at least three years[45]. In *Maktouf And Damjanović v. Bosnia and Herzegovina* case, the ECtHR assessed that the two-year term of office of judges appointed by the UN High Representative to try crimes in Bosnia did not infringe on their independence, even though the term was renewable[46]. In the ECtHR's view, this was justified by the provisional nature of this Tribunal, and the manner in which the judges were selected provided a guarantee of their impartiality and independence.

The ECtHR points out that not only the removal from office of a judge, but also the removal from a particular function before the end of the term, such as the office of president or vice-president of a court, undermines the principle of independence[47] . The restrictive rules adopted by the ECtHR seem to be consistent in this respect with those adopted by the CJEU - according to the CJEU, a national regulation according to which a judge may be removed from his delegation to a higher court by an arbitrary decision of the Minister of Justice is unacceptable[48].

The shortening of the term of office of a judge should be exceptional, and even an amendment to the Constitution does not justify the arbitrary interruption of the term[49]. This also applies to the

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[42] Constitutional Tribunal (Poland), SK 7/06, Judgment of 24.10.2007.
[43] Constitutional Tribunal (Poland), SK 7/06, Judgment of 24.10.2007 at para. 5.5.
[44] ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, Judgment of 30.11.2010, Appl. no. 23614/08 at para. 51-53.
[45] Constitutional Tribunal (Poland), SK 7/06, Judgment of 24.10.2007 at para. 5.5, ECtHR, Campbell and Fell v. The United Kingdom, Appl. no. 7819/77; 7878/77, Judgment of 28.06.1984 at para. 80.
[46] ECtHR, *Maktouf And Damjanović v. Bosnia And Herzegovina*, Appl. nos. 2312/08 and 34179/08, Judgment of 18.07.2013 at para. 50-51.
[47] ECtHR, *Broda and Bojara v. Poland*, Appl. nos. 26691/18 and 27367/18, Judgment of 29.08.2021 at para. 121.
[48] Joined cases C-748/19 - C-754/19, *W.B. and Others*, (EU:C:2021:931) at para. 87.
[49] ECtHR, *Baka v. Hungary*, Appl. no. 20261/12, Judgment of 23.06.2016.

shortening of the term of office of a judge sitting on the NCJ[50] .

The CJEU also emphasises that it follows from the principle of irremovability of judges that they cannot be arbitrarily retired. Thus, in its judgment in case C-618/18, the CJEU ruled that Poland, by reducing the retirement age for Supreme Court judges from 70 to 65, violated the principle of irremovability, and thus an element of judicial independence. The CJEU stipulated that a reduction in the retirement age of judges is in itself permissible, but that an abrupt reduction without a transitional period is not permissible, as it would have the effect of undermining the institution. Indeed, in the Polish case cited, the national legislation would immediately cover 27 of the 72 judges of the Supreme Court.

E. Disciplinary Cases

Disciplinary sanctions against judges must be controlled by the courts. The ECtHR approves the regulation that it is the judges of the Supreme Court - at the top of their career, the best qualified, not having to seek promotion - who should deal with disciplinary cases[51]. Administrative bodies which are not courts of law, such as the NCJ (Portugal's CSM) can also be involved in hearing disciplinary cases against judges[52]. However, it is important that these bodies do not include representatives of the executive, such as the Minister of Justice[53]. Disciplinary cases must also not concern the administration of justice itself or the interpretation of the law[54].

F. The Lack of Pressure

Practice is crucial to the assessment of national solutions. In the Polish case, the ECtHR shared the findings of the Polish Supreme Court, as expressed in its resolution of 23 January 2020, that the Minister of Justice, who is also Prosecutor General, exerted considerable influence on the composition of the NCJ, which in turn has an important position in the process of appointing Polish judges to positions[55]. Excessive influence of the legislative and executive authorities on the appointment of judges is incompatible with Art. 6(1) ECHR and as such adversely affects the entire process and ultimately the legitimacy of the court composed of the judges appointed this way[56].

G. Second Reflection

The purpose of the above analysis was to clearly articulate the requirements that need to be met for the guarantees of independence and impartiality. All the above-mentioned aspects must be taken

[50] ECtHR, *Grzęda v. Poland,* Appl. no. 43572/18, Judgment of 15.03.2022.
[51] ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, Appl. nos. 55391/13, 57728/13, 74041/13, Judgment of 6.11.2018 at para. 163.
[52] ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, Appl. nos. 55391/13, 57728/13, 74041/13, Judgment of 6.11.2018 at para. 151.
[53] ECtHR, *Volkov v. Ukraine,* Appl. no. 21722/11, Judgment of 09.01.2013.
[54] ECtHR, *Harabin v. Slovakia,* Appl. no. 58688/11, Judgment of 20.11.2012.
[55] ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, Appl. nos. 49868/19, 57511/19, Judgment of 8.11.2021 at para. 205, Supreme Court of Poland, BSA I-4110-1/20, Verdict of 23.01.2020 at para. 38.
[56] ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, Appl. nos. 49868/19, 57511/19, Judgment of 8.11.2021 at para. 208

into account in formulating proposals for changes and curing the crisis in the current situation of the judiciary in Poland, which will be referred to in the next part of the work.

3. Part Three - Diagnosis and Treatment. The Model of Disciplinary Proceedings for Judges in Poland in the Context of Ensuring the Guarantees of Independence and Impartiality of Judges.

Due to the wide scope of the problem, the final section will examine selected aspects of disciplinary proceedings for judges in Poland in the context of the 15 July 2021 judgment of the CJEU, Commission/Poland, C-791/19[57] and the changes to Polish legislation currently in process. The model of disciplinary proceedings for judges is in fact inextricably linked to the guarantee of independence and impartiality of judges. As the CJEU pointed out in the aforementioned case: 'the mere prospect, for the judges of the Sąd Najwyższy (Supreme Court) and the ordinary courts, of being exposed to the risk of a disciplinary procedure capable of leading to proceedings being brought before a body whose independence is not guaranteed is liable to affect their own independence'[58]. What steps should therefore be taken to ensure that the model of disciplinary proceedings against judges in Poland complies with the requirements of the principle of judicial independence within the meaning of the second paragraph of Article 19(1) of the Treaty on European Union (hereafter TEU), pursuant to which Member States shall establish the remedies necessary to ensure effective judicial protection in areas covered by European Union law?

A. Judgment of the CJEU of 15 July 2021, Commision and Poland, C-791/19

Judgment of the Court of 15 July 2021, Commision and Poland, C-791/19 declared that the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

(1) by failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court which is responsible for reviewing decisions issued in disciplinary proceedings against judges;

(2) by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts;

(3) by conferring on the President of the Disciplinary Chamber of the Supreme Court the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts and, therefore, by failing to guarantee that disciplinary cases are examined by a tribunal 'established by law';

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[57] C-791/19 R, *Commision* and *Poland,* (EU:C:2021:596).
[58] C-791/19 R, *Commision* and *Poland, (*EU:C:2020:277), at para. 90.

(4) by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time and by providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect on the course of the disciplinary proceedings and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel and, therefore, by failing to guarantee respect for the rights of defence of accused judges of the ordinary courts.

Also the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU;

(5) by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the CJEU to be restricted by the possibility of triggering disciplinary proceedings.[59]

B. Proposals for Legislative Changes and Their Assessment

The Polish legislator, as part of the legislative work aimed at 'healing' the situation in the Polish judiciary, is currently proceeding with a presidential bill amending the Supreme Court Act and other acts[60] (hereinafter the 'Amending act'). The main premise of the amendment is the liquidation of the the DC and the creation in its place of the Chamber of Professional Responsibility in the Supreme Court (hereafter: 'the CPR'). The project, after completing the legislative procedure in the Sejm and the Senate and rejecting by the Sejm 23 out of 29 Senate amendments, most of which were key ones because they concerned, among others, the annulment of decisions of the liquidated the DC, was presented on 10 June 2022 for signature by the President of the Republic of Poland, who has 21 days to sign it. Prior to signing the act, the President of the Republic of Poland may request the Constitutional Tribunal to assess the act's compliance with the Constitution or, with a reasoned request, refer the act to the Sejm for reconsideration.[61]

1. Proposed Amendments to Point 1 of the CJEU of 15 July 2021, C-791/19

In the CJEU's view, doubts about the independence of the NCJ, with whose involvement the appointment of the DC judges to the Supreme Court was made, are far-reaching. As mentioned earlier, the main objection to the new NCJ is the way it is constituted. Currently, the 15 members of the NCJ are appointed by the Sejm, which is the legislative power[62]. Such a solution infringes the principle of the separation of powers, which is crucial for the system of a democratic state under the

[59] C-791/19 R, *Commision* and *Poland,* (EU:C:2021:596), at para. 237.
[60] The Act of 9.06.2022 amending the Supreme Court Act and certain other acts, text of the Act finally determined after consideration of the Senate amendments, available athttp://orka.sejm.gov.pl/opinie9.nsf/nazwa/2011_u/$file/2011_u.pdf. The President of Poland has signed the bill on the 13.06.2022 and the bill is awaiting publication.
[61] Article 122(2)-(5) of the Constitution of the Republic of Poland of 2.04.1997 (Journal of Laws No 78, item 483, as amended).
[62] Article 9a of the Act of 12.05.2011 on the National Council of the Judiciary (i.e. Journal of Laws of 2021, item 269).

rule of law. Furthermore, the introduction of amendments to the Act on the NCJ[63] unconstitutionally shortened the term of office of its judges[64]. There are also doubts about the non-disclosure of lists of support for candidates for members of the NCJ, despite a final ruling in this regard[65]. The current NCJ is perceived as a political tool and, in this context, the fact that this body plays an important role in the procedure for the appointment of the DC judges of the Supreme Court also implies an assessment of this Chamber as politicised. Moreover, the judges of the DC are appointed from outside the group of judges of the Supreme Court, and the Chamber itself is strongly separated organisationally within the structure of the Supreme Court[66].

The Amending act establishes the CPR in replacement of the DC. Under the bill, 11 judges are to be appointed by the President of the Republic of Poland from among 33 judges sitting in other chambers of the Supreme Court, randomly selected by the President at a meeting of the Supreme Court's Judges' Collegium. The judges of the Supreme Court cannot refuse to participate in the drawing, the appointment, or to adjudicate in the CPR. Judges are to be appointed for a concurrent 5-year term, but the Amending act provides the possibility of a supplementary draw until the end of the original term in the event of its expiry in holding office[67]. The term of office of judges, and the way in which they are selected - by drawing - was intended to fulfil a guarantee function. However, the manner in which the President of the Republic of Poland is to appoint judges to the CPR of the Supreme Court from among those selected by drawing is not necessarily transparent. The Amending act does not specify any selection criteria and does not provide for a procedure for assessing candidates, but only for immediate submission to the President of the Republic of Poland of a list of selected judges, together with information concerning any disciplinary proceedings pending against them, and a record of the drawing[68]. This solution may be controversial, but its definitive positive effect is to remove the NCJ from the procedure for appointing judges to this Chamber. However, this does not change the fact that under the terms of the Amending act, it is the President, as a representative of the executive, who will select the judges of the Disciplinary Chamber, which may raise serious doubts as to the possibility of 'healing' the disciplinary court in Poland.

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[63] Act of 8.12.2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws 2018, item 3).

[64] ECtHR, *Grzęda* v. *Poland*, Appl. no. 43572/18, Judgment of 15.03.2022, available at https://hudoc.echr.coe.int/fre?i=001-216400.

[65] Judgment of the Regional Administrative Court in Warsaw of 23.11.2018 (II SA/Wa 488/18).

[66] Article 30 and Article 48 para. 7 of the Act of 8.12.2017 on the Supreme Court (i.e. Journal of Laws of 2021, item 1904, as amended).

[67] Article 1(17) of the Act of 9.06.2022 amending the Law on the Supreme Court and certain other laws, text of the law finally determined after consideration of the amendments of the Senate, available at http://orka.sejm.gov.pl/opinie9.nsf/nazwa/2011_u/$file/2011_u.pdf.

[68] *Ibidem.*

In turn, restoring the independence of the NCJ will be an arduous and time-consuming process, and the Amendment act, as it stands, tries to remedy the situation in part, but not entirely successfully.

With regard to the legal effects of the decisions made so far by the DC, the Amending act provides that the circumstances surrounding the appointment of a judge of the Supreme Court may not constitute the sole basis for challenging a decision made with the participation of that judge or questioning his or her independence and impartiality[69]. Thus, the Amending act does not undermine the legality of the rulings issued by the DC. At the same time, however, the Amending act introduces the so-called 'test for a judge's independence and impartiality', according to which it is possible to examine whether a judge of the Supreme Court meets the requirements of independence and impartiality taking into account the circumstances surrounding his or her appointment and his or her conduct after appointment - at the request of a party, in relation to a specific case[70]. In the course of voting on the amendments, the Senate wanted to declare invalid and of no legal effect all rulings issued so far by the DC[71]. In the justification of the Amending act[72], the Senate pointed out that in accordance with the case law of the CJEU and the ECtHR, the DC is not an independent and impartial body and does not possess the attribute of a court, and therefore decisions issued by such a Chamber should be eliminated from legal circulation. Other actions would, in fact, lead to challenging the rulings of the CJEU and the ECtHR. In turn, the Presidium of the NCJ, in its position of 2 June 2022[73] criticised the cited amendment of the Senate, pointing to the destabilisation of the legal system, the ruinous impact on the dignity of the Supreme Court and the entire judiciary, and the violation of the principle of citizens' trust in the state and the permanence of the decisions of state bodies. Both positions testify to the highly polarised views of the political class. An argument in favour of leaving in force the judgments issued so far by the DC could be the principle of legal certainty and fear of causing legal chaos. However, leaving in legal circulation judgments issued by a body which does not meet the requirements of a court established by law would mean sanctioning violations found by the ECtHR and the CJEU, thus leading to questioning the content and meaning of these judgments in the European and Community space. Leaving in place the decisions already made by the DC will mean that these decisions will continue to be

[69] Article 1(24) of the Act of 9.06.2022 amending the Act on the Supreme Court and certain other acts, text of the Act finally determined after consideration of the amendments of the Senate.
[70] *Ibidem.*
[71] Point 21 of the resolution of the Senate of 1.06.2022 on the Act amending the Supreme Court Act and certain other acts, point 21, available at https://orka.sejm.gov.pl/Druki9ka.nsf/0/FBA7B05500B6053FC1258855003C7814/%24File/2309.pdf.
[72] *Ibidem.*
[73] Position of the Presidium of the NCJ of 2.06.2022 on the amendments of the Polish Senate to the Act on the Supreme Court, available at https://orka.sejm.gov.pl/Druki9ka.nsf/0/AD4794049A07BEDDC125885B0043E2EB/%24File/2309-001.pdf

challenged, consequently exacerbating the crisis in the judiciary, especially bearing in mind that since October 2018 the DC has recognised approximately 1 000 disciplinary cases[74]. In our view, however, a radical change resulting in the annulment of the rulings issued by the DC to date would undoubtedly put a definitive end to the dispute as to their validity and legal force.

2. Proposed Amendments to Point 2 of the CJEU of 15 July 2021, C-791/19

Regarding the above point, the Amending act does not amend the Act on the Common Court System (hereinafter: 'the ACC'), but responds to the above allegation by liquidating the DC and replacing it with the CPR. Article 107 paragraph 1 of the ACC provides that a judge is liable to disciplinary action for official (disciplinary) misconduct, including for: 1) obvious and serious offence against the provisions of the law, 2) acts or omissions which may prevent or significantly obstruct the functioning of the judicial organ; 3) acts questioning the existence of a judge's official relationship, the effectiveness of a judge's appointment, or the legitimacy of a constitutional organ of the Republic of Poland; 4) public activities incompatible with the principles of independence of courts and independence of judges; 5) offence against the dignity of the office. In the cited judgment of 15 July 2021 CJEU, however, focused on the first of the premises, pointing to the possibility of political control in the content of court rulings[75].

The condition of an obvious and serious offence against the law, which entitles to initiate and conduct of disciplinary proceedings, is in line with EU guarantees, taking into account the previous case law of the Supreme Court. National case law indicates the absolute exceptional nature of the application of this condition, limiting it to cases of obvious and serious legal offences. The CJEU rightly points out, however, that this case law was shaped in the period prior to the establishment of the DC. For these reasons, the CJEU upheld the abovementioned allegation, ruling that Poland was in breach of Article 19(1) TEU, holding that the combination of vague concepts in Article 107(1)(1) of the ACC the appointment of the DC, which is not a court established by statute, does not ensure the independence and impartiality of judges and may be a political tool, which justifies the finding of the above violation. In principle, the abolition of the DC and establishing in its place a court that meets the guarantees of independence and autonomy would allow it to restore the situation as before the establishment of the DC, should be considered positive, assuming that the CPR meets these requirements. However, in our view, a better solution would be to clarify the law by narrowing the grounds for disciplinary liability and eliminating from the scope of disciplinary offences judgments concerning the functioning of the judiciary, which would provide greater

[74]Supreme Court, *Case Movement Statistics*, available at https://www.sn.pl/sprawy/SitePages/Statystyki_ruchu_spraw.aspx?ListName=Statystyka_Izba_Dyscyplinarna.
[75] C-791/19 R, *Commision* and *Poland,* (EU:C:2021:596), at para. 116.

guarantees of the court's independence and autonomy. It is simply unacceptable that disciplinary proceedings are even feared for the content of substantive court rulings.

3. Proposed Amendments to Point 3 of the CJEU of 15 July 2021, C-791/19

The change proposed in the Amending act regarding the designation of the competent disciplinary court of first instance (at the Court of Appeal) is only illusory. This court is still to be designated, however, not by the President of the Supreme Court in charge of the DC (which is supposed to be abolished), but by the Supreme Court - the CPR. In view of the above, the assessment expressed in the judgment of 15 July 2021 remains valid. CJEU's statement that such a disciplinary court is not a 'court established by law' (Article 19(1), subparagraph 2, TEU) remains valid. There is no predictability and certainty as to the jurisdiction of a disciplinary court so designated and thus no guarantee of the court's independence and autonomy. In order to introduce real change in this respect, it would be necessary to designate specific courts within a given appellate jurisdiction to hear disciplinary cases of judges who sit on a different appellate jurisdiction (for example, a disciplinary court attached to the Court of Appeal in Gdańsk could be competent for judges who serve in the Kraków appellate jurisdiction).

4. Proposed Amendments to Point 4 of the CJEU of 15 July 2021, C-791/19

The Amending act removes in its entirety the doubts indicated by the CJEU in the judgment of 15 July 2021. The draft provides that the second sentence of Article 112b para. 5 of the ACC is deleted. Pursuant to this provision, it was possible for the Minister of Justice to reappoint the Disciplinary Officer of the Minister of Justice in the same case, which posed a risk that the case would not be conducted within a reasonable time. The draft provides for the repeal of Article 113a of the Code of Criminal Procedure, which stipulates that actions related to the appointment of a public defender and his/her commencement of defence shall not halt the course of proceedings. Also, Art. 115a paragraph 3 of the ACC would be repealed, according to which the disciplinary court conducts proceedings despite the excused absence of the notified defendant or his/her defence counsel, unless this is opposed to the good of the disciplinary proceedings. This would remove provisions that did not ensure an effective right of defence for the defendant during proceedings before the disciplinary court. As the Senate did not introduce any amendments in this respect, the amendment should be assessed positively in this part.

5. Proposed Amendments to Point 5 of the CJEU of 15 July 2021, C-791/19

The amending act introduces paragraph 3 to Article 107 of the ACC, pursuant to which it is not a disciplinary offence to apply to the CJEU for a preliminary ruling on the question referred to in Article 267 TFEU. This solution is intended to remove the concern that judges will feel threatened by the initiation of disciplinary proceedings against them for making a preliminary reference to the

CJEU. Provisions of national law cannot prevent the application of EU law, including the powers of the courts under Article 267(2) and (3) TFEU. Such a solution is a casuistic one, but one that responds to the allegations contained in the CJEU judgment of 15 July 2021.

C. Negotiations to Restore the Independence and Impartiality of the Judiciary in Poland - Third Conclusion

The crisis of the judiciary in Poland in 2015 deepened gradually, and the changes that the actions of the legislature have led to will not be possible to eliminate in the short term. What model for their healing should therefore be adopted? Uncompromising and dynamic, or balanced, but not corresponding to the indications arising from the case law of the CJEU and ECtHR? The Polish legislator is more inclined to apply the second model. However, will the Amending act meet the requirements insofar as it is to be an instrument for restoring the rule of law in the domestic legal order? It seems that only partially, within the scope of allegations in points 4 and 5. Other solutions proposed in the Amending act do not constitute an adequate response to the allegations of the CJEU. The Polish legislator limits itself to apparent solutions that do not solve the core of the problem. In particular, it concerns the procedure for determining the composition of the new Chamber of Professional Responsibility, which will consist of judges elected by the President of the Republic of Poland - the representative of the executive power, without applying any criteria for evaluating candidates. Nor does the legislator refer in any way to the validity of the existing rulings of the Disciplinary Chamber of the Supreme Court.

From our perspective, the only way out of the crisis of the rule of law is consistent implementation of changes and development of an ever better and more efficient judicial system with respect for the principle of the tripartite separation of powers and constitutional norms, as well as European values and Community regulations. In this respect, the jurisprudence of the CJEU and the ECtHR helps to identify the elements that safeguard the independence and independence of judges in Poland. It is necessary here not only for the executive, legislative and judicial authorities to work together, but also for cooperation at the Community level, as dialogue can also help to restore the values of a democratic state under the rule of law that have been violated in the internal legal order.

The Final Word

The existence of a judicial crisis in Poland is undeniable. It is also indisputable that it has been recognised at the European level, where measures have been taken to restore the stability of the judicial system in Poland. Therefore, are there remedies that will cure the "patient" and not harm "him"? One of them was to be the presidential amendment to the law, adopted by Parliament a few days ago. In our opinion, however, this is an insufficient and ostensible solution. Another could be to challenge the appointment of all judges, promoted by the NCJ after 2017, and consequently the rulings made by them. However, this remedy seems to have too many side effects, given that Poland has already thousands of judgments issued by newly appointed judges. Nevertheless, Poland should introduce legislation to ensure the independence of judges and the independence of the judiciary by establishing disciplinary courts in a manner that respects the principle of tripartite authority, eliminating mechanisms that allow the executive to remove judges from their positions, as well as introducing clear criteria for the appointment of judges and increasing the participation of the judicial community in the appointment of the body involved in their appointment procedure.