Judicial Independence in Poland

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A. Introduction

Following 20 years of transformation, Poland has an independent judiciary, in both the constitutional and practical sense. Guarantees of Polish law, although perhaps not perfect with respect to certain issues, provide a general guarantee of independence which is additionally reinforced by guardians of this principle, in particular the National Council of the Judiciary. The Polish judiciary has so-called institutional memory. In 1989 there was no radical clearing out of the justice system of judges who collaborated with the previous system. Thanks to this it was possible to stabilize a legal system immediately after the start of transformation and to make a natural shift in generations of judges and build the principle of independence on a long term basis.

The principle of judicial independence was developed in the jurisprudence of the Constitutional Court since 1989 and in 1997 it was sanctified by numerous provisions of the Constitution. Constitutional provisions, along with different statutes, provide for a relatively stable environment for the development of the judiciary's independence in daily practice. Over the last 20 years there have been a few constitutional cases which touched upon certain issues concerning the independence of the judiciary. The most important one was a case concerning adjudication by probationary judges, which resulted in a serious reform of the judicial appointment system. Overall, those cases were more fine tuning in character than revealing of some structural deficiency.

* The authors would like to thank Katarzyna Gonera, judge of the Supreme Court, and Eva Katinka Schmidt, Rule of Law Officer of OSCE ODIHR, for their invaluable comments on earlier drafts.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_17,

Analysis of the daily practice of the judiciary shows that it is highly independent. The following are evidence of that: the number of acquittals and the number of occasions on which the legislative and executive branches of government lose a case decided by a court (e.g. cases concerning responsibility of the State Treasury for damages). Despite much criticism and pressure exerted by politicians on the judiciary in 2005-2007 (Poland was ruled at that time by the populist Law and Justice party), decisions issued by courts in most cases were highly independent and were contrary to the wishes of politicians. Nevertheless, the critical statements – combined with the structural inefficiency of the justice system – undermined the public trust in the judiciary. In 2007 we were able to observe change in the atmosphere surrounding the judiciary. The new centre government emphasized its allegiance to democratic values and judicial independence.

This general picture of judicial independence does not mean that the current status of the Polish judiciary is perfect. Judicial independence is not awarded once and for all and is more a continuous process of adapting to changing needs and circumstances. It should also be noted that while judicial independence may be guaranteed, the general performance of courts (and the public perception of courts and their independence) may suffer due to the malfunctioning of the judiciary, e.g. length of proceedings.

Since 1989 Poland has made considerable progress towards the creation of a truly independent judiciary. One of the priorities in the Polish transformation was to ensure that the judiciary was a fully independent third power, and this has largely been achieved. Many guarantees of independence have been elevated to the constitutional level, and the National Council of the Judiciary (hereinafter "NCJ") has acquired a constitutional mandate to safeguard judges' and courts' independence. For the most part, the boundary between the judiciary and the political branches has been clearly defined and accepted. There are significant remaining areas of concern, however, the most important of which are the continuing involvement of the executive power in judicial administration.

The formal guarantees of judicial independence are generally satisfactory. Constitutional guarantees are included in Article 10 of the Polish Constitution,[1] the separation of powers principle; Article 173 of the

[1] The Constitution of the Republic of Poland as adopted by the National Assembly on 2 April 1997, available at <http://www.trybunal.gov.pl/eng/index.htm>.

Constitution, which provides that courts and tribunals shall constitute a separate power and shall be independent of other branches of power; Article 178(1) of the Constitution enshrining the principle of independence of individual judges stating that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes." Moreover the Constitutional Court has repeatedly ruled in support of judicial independence.[2]

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

Despite the establishment of constitutional guarantees of independence, the executive, in particular the Ministry of Justice (hereinafter "MoJ"), retains considerable administrative and supervisory authority over the organization and affairs of the judiciary. The powers of the MoJ with respect to the judiciary are not defined in the Constitution. They stem from the Act on the Common Courts' System (hereinafter Act on Courts, "AOC").[3] According to Article 9 of the AOC the MoJ exercises administrative supervision over the judiciary. It exercises this power directly or through the supervision service. The supervision activities of the MoJ include: the power to establish courts and court divisions (as well as to abolish them); the power to appoint (and dismiss) Presidents of common courts, however upon the consent of the self-governing bodies of the judiciary or the NCJ;[4] the power to initiate disciplinary proceedings against a judge; the power to appoint administrative directors of courts; the power to issue reproaches (*wytyk*) pointing

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[2] For example in its judgment of 9 November 1993, No. K 11/93, the Constitutional Court stated that "one of the elements of the principle of the separation of powers and of the foundations of the democratic construction of a law-abiding state is the principle of judicial independence."

[3] Act of 27 July 2001 on the Common Courts' System (*Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych*), Journal of Laws (*Dziennik Ustaw*) of 2001, No. 98, item 1070, as amended.

[4] Please note that the procedure for expressing consent is much more complicated. For the purpose of this study we described it in a simplified form. See *infra* B. I. 2. National Council of the Judiciary.

out inefficiency by judges in the adjudication of a case;[5] the power to revoke any administrative orders; the power to establish internal rules of administration of courts. Supervision by the MoJ is exercised through inspection visits, statistical analysis of courts' performance, the examination of case backlogs, and review of complaints about judges' behaviour or rulings.

The Minister of Justice is responsible before the *Sejm*[6] (questions from the deputies, possibility of vote of no confidence), on the same conditions as other ministers. The Minister might be brought to justice in person before Tribunal of the State (*Trybunał Stanu*) in quasi-penal proceedings for breach of the Constitution and laws which is not a common crime. Supervision over the adjudication function of courts is exercised by the Supreme Court (hereinafter "SC").[7] The First President of the SC submits information to the *Sejm* on the work of the Supreme Court.[8] The information is publicly available through records of sessions of the *Sejm*. The representatives of the Government are also invited to the annual meeting of the SC judges where the First President of the SC makes a presentation summing up the work of the court in the previous year. There is no general requirement to present annual reports on the activities of all courts.

2. National Council of the Judiciary

The NCJ[9] was set up as early as 1989 and it was acting on the basis of amended provisions of the Constitution of 1952 and the statute. The current competences of the NCJ are set out in the Constitution of 1997. According to Article 186 of the Constitution, the role of the NCJ is to safeguard the independence of courts and judges. The NCJ is a *sui generis* organ. It is part neither of the executive nor of the judiciary. It is also not an organ of self-government of judges. It is composed of: the First President of the SC, the Minister of Justice, the President of the

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5 The procedure for issuing reproaches is described in another part of the chapter. It does not in practice offer a serious threat to judicial independence.

6 *Sejm* and *Senate* are the lower and upper houses of Parliament.

7 Article 7 AOC.

8 Article 10(1) Act of 20 September 1984 on the SC (*Ustawa z dnia 20 września 1984 r. o Sądzie Najwyższym*), Journal of Laws (*Dziennik Ustaw*) of 1984, No. 13, item 48, as amended.

9 See NCJ website at <http://www.krs.gov.pl/index_en.php>.

Supreme Administrative Court (all of them are members of the NCJ while performing the relevant function); representative of the President of the Republic (who may be dismissed at any time and is not a member of the NCJ for a specific term); 15 judges chosen from among the judges of the SC, common courts, administrative courts and military courts (elected for four year terms);[10] four members chosen by the *Sejm* from among its Deputies and two members chosen by the Senate from among its Senators (all of them are chosen to be members of NCJ during their parliamentary term).[11]

The executive does not have a significant influence on the activities of the NCJ. There have been no serious conflicts impacting on the role of the NCJ as the guarantor of judicial independence due to such composition. Although by virtue of constitutional composition the NCJ is not an organ of judicial self-government, due to the daily practice and constitutional culture the NCJ is regarded as such organ. The President and two Vice-Presidents of the NCJ are elected from among the NCJ's members by the NCJ itself.

Members of the NCJ may in general be dismissed by the organs which elected them. In case of judges (constituting the majority of the NCJ members) it is not dangerous to the integrity of the NCJ, since they are elected by different judicial self-governing bodies. Their function is also connected with the type of courts they represent. The powers of the NCJ include the ability to submit motions to the Constitutional Court on matters concerning the independence of the courts and impartiality of judges; the right to present opinions on candidates for judgeships; the ability to request the Disciplinary Spokesman (*rzecznik dyscyplinarny*) to initiate disciplinary proceedings with respect to judges and to appeal against the judgments of disciplinary courts of lower rank; to consider judges' applications for retirement, to consent to the continuing in post of judges who have attained 65 years of age; to consider ap-

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[10] Article 7 Law on the NCJ provides the power to elect members of the NCJ by different courts. In general, they are elected by general assemblies of judges of relevant courts. As a result, two members of the NCJ are elected from among the SC judges, two members from among the administrative courts' judges; two members from among the appeal court judges, eight members from among regional court judges and one member from among the military court judges. All judges are elected members of the NCJ for a term of four years. The term is renewable only once.

[11] The composition of the NCJ is established in Article 187 of the Constitution.

plications by retired judges to return to judicial post; to appoint the Disciplinary Spokesman of common courts; to give its opinion on the appointment and dismissal of Presidents and deputy Presidents of common courts and military courts; to carry out court inspections or vet the work of a judge whose individual case is subject to consideration by the Council; to give opinions on the remuneration of judges and other opinions regarding the laws on the judiciary; to give opinions on the judicial budget; and to give opinions on candidates for the position of the head of the National School for the Judiciary and Prosecutor's Authority.[12] The NJC also has a right to appoint three candidates to the programme's Council of this School.

Representatives of the NCJ may be invited by parliamentary committee chairmen to meetings of their committees. NCJ representatives taking part in the work of parliamentary committees *de facto* play the role of a representative body for judges. The NCJ has the right to present opinions on all bills concerning the judiciary. It is even the duty of the Parliament to request such an opinion, but its substance is not binding upon the Parliament.[13]

The NCJ performs its duties with the assistance of the Bureau of the Council. The NCJ appoints, from among its members, standing commissions on: disciplinary responsibility of judges, judges' professional ethics and budgetary issues; it may also appoint commissions on other issues. There are numerous tensions between the NCJ and the MoJ concerning its powers and supervision over the judiciary. Those tensions usually result in judgments of the Constitutional Court. Hitherto the Constitutional Court has had to adjudicate on a number of issues directly relevant to judicial independence, and the role of the NCJ, the MoJ and bodies of judicial self-government such as judges' assemblies. For example with respect to the appointment of Presidents and Vice-Presidents of courts the Constitutional Court upheld the legislative

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[12] Powers are defined by the Act of 27 July 2001 on the National Council of the Judiciary (*Ustawa z dnia 27 lipca 2001 r. o Krajowej Radzie Sądownictwa*), Journal of Laws (*Dziennik Ustaw*) of 2001, No. 100, item 1082, as amended.

[13] Judgment of the Constitutional Court of 24 June 1998, No. K 3/98. The Constitutional Court stated that "the Law on the NCJ in any way does not restrict the freedom of the legislative body to regulate the judiciary. It only assumes that getting knowledge on the position of the NCJ with respect to the draft law may influence the process of reflection by the legislative body and will allow for avoidance of regulations which are not well-thought and well prepared."

change under which judges' assemblies were deprived of the right to disapprove of the Minister's decision to appoint court Presidents (thereby blocking an appointment or dismissal) and were left with purely advisory competences.[14] The Constitutional Court stated that it was only a shift in powers, since the competence to adopt the binding decision ultimately remains among the NCJ's powers. At the same time the NCJ provides sufficient representation of the judiciary, although it is not purely organ of judicial self-government.

Under amendments to the Law on the NCJ introduced in March 2007 judges who at the same time were Presidents or Vice-Presidents of courts could not be members of the NCJ. Under the same amendments, judges who were already elected to the NCJ (and performed those functions) had to choose – they would be either Presidents (Vice-Presidents) of a court or members of the NCJ. It was probable that as a result of those provisions approximately 40% of members of the NCJ would resign and the composition of the NCJ would significantly change before the term in question ended. In the opinion of the Constitutional Court such solutions were disproportionate intrusions into the constitutionally shaped system of election to and the operation of the NCJ.[15] Any such measures, in order to be constitutional, would have to be introduced with effect from the next term of the NCJ. The case is significant, because it was one of the measures introduced by the Parliament which attempted to influence the composition of the NCJ within one term.

With respect to the powers of the NCJ regarding unification of the interpretation of law the Constitutional Court declared that granting the NCJ a power to "inspire and support actions aiming at the unification of the interpretation of law in the case-law of courts" would be an impermissible intrusion into the judicial activities of courts.[16] In particular, there are already certain institutions (such as the SC or the Supreme Administrative Court) the role of which is to ensure the unified interpretation of law. In the judgment of 15 January 2009, the Constitutional Court did not oppose the exercise by the MoJ of general administrative

[14] Judgment of the Constitutional Court of 18 February 2004, No. K 12/03, English summary of the judgment available at <http://www.trybunal.gov.pl/eng/summaries/documents/K_12_03_GB.pdf>.

[15] Judgment of the Constitutional Court of 18 July 2007, K 25/07.

[16] Judgment of the Constitutional Court of 16 April 2008, No. K 40/07.

supervision over the judiciary. [17] In the opinion of the Constitutional Court administrative supervision over the judiciary exercised by the MoJ is necessary in order to verify how the court structure operates. At the same time it is the task of the legislative body to create different safeguards against unnecessary encroachment of the MoJ on the judiciary. In particular, the supervision should never embrace the sphere which is reserved for the impartial judge, operating in an independent court. The MoJ has prepared the relevant amendments to the AOC, which provide for different additional guarantees of judicial independence. However, they have not hitherto come into force. The Constitutional Court also decided that the institution of reproaches (*wytyk*), issued by the MoJ should remain.[18] As long as they do not encroach upon the exercise of the judicial power, they are in compliance with the Constitution. It agreed with NCJ's challenge that the MoJ's power to appoint temporary Presidents of courts (in a situation when such Presidents were not appointed in a proper procedure) may endanger the relationship between the powers.[19] This is possible because there is no legal restriction as regards the maximum period during which one can serve as a temporary President of a court.

The institution of delegation of judges is widely used in Poland. For example a number of judges perform different administrative or conceptual tasks in the MoJ or work in the National School of the Judiciary and the Prosecutor's Office. Some judges are also delegated to adjudicate in courts of equal rank in other locations or in higher courts. The above power is exercised by the MoJ on the basis of Article 77 of the AOC. In a recent judgment, the Supreme Court had to decide whether the power to delegate judges to other courts is a personal power of the MoJ or may be delegated to vice-ministers.[20] In July 2007 one of the panels of the Supreme Court held that it is exception when the executive power interferes with administration of the judiciary and therefore

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[17] Judgment of the Constitutional Court of 15 January 2009, No. K 45/07. In the opinion of the Constitutional Court, it is obvious that the judiciary has to act in structures which are separated from other branches of power. It should have separate financial resources allowing for its operation, have an internal system of control and the legal ability to protect its prerogatives. It should also have the ability to voice its concerns to other branches of power in order to make the operation of the judiciary more effective.

[18] Judgment of the Constitutional Court of 15 January 2009, No. K 45/07.

[19] Id.

[20] Resolution of the Supreme Court of 17 July 2007, No. III CZP 81/07.

one should limit any possibility of abuse. Therefore, it should be for the MoJ alone to exercise this power. It should be emphasized that a judge's right to be delegated may never be exercised without the consent of a given judge. However, such interpretation caused fear that thousands of trials in Poland would have to be re-opened due to invalidity, as it was common practice for vice-ministers to sign delegations in the name of the MoJ.[21] The Supreme Court resolved this problem in plenary session deciding that such power could also be delegated to vice-ministers.[22]

The Constitutional Court does not in general oppose the practice of delegating judges to other courts.[23] It emphasizes that sometimes it may be necessary to strengthen certain courts so that they can perform their functions more effectively. As regards the delegation of judges to the MoJ (or other government-controlled institutions) the Constitutional Court stated that such practice may raise certain concern (especially if a significant number of judges is delegated). However, in its opinion one cannot claim that it is unconstitutional *per se*. At the same time however, the Constitutional Court quashed provisions allowing judges who are delegated to the governmental administration to perform further adjudicative functions in courts. Such practice was declared contrary to the principle of the separation of powers and was common among judges delegated to the MoJ. Currently, if a judge is e.g. delegated to the MoJ to perform certain functions, at the same time he/she cannot adjudicate on cases. The Constitutional Court also challenged the possibility of delegating judges without their consent. Such possibility existed under the regulations, although delegation without consent was limited in time. In the opinion of the Constitutional Court lack of consent means that any decision of the MoJ may be arbitrary, and thus it could be contrary to the principle of the separation of powers (since the organ of the executive power could impose its will on the independent judge).

Apart from judgments of the Constitutional Court, the division of powers between the NCJ and the MoJ is the subject of constant debate.

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[21] According to information provided by Gazeta Prawna in years 2003-2006, there were in total 4,590 delegations of judges to perform functions in other courts. Only a few of them were signed by the MoJ. M. Pionkowska, Sędziego może delegować także podsekretarz stanu, 19 November 2007, available at <http://samorzad.infor.pl/sektor/organizacja/ustroj_i_jednostki/artykuly/388048,sedziego_moze_delegowac_takze_podsekretarz_stanu.html>.

[22] Resolution of the Supreme Court, full panel, of 14 November 2007, No. BSA I - 4110 - 5/07.

[23] Judgment of 15 January 2009, No. K 45/07.

In the opinion of the NCJ, the administration of the judiciary should be subject to the supervision of the First President of the SC. In this context, representatives of the NCJ recall the years 2005-2007, when the Minister of Justice was a populist politician whose activities raised concerns as regards the proper exercise of the supervisory functions by the MoJ. Taking into account the above experience the NCJ is concerned that where a politician becomes the MoJ who does not respect the principles of the democratic state ruled by law and the independence of the judiciary, there is a threat to the judicial principle of independence. In the opinion of the NCJ such MoJ could use existing mechanisms to try to influence the activities of the judiciary. It would be safer, then, to give such supervisory competences to the First President of the SC.[24]

3. Budgetary Issues

Formally speaking, courts can act autonomously without the interference of the executive. However the budget for the courts is administered by the MoJ. This issue has been the subject of controversy for many years. The AOC provides for incomplete budgetary autonomy. There is a separate item on common courts in the state budget, which is untouchable. It may be increased or decreased only by way of legislative act. Furthermore, the money allocated to the judiciary cannot be transferred to some other tasks undertaken by the MoJ.

The judiciary also has certain influence in the budget drafting process. Eleven courts of appeal transmit the proposals of lower courts under their jurisdiction to the NCJ, which forwards the formal application to the MoJ. The MoJ weighs the proposal in light of the budgetary capacity of the state budget as a whole. Thus, the MoJ develops the final version of the budget proposal. The Ministry of Finance is obliged to accept the budget proposal of the MoJ without being able to change it. It

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[24] As is emphasized in the general information on the website of the NCJ, in 2006 the NCJ reacted decisively to every attack on the constitutional principle of judicial independence. In the Position of 8 February 2006 concerning threats to the independence of judges, the Council severely criticized activities of some members of the government, the MoJ in particular, for interfering with the authority of the administration of justice and infringing of judicial independence. The NCJ emphasized, not for the first time, that its actions relating to defending the independence of judges did not mean that it was against the criticism of court judgments: "It is acceptable and needed yet with maintaining proper standards, without insults and threats towards the judges."

can only make comments and review the budget in relation to the balancing of the whole state budget. In the implementation of the budget, it is the MoJ which is responsible for the realization of the budget for the judiciary, and not the Ministry of Finance. After submission to the Parliament, the NCJ is a partner in discussion regarding the budget proposal, without the MoJ acting as intermediary.

The current system, although it guarantees courts and the NCJ a certain level of influence on budgetary issues, is not totally clear and is quite complicated in practice. The division of powers between the NCJ and MOJ in projecting the budget in particular is not clear. Therefore, there are discussions pending about the creation of total financial autonomy for the courts. Such a solution was created for the Prosecutor's Authority, which on 31 March 2010 was separated from the MoJ. The creation of such a system would mean that it would be up to the NCJ to submit a financial plan for the judiciary to the *Sejm* (without the MoJ as intermediary).[25]

The Constitutional Court assessed regulations concerning financial control and audit, to be performed by the Ministry of Finance.[26] The Constitutional Court emphasized that this problem is especially sensitive, due to the division of powers between the executive and judicial branch. The principle of the independence of the judicial branch does not allow for examination by representatives of the executive branch of documents directly related to the exercise of the judicial power, such as documents on exemption from court fees or decisions on granting legal aid. Furthermore, for representatives of the Ministry of Finance to enter the organizational units of the judicial branch and to access documents and other materials, without any time or subject restrictions and without sufficient justification of the need for control, would be a threat to the so-called external appearance of the independence of the justice system. It could lead to the false conviction of citizens that government had an institutional impact on the way the justice system operates. Therefore, the relevant provisions were quashed by the Constitutional Court.

The Constitutional Court also dealt with the problem of the NCJ's budget.[27] Taking into account the special characteristic of the NCJ – an

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[25] Cf. Sądy chcą mieć autonomię budżetową (Courts want to have budget autonomy), Gazeta Prawna, 12 April 2010.

[26] Judgment of the Constitutional Court of 9 November 2005, No. Kp 2/05.

[27] Judgment of the Constitutional Court of 19 July 2005, No. K 28/04.

organ at the intersection of three branches of government – the Constitutional Court confirmed that the NCJ may not be treated as a part of the judicial branch. Therefore, there was no need for the NCJ to have the same guarantees of independence as the judiciary and that it came under the budget of the Chancellery of the President was in compliance with the Constitution. Nevertheless, since 1 January 2006 the NCJ has had a separate budget and is financed directly from the state budget, without any intermediaries.[28]

4. Internal Administration of Courts

Internal administration of the courts is carried out by their Presidents. They are accompanied by Vice-Presidents and judges presiding over courts departments. The judge presiding over the court department manages the operation of the department as regards the quality and effectiveness of the court's work.[29] The President manages the operation of the court and is responsible for the effectiveness of the court's work, personnel, security measures, adequate organization of work, and training or statistical reporting.[30] The President of a regional court additionally deals with the administration of and general administrative supervision over district courts except for matters passed to the President of the appeal court.

Polish courts may have executive directors (in regional courts and appeal courts) and financial managers (in district courts, however not all of them since it is not obligatory to appoint financial manager). They are appointed by the MoJ upon the motion of the Presidents of district, regional or appeal courts. The competences of directors in courts are not clear cut as regards co-operation (and potential conflict of competences) with Presidents of courts. Therefore, the MoJ in a recent proposal to amend the AOC decided to increase the competences of directors and to delineate the division of powers between them and Presidents. The tasks of directors would be entirely administrative in nature (including the supervision of support staff), while those of Presidents

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[28] By virtue of Article 231 Law of 30 June 2005 on the public finances (*Ustawa z dnia 30 czerwca 2005 r. o finansach publicznych*), Journal of Laws (*Dziennik Ustaw*) of 2005, No. 249, item 2104.

[29] § 57 Ordinance of the Minister of Justice of 23 February 2007 on Regulation of the internal operation of ordinary courts.

[30] Id., § 32.

would be of an adjudicatory nature (with special emphasis on the supervision of judges and others dealing with adjudication), e.g. controlling the effectiveness of work, the work-load of judges and the divisions of courts, securing the transfer of case-files to other courts in case of need, informing on selection of judges to deal with certain cases. It is not clear whether this proposal will enter into force. In the opinion of the NCJ the reform will lead to the loss by Presidents of courts of any control over court directors and managers. It may be dangerous to the independence of the judiciary. In the opinions of the authors, the threats raised by the NCJ are exaggerated. Depending upon the proper selection of court directors, they may bring a lot of help to the daily functioning of courts.

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

The system of selection and appointment of judges is one of the most discussed problems in Poland which is now undertaking a process of restructuring the current system. These are not just legal, but also intellectual, changes regarding the status of judges among legal professions. Basically, Poland is in the slow process of transforming a judicial career from the decentralized model towards the model of central training resulting in the appointment of young judges.

Judges are appointed by the President of Poland upon the motion of the NCJ, for an unlimited period of time.[31] The Constitution does not provide details as regards the appointment of judges. Rather it includes certain guarantees of judicial independence such as immunity or immovability from office. The AOC provides for three general avenues through which one could become a judge: by following judicial training and passing a judge's exam, by being a judge's assistant or court clerk (*referendarz sądowy*) for a certain period of time and then passing an exam, or by transfer from other legal professions, such as those of prosecutor, attorney, legal advisor or notary. In practice, however, the last avenue to becoming a judge is quite rarely used and is usually applicable to judges of higher courts.

Under Article 61 of the AOC there are the following preconditions to becoming a judge. Polish citizenship and full legal capacity are required,

[31] Article 179 Constitution.

as well as an immaculate character. The applicant must have graduated from the higher legal studies in Poland and obtained the title of *magister iuris* or graduated from foreign legal studies which are recognized in Poland. He or she must be capable from the health point of view to perform the duties of a judge and have the age of at least 29. Furthermore the candidate is required to have passed the judge's exam or prosecutor's exam; and have completed the judicial traineeship at the National School for the Judiciary and the Prosecutor's Authority or worked as a probationary prosecutor for at least three years before applying for the position of a judge. Furthermore, the following are entitled to be appointed to the position of district court judge: judges of administrative courts or martial courts;[32] prosecutors; legal scholars employed at universities or scientific institutions and holding the title of *doktor habilitowany* (which is a second academic degree, after a Ph.D.) in law sciences; attorneys, legal advisors or notaries with at least three years' experience; and advisors and other legal officers of the Office for Legal Representation of the State Treasury (*Prokuratoria Generalna*).[33]

There are additional requirements as regards appointment to higher courts. In general, more years of experience are required for one to be appointed to higher courts.[34] The appointment procedure of the abovementioned representatives of different legal professions is similar to that in the case of any other candidate for the position of judge. Finally, three categories of judicial personnel may apply for appointment as a judge of the district court. They include a judge's assistant (*asystent sędziego*), after six years of working in that position; a court clerk (*referendarz sądowy*) after five years of working in that position; and a probationary prosecutor (*asesor prokuratorski*) after three years of working in that position. With respect to these, there is also a requirement to finish professional training in one of legal professions and to pass the final exam (e.g. attorney's exam), before applying for the position of judge.

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[32] Poland has a separate structure of administrative and military courts. There are discussions on the abolition of military courts in Poland. However, total abolition would require a change to the Constitution, and therefore this reform is not seriously contemplated. Rather, there is a tendency to restrict the competences of the military courts.

[33] Article 61(2) AOC.

[34] For example, an attorney needs at least six years' experience (including at least three years directly before appointment as a judge) to become a judge of the regional court. As regards the courts of appeal it is eight years.

2. The Process of Judicial Selection

a) General Overview

Every person who meets the requirements for appointment as a judge may propose his/her candidacy for one announced vacant post to the President of the relevant regional court (or President of the appellate court if applying for a post in that court). Vacancies for judges are announced in the official gazette of the Polish state – *Dziennik Urzędowy Rzeczypospolitej Polskiej "Monitor Polski"* – so the information is available to every interested person.

The role of the President of the court is to assess whether all the formal requirements have been met by the candidate. If yes, the President of the court passes the application on to the college of the court (*kolegium sądu*)[35] with an assessment of the candidate's qualifications. The President of the court also determines the date for the general assembly of judges (*zgromadzenie ogólne sędziów*)[36] which will consider the candidacy. He/she has also to notify the Minister of Justice of every candidate for the position of a judge. Before the date of the general assembly of judges, the college of the court assesses a candidacy and gives an opinion. If there is more than one candidate, the general assembly of the judges assesses all candidates at the same meeting. The general assembly assesses candidates by voting and notifies the relevant opinion to the President of the court. The role of the President of the court is then to inform the NCJ, with the intermediation of the MoJ. The MoJ's role is to check whether a given candidate meets the criterion of immaculate character. That is assessed in co-operation with the Supreme Police Commander, within the specified legal procedure. Data are collected as regards any activities of the candidate which could be contrary to the legal order, contacts with criminal groups or groups of social pathology (e.g. prostitution, sexual deviations), as well as circumstances

35 The college of judges of a given court is a special organ dealing with the administration of the court. There are colleges of judges in regional courts (four to eight members) and in courts of appeal (three to five members). They are elected by the general assembly of judges of the relevant courts (organ of self-government) for a two-year term. The college's tasks include e.g. the division of tasks in the court and setting the principles for the division of cases among judges, giving opinions on candidates for judges, or the appointment or dismissal of presidents of courts departments, giving opinions on financial plans, consenting to the delegation of judges.

36 For information on the general assembly of the court see id.

indicating addiction to alcohol or drugs. However, such analysis is not made in a situation when a candidate already works in the office of the judge or prosecutor (and e.g. applies for a higher position).[37]

The Supreme Police Commander, on the basis of collected data, prepares information on the candidate for the MoJ. The MoJ has the responsibility to pass such information on to a relevant candidate. It also submits it, together with all other documents (application, opinions etc.), to the NCJ. The NCJ reviews all the candidates and recommends which are suitable for appointment to a given judicial post. The decision of the NCJ is made by resolution. Following this, the resolution is passed to the President, who has the constitutional power to appoint those recommended by the NCJ to the office of judge. The NCJ prepares separate resolutions on candidates it considered unsuitable and returns them to the MoJ. For a long time these resolutions did not require written justification[38] and the candidate was not entitled to appeal against them.[39] However, the law allowing for such practice was challenged in the Constitutional Court, which stated that the lack of a chance to appeal to the court against resolutions of the NCJ violates the constitutional right to a court.[40] Recommendations issued by the NCJ were considered to be in fact administrative decisions of an individual nature. According to the Constitutional Court they should be the subject of court review. The review should be of only a procedural nature (e.g. the proper counting of votes in proceedings before the NCJ, the taking into account of all the documents presented by the candidate). It is not the role of the reviewing court to replace the decision of the NCJ as to the merits and material assessment of the given candidate. As a result of this judgment, the Parliament has adopted changes to the AOC, according to which it is possible to appeal resolutions of the NCJ to the SC.[41]

The MoJ is entitled to submit a candidate for any judicial post of the common courts directly to the NCJ. In such a case the candidate is not

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37 Article 58 AOC.

38 Article 21(1) Decree of the President of the Republic of Poland on detailed mode of operation of the National Council of the Judiciary and proceedings before the Council.

39 Article 13(2) Act on the NCJ.

40 Judgment of the Constitutional Court of 27 May 2008, No. SK 57/06.

41 Article 13(2) Law on the NCJ. The relevant amendment was passed on 12 February 2009, Journal of Laws (*Dziennik Ustaw*), No. 54, item 440.

subject to election by the general assembly of judges.[42] Such procedure, in the opinion of the authors, does not endanger judicial independence. First, the power is still in the hands of the NCJ, which has the ultimate decision on any candidate. Second, in practice this procedure is used very rarely. The only pre-condition for such special nomination procedure is fulfilment of the general requirements concerning a given position of judge. It means that the MoJ may try to nominate current judges, prosecutors, members of other legal professions or scholars.

b) The National School for the Judiciary

The National School for the Judiciary and the Prosecutor's Authority (hereinafter "National School"),[43] following recent legal changes connected with the abolition of the institution of probationary judge is currently one of the paths to becoming a judge. The National School is controlled and managed by the MoJ (to resemble the French, Spanish and Portuguese models).[44] Under the Law on the National School[45] a centrally-administered school training future judges and prosecutors was created.[46] Training is organized in the following way. First, the law

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[42] Article 59 AOC.

[43] The proposal to create the National School was heavily criticized, foremost by institutions proposing other solutions. The following arguments were raised: the best law school graduates would prefer to choose prestigious and rich law firms over starting long apprenticeship without a clear chance of success. The MoJ's control over the National School and the curriculum as well as the joint training of future judges and prosecutors created a danger for judicial independence; graduates of the National School would not have sufficient experience in adjudicating cases, since their training would be mostly theoretical.

[44] Written justification of the draft law on the National School specifically referred to examples of schools in France, Spain and Portugal.

[45] Act of 23 January 2009 on the National School for Judiciary and Prosecutor's Office (*Ustawa z dnia 23 stycznia 2009 r. o Krajowej Szkole Sądownictwa i Prokuratury*), Journal of Laws (*Dziennik Ustaw*), No. 26, item 157.

[46] The Law on the National School also regulated the status of existing apprentice judges. It should be noted that the judgment of the Constitutional Court was issued when a significant number of apprentice judges were in their years of judicial practice. The Parliament could not omit this issue, as it would mean that following entry into force of the judgment those apprentice judges would lose the competence to adjudicate, and cases in their docket would have to be reheard. Furthermore, there were not enough judges to take over their responsibility. Finally, the principle of legitimate expectations should be taken

school graduate has to win the competition and be admitted for "general apprenticeship" which lasts for 12 months. Following the "general apprenticeship", the best applicants may start a "judicial apprenticeship" lasting 54 months.[47] Of this period, 30 months is training which ends with the judges' exam. For the next 24 months they are still associated with the School, but undertake training in local courts, being assistants to judges (*asystent sędziego*) or court clerks (*referendarz sądowy*). They do not, however, exercise a typical judicial function (like the challenged probationary judges). The role of court clerk is to issue court decisions in simple, technical or registry cases. The role of the judge's assistant is to assist and help a judge in performing his tasks. Only after the end of their judicial apprenticeship may they participate in competitions for new judicial appointments. We do not yet know what will be the outcome of activities and training organized by the National School and how many graduates of the School will become judges.

c) Access by Members of Other Legal Professions to the Office of a Judge – Theory vs. Practice

As was mentioned, members of other legal professions have a right under the relevant AOC provisions to apply for vacant judicial positions. In practice, however, it is very difficult for members of professions such as those of attorney, legal advisor or notary to become judges, even if they have high qualifications. There are two major reasons for this problem. Firstly, the practice of appointing judges after they were previously delegated to perform functions in a given court. The problem of the delegation of judges to adjudicate in higher courts before they were officially appointed as judges in higher courts was highlighted by the National Chamber of Control (*Najwyższa Izba Kontroli*, hereinafter

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into account with respect to apprentice judges and their prospects of a judicial career. Therefore, the Law on the National School shortened the periods of practice required from apprentice judges to be appointed as judges from four years to just one year. In this way, following the entry into force of the Law, the National Council of the Judiciary could start the process of recommendations of apprentice judges for positions as judges. In March, April and early May 2009, hundreds of apprentice judges were appointed by the President to be ordinary judges.

47 Some of them will start the prosecutor's apprenticeship.

"NIK")[48] in its 2001 report.[49] NIK also found that despite the possibility, the appointment of a person from another legal profession to exercise the functions of a judge takes place rarely and represents only a small percentage of all judicial appointments.[50] Secondly, the evaluation of candidates for judges *de facto* privileges those who are already in the judicial *environment* and are not outsiders like attorneys or legal advisors.[51]

aa) Delegation of Judges as a Method of Appointing them to Higher Courts

The practice of delegation of judges implies that judges of lower courts stay in that rank but adjudicate in higher courts. Delegated judges then have a better chance of being appointed to such courts. According to the amendments to the AOC proposed by the MoJ, the rules on delegation of judges should be changed. The MoJ claims that this practice (appointment to higher court only following a period of delegation to adjudicate in that court) is not acceptable. In the opinion of the MoJ such qualification procedure puts at a disadvantage those judges who would like to apply for positions in higher courts but have not had the opportunity of being delegated to such court. If the delegation is supposed to be a measure to check the competence of judges to adjudicate in higher courts, it should be of a general nature and not selective. This is not the case in Poland. Furthermore, the provisions of the AOC do not detail what conditions need to be fulfilled by the judge in order for

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48 The National Chamber of Control is a special constitutional organ which is tasked with controlling the activities of any branch of power. It is highly independent from any branches of power by virtue of the constitutional guarantees.

49 Information about the results of the check (control) of the performance of the supervision over administrative activity of the courts, Chief Board of Supervision – Department of Public Administration (document No. 150/2001/P00/003/DAE), Warsaw, December 2001, further related to as CBS '2001.

50 One should note, however, that there are cases when courts have problems with recruitment. For instance, the Appellate Court in Warsaw has had such a problem for several years – there were not enough judges willing to be delegated to this court. See *infra* B. II. 2. c) aa) Delegation of Judges as a Method to Appoint them to Higher Courts.

51 See *infra* B. II. 2. c) bb) Access to Judicial Offices by *Outsiders*.

him to be delegated to a higher court. In the opinion of the MoJ, delegation should be used only in exceptional situations (e.g. the strengthening of an overburdened court) and not as a general practice.[52]

Taking into account the need to increase the effectiveness of the justice system, the proposed amendments to the AOC also provide for modification of rules governing so-called horizontal delegation (to a court which is on the same jurisdictional level as the court to which the judge is assigned) as well as delegation to lower courts. Such decisions would be made by the President of the relevant court of appeal, upon the consent of the judge in question and the college of judges (*kolegium sądu*) sitting in a given court. Delegation can be made for an unlimited period of time, but no less than six months. The current practice is to delegate judges for only 30 days. In practice, this period is divided into individual days, and at the same time judges – for a period of several months – were hearing their cases in their courts of origin in the same way, but they merely added to this one or two days per week for adjudication in the court of delegation.

bb) Access to Judicial Office by *Outsiders*

As was mentioned, in practice it is difficult for representatives of other professions (attorneys, notaries, legal advisors) to be promoted as judges. An example of this problem is a recent case decided by the Supreme Court. On 10 June 2009, it decided the case of an attorney with long professional experience who challenged the current practice of restricting the approach to judicial appointments for members of other legal professions.[53] The attorney submitted her application for the position of judge at the Regional Court in Gdansk. In total there were ten candidates (nine of them judges of district courts) for the advertised nine posts. The attorney received a positive opinion from the MoJ. However, she did not receive the recommendation of the majority of judges present at the general assembly of representatives of judges of

[52] Proposal to change the rules on delegation are part of the broader package of reforms to the AoC, proposed by the MoJ, announced on 12 May 2009. Draft law and justification to the law are available at <http://www.ms.gov.pl/aktual/usp_projekt.pdf>; <http://www.ms.gov.pl/aktual/usp_projekt_uzasad.pdf>.

[53] Judgment of the Supreme Court of 10 June 2009, No. III KRS 9/08.

the Gdansk circuit.[54] Later, the NCJ decided not to recommend her to the President for appointment. In her appeal to the SC she claimed that there are no statutory criteria allowing her professional qualifications to be comprehensively assessed in a competition for the position of judge. Furthermore, she indicated numerous procedural mistakes committed by the NCJ when evaluating her candidacy. She indicated that lack of sufficient support for her was a result of the solidarity of members of the judicial community with other judges, and thus the exclusion of members of other legal professions (such as attorneys and legal advisors) from the possibility of successfully applying for judicial positions. She claimed also that her longstanding experience as a judge (she was a district court judge before becoming an attorney) as well as the positive opinion of the judge-evaluator (who assessed her performance as an attorney) were not taken into account.

The SC as a result of review of her appeal found a gross violation of law by the NCJ and remanded the case for re-examination. The SC indicated different procedural mistakes committed at the voting on her application. What is most important, the SC suggested that the NCJ should not limit the number of recommendations of candidates for judges submitted to the President for appointment to the number of free judicial positions. In an *obiter dictum* the SC suggested that it would be rational for the NCJ to offer more candidates and to leave the President with a decision in this matter in order to select the best candidates.

In the opinion of the authors the above opinion of the SC is quite alarming, because in another case the President refused to appoint judges despite the recommendation of the NCJ. Then it was claimed that such a move by the President was a threat to judicial independence, as the decision of the President was discretionary and unreasoned. Thus, following a path suggested by the SC would in fact mean agreeing to give the President a power which he does not have under the Constitution – power to select judges. As a result of the remand the case was reviewed by the NCJ and the attorney was finally appointed as a judge. Nevertheless, the case may be regarded as confirmation of existing practice, which heavily restricts access to the judicial profession for members of other legal professions. Second, it shows the need for amendment of procedures and the creation of a transparent system of recommendations by the NCJ. The creation of such a system is now

[54] Specifically the name of this organ of self government was *Zgromadzenie Ogólne Przedstawicieli Okręgu Sądu Okręgowego w Gdańsku*.

subject to consideration by the MoJ.[55] As of the date of this chapter, the proposed amendments to the AOC are still subject to discussion.

The MoJ proposes to introduce criteria for the assessment of all candidates for judges. It is supposed that the new criteria will have a special impact on candidates coming from other than judicial legal professions. Furthermore, mechanism of selection will be modified. In the draft law the MoJ emphasized that change in the law is caused by the Constitutional Court which declared that the NCJ should have criteria in order effectively and objectively to assess candidates for judges.[56] According to the Constitutional Court neither the AOC nor the Law on the NCJ provided criteria for the assessment of candidates and the only method of selection is provided in resolutions of the NCJ. Such practice does not comply with the constitutional requirement that any matters of crucial importance for the protection of rights and freedoms should be regulated by the statutory act. As a consequence, draft amendments to the AOC provide for detailed criteria of evaluation of judges and candidates for such posts. They are shaped in such manner as to allow adequate comparison of the qualifications of different legal professionals.[57]

Second, the suggested amendments to the AOC provide for the establishment of the Competition Commission, which would be composed of judges of different courts, but also of representatives of other legal professions and academia – in order to provide for a representation of different stakeholders, not just the judicial community.[58] Its role would be to make the preliminary ranking of candidates for a given judicial position, in accordance with the evaluation of their qualifications and

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[55] On 12 May 2009 the MoJ announced the reform of the AOC. The draft law and justification for the law are available at <http://www.ms.gov.pl/aktual/usp_projekt.pdf> and <http://www.ms.gov.pl/aktual/usp_projekt_uzasad.pdf>.

[56] Judgment of the Constitutional Court of 29 November 2007, No. SK 43/06.

[57] Criteria include professional experience, recommendations, publication, periodical assessments of performance, and disciplinary penalties. The assessment should be made taking into account the specific character of the work performed by the candidate (e.g. quality of legal publication with respect to scholars, quality of legal interventions, court letters etc. with respect to attorneys).

[58] Members of the Competition Commission would be elected by their respective representative organs, e.g. judges by organs of self-government, attorneys by the National Bar Association, prosecutors by the Prosecutor General etc.

other criteria specified in the AOC. Simply, the Competition Commission would evaluate candidates on the basis of all collected documents and opinions, including opinions by the college of the court or the general assembly of judges. Such list with candidates would be then a kind of supplementary material for the NCJ when selecting candidates for judicial positions. The NCJ would not be obliged to comply with the ranking. However, if it decided to deviate from it, it would have to provide additional justification for such a decision.

This proposal was strongly criticized by the NCJ (which in general is opposed to the newest amendments to the AOC proposed by the MoJ). In the opinion of the NCJ the establishment of the Competition Commission would be an encroachment upon the constitutional and statutory powers of the NCJ, as the NCJ would no longer have a real right to propose candidates for judges to the President. The role of the NCJ under this new procedure would be limited to that of a "postman" of the list of candidates for judges compiled by the Competition Commission for the President. The NCJ claims that such shift of power is unconstitutional. It is not certain whether the MoJ will proceed with plans to create the Competition Commission. If it happens, the NCJ will certainly try to challenge the law before the Constitutional Court.[59] In the opinion of the authors, the idea of the Competition Commission is not well thought through. It could work, but only if such Commission were to fit into the structure of the NCJ. Certainly, there is a need to establish clear criteria for judicial appointments, as the current system is not transparent.

The potential resignation by the MoJ from plans to create the Competition Commission does not solve the problem of the implementation of the Constitutional Court's judgment (SK 43/06). The NCJ should have criteria and a procedure for evaluating candidates, clearly established by statute, and regulating in a transparent way access to the judicial profession. It seems that the idea of the Competition Commission could work, but such body should be situated strictly within the NCJ (as an advisory body or panel to the whole NCJ) and not outside it. One should also consider the participation in such a body of representatives

[59] It should be noted that by virtue of Article 191(1) point 2 in connection with Article 186(2) of the Polish Constitution, the NCJ has a power to challenge any laws within the scope of the independence of courts and the impartiality of judges.

of other legal professions (such as attorneys, legal advisors, notaries, or prosecutors) as observers, without a right to vote.[60]

However, even if the NCJ will be better equipped to assess candidates from other professions for judicial positions, there is still a problem of getting positive recommendations from self-governmental bodies of the judiciary (e.g. the general assembly of judges). Practice shows that such bodies may be reluctant equally to assess candidates from a judicial *environment* and members of other legal professions (outsiders). At the same time such opinions play an important role in the later assessment of the candidate by the NCJ.[61]

d) Exercise by the President of the Power to Appoint Judges

Over the years there have been no special concerns as regards the exercise of the power of appointment of judges by the President of Poland. However, following the election of Lech Kaczynski in 2005 as the President of Poland one could identify two major changes in the policy. First, the President considered motions for appointment submitted by the NCJ for extremely long periods of time. It was claimed that the *freezing* of these motions could have an impact on the performance of particular judges and their independence. Because of that, the AOC was amended in 2009[62] to provide that the President has 30 days from the submission of a motion by the NCJ in which to make a final decision as regards the candidate.[63] Second, the President in September 2007 made an unprecedented decision not to appoint five candidates to the position of judges of district courts, and not to appoint four judges of dis-

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[60] Cf. A. Bodnar, Otwarcie zawodu sędziego na tle wyroku SN z 19.6.2009 r., III KRS 9/08 (Opening of Judicial Profession in the Light of Judgment of the Supreme Court of 19 June 2009, No. III KRS 9/08), in: J. Ignaczewski (ed.), Perspektywy wymiaru sprawiedliwości (Perspectives of the Judicial System), Special additional issue to Monitor Prawniczy No. 3/2010, 26-29, available at <http://www.hfhrpol.waw.pl/precedens/images/stories/file/dodatek_do_MoP_3_2010.pdf>.

[61] Id.

[62] Article 60 Law on the National School of the Judiciary and Prosecutor's Authority, which amended Article 55(2) AOC, passed on 23 January 2009, Journal of Laws (*Dziennik Ustaw*), No. 26, item 157.

[63] This law is currently binding, but was subject to the constitutional challenge by the President to the Constitutional Court. Case No. K 18/09. The case is still pending.

trict courts as judges of regional courts. As far as all the candidates were concerned the process of judicial appointment had been made in accordance with the law. The candidates fulfilled all preconditions required for the relevant positions. In particular they had obtained a positive opinion from the NCJ. The refusal to appoint was made without justification.[64] Neither public opinion nor the candidates had any knowledge of the grounds for refusal. There is no clear regulation on whether the President should justify his discretionary decisions. The refusal raised concerns by the judiciary in Poland and by NGOs because the President used his competence for the first time to block the appointment process.[65] Previously there had been only one situation in which the President of Poland decided not to appoint to a judicial position. But in this case, according to information provided in discussions with the NCJ, the President of Poland only returned the relevant files of the candidate and asked for clarifications. Therefore, the current use of this competence may be regarded as a breach of the established constitutional tradition in Poland. It may be also interpreted as a problem resulting from the lack of transparent, precise and detailed regulations on judicial appointments. Furthermore, the refusal to appoint could be read as a signal to polish judges and candidates that their professional careers may depend upon the political process and executive power. It may have a chilling effect on the judiciary. The process of judicial appointments is crucial to the independence of the judiciary and should not depend upon political influences.[66]

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[64] The Helsinki Foundation for Human Rights, which supported the legal representation of those not appointed as judges by the President, requested information on the official reasons for the President's decision, but was refused. Also the candidates did not receive such information.

[65] For example, the statement by the Secretary General of the International Commission of Jurists on 25 October 2007, Helsińska Fundacja Praw Człowieka, available at <http://www.hfhr.org.pl/precedens/aktualnosci/oswiadczenie-miedzynarodowej-komisji-prawnikow.html>.

[66] The judicial candidates who were not appointed by the President, with the support of the Helsinki Foundation for Human Rights, started litigation, seeking judicial review of the President's decision. *Inter alia* they submitted constitutional complaints to the Constitutional Court claiming that refusal to appoint judges without giving any justification threatens the principle of independence of the judiciary and the separation of powers. Furthermore, lack of justification of a discretionary decision by the President is contrary to the rule of law principle. For the moment, the constitutional complaints are registered in the Constitutional Court. Importantly, at the beginning of June 2009 the Pol-

The President of Poland's refusal to appoint judges was a subject of concern to the Consultative Council of European Judges (CCJE) of the Council of Europe. In its declaration adopted on 24 November 2008, the CCJE, analysing the above-mentioned decision of the Polish President, referred to its opinions and emphasized inter alia that "while it is widely accepted that appointment [...] can be made by an official act of the Head of State, yet given the importance of judges in the society [...], Heads of State must be bound by the proposal from the Council of the Judiciary".[67] Also, the International Bar Association (IBA) and the Council of the Bars and Law Societies of Europe (CCBE) in 2007 and 2008 reports both emphasized that there is a need to explain this decision thoroughly and that it raises serious implications as regards judicial independence.[68]

The matter of the unappointed judges was referred to the Constitutional Court by the First President of the SC, claiming that there is a conflict of competences between the NCJ and the President as regards the assessment of judicial candidates. The Constitutional Court decided to discontinue proceedings in this case.[69] The Constitutional Court said that this conflict was of a hypothetical nature, as it was impossible to find out what kind of criteria were used by the President when he refused to appoint judges and whether the exercise of his prerogatives by the President was in conflict with the competences of the NCJ.

In the opinions of the authors, the decision of the Constitutional Court is not convincing. It seems that the Court did not want to give a decision in this case, as it would be the first case on conflict of competences. Most probably, the Court did not want to create a new line of jurisprudence on the basis of a case which was not a typical conflict of competences case, but involved many other problems and issues. As long as this case is not fully explained, the President will still retain a power to give decisions on judicial appointments which are not justified and not

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ish Ombudsman declared that he supported the constitutional complaints and constitutional argumentation used by complainants.

67 Declaration of the CCJE, Helsińska Fundacja Praw Człowieka, available at <http://www.hfhr.org.pl/precedens/images/stories/Pdfy/deklaracja.pdf>.

68 IBA and CCBE, Report Justice under Siege of 2007 and Follow up report of 2008 to Justice under Siege: a report on the rule of law in Poland, available at <http://www.ccbe.org/fileadmin/user_upload/NTCdocument/11_2007_Nov06_Report1_1194344860.pdf>, and <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DF75F80F-A773-410C-A6A8-661F6612D0CC>.

69 Decision of the Constitutional Court of 23 June 2008, No. Kpt 1/08.

transparent. The case of the unappointed judges is still the subject of individual litigation. Currently, the constitutional complaints of those judges are awaiting review by the Constitutional Court.

3. Length of Office and Reappointment

In Poland, judges are appointed for life.[70] This is one of the basic guarantees of their independence. Accordingly there is no system of judicial re-appointment. It is possible for a judge to resign from the profession in order to become an attorney, prosecutor, notary or legal advisor. If such persons then decide to return to the judicial profession they will have to go through the system of judicial appointment once again. Nevertheless, a period of working as a judge may have a certain impact on the assessment of a person's candidacy for the position of a judge. It means that a person returning to judicial office would most probably have better chances to win a competition (provided that previous resignation was not caused by a poor standard of work) than *outsider* candidates. In recent years we have observed an out-flow of judges to other legal professions. The main reasons were salaries, but also dissatisfaction with the general functioning of the justice system or the lack of a clear and objective practice of promotion to higher courts.

4. Training of Future Judges

Training of future judges is currently undertaken (since 2009) within the framework of the National School. The detailed programme of the National School is the subject of legal regulation. It puts more emphasis on training different skills than the training previously organized for judicial candidates. For example, the programme includes such practical training as mock trials. Currently there is only a programme for so-called *general apprenticeship*, as the first group of apprentices started in the autumn of 2009. There is as yet no regulation detailing the programme for the second stage of *apprenticeship* (when candidates assist in courts, but also have specific judicial training).

There are also different educational programmes organized for judges, mainly thanks to EU funds.[71] The National School is responsible for

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[70] Article 179 Constitution.

[71] Programmes are addressed mostly to ordinary judges and address issues of material or procedural law relevant for a judge's specialization as well as

the coordination of those programmes. In addition there are specific programmes organized for judges by NGOs.[72] The Centre for Information of the Council of Europe is also organizing seminars for judges on standards under the European Convention on Human Rights. Within those educational programmes, judges have an opportunity to make a site visit to the European Court of Human Rights. Seminars are highly appreciated by judges.[73]

5. Regulations Concerning Minority or Gender Representation

There are no special regulations concerning minority or gender representation. However, one should note that there is a constitutional right of equal access by all Polish citizens to public service.[74] In fact, it is commonly claimed that the profession of judge is highly feminized and that currently there are more women than men as judges. The recent study prepared by Foundation Feminoteka shows that there are significantly more women working as judges, Vice-Presidents and Presidents of courts than men. This is especially visible in lower courts. However, men prevail in higher courts, especially in the SC and the Constitu-

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training on contacts with the media, auto-presentation, psychological training etc.

[72] It is worth mentioning just a few examples: "Courts and Constitution" for judges together with advocates in all appellate circuits, co-organized by "Iustitia", Polish of the ICJ and National Bar Council; "A Journalist in Court" – series of seminars for journalists and judges on the media – judicial collaboration (Iustitia, Stefan Batory Foundation, Helsinki Foundation for Human Rights); many other seminars organized by Iustitia on: mediation, culture and communication in court, Structural reform of the judicial system, many seminars organized by local branches of Iustitia including five seminars in Poznań on "Courts and Judges in the Face of Challenges of the European Integration"; series of seminars for judges on judicial culture, psychology of the courtroom and "stress management", legal reasoning and methods of interpretation, constitutional and international standards in daily judicial practice, language of the courtroom etc. (Helsinki Foundation for Human Rights).

[73] See for example press release on the 18th edition of series of seminars "Application of the ECHR in the domestic legal system", Council of Europe, available at <http://www.coe.org.pl/pl/biuro_informacji_rady_europy/aktualnosci?more=1343274962>.

[74] Article 60 Constitution.

tional Court.[75] Article 32(2) of the Constitution prohibits discrimination for any reason. It means that one may not be discriminated against in access to the judicial profession by reason of race or ethnic origin, disability, sex, sexual orientation etc. In addition Poland is bound by EU anti-discrimination laws which prohibit discrimination due to sex, race or ethnic origin, religion, age, disability and sexual orientation.[76]

6. Latest Developments Regarding the Process of Judicial Appointments – Resolution of the Problem of Probationary Judges

The current system of judicial appointments is still in the process of formation and it is not certain how it will finally stabilize in the future. Major changes in this area were caused by the judgment of the Constitutional Court concerning probationary judges. Until 2009 the most frequently used way to the profession of judge was judicial training, which consisted of two stages – judicial traineeship (*aplikacja sądowa*) and judicial apprenticeship (*asesura sądowa*). There were in general basic steps to be followed in order to become a judge: graduation from the law school, judicial training (*aplikacja sądowa*) lasting for three years, the passing of the judges' exam, practising for at least three years (but up to four years) as a probationary judge[77] (*asesor sądowy*) in a court, and being at least 29 years old.[78] In practice this avenue was used by graduates fresh from law school. Usually they did not practise any other profession before starting the judicial traineeship (*aplikacja*). The candidate for judicial traineeship had to take an examination organized

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[75] See B. Gessel-Kalinowska vel Kalisz, Czy Temida też była kobietą? (Was Temida also a woman?), available at <http://lex.pl/?cmd=artykul,3055>.

[76] E.g. Directive 2000/43/EC, Directive 2000/78/EC, Directive 2006/54/EC.

[77] The institution of probationary judge originates from the law on the structure of the judiciary of 1928. This institution referred in fact to provisions which were binding in the former Prussia, and on the other hand to secretaries of council (*sekretarz rady*) and court adjuncts (*adiunkt sądowy*) acting in the former Austrian territory. After the Second World War this institution was retained. See: T. Ereciński, J. Gudowski, J. Iwulski, Komentarz do prawa o ustroju sądów powszechnych i ustawy o Krajowej Radzie Sądownictwa (Wydawnictwo Prawnicze LexisNexis), 393, at 394 (2002).

[78] This is a basic overview of the system of judicial appointments, and of course there were many modalities with respect to members of other legal professions, assistants to judges (*asystenci sędziów*) or court clerks/referendaries (*referendarze sądowi*).

by the President of the court of appeal.[79] After the candidate passed the exam, the board of the regional court gave an opinion on him as a probationary judge as well as consent to burden him/her with a judge's duties. One could be a probationary judge for up to four years. The aim was to evaluate the potential judicial candidate. In this period probationary judges had certain guarantees of independence and impartiality. Nevertheless, they were still subject to assessment, since depending on performance, they could get a positive recommendation from the NCJ or not, and they were not yet appointed for life. The probationary judge had the power to adjudicate on cases.[80] In practice, the role of probationary judges was not only to assist judges or be trained, but to act as regular judges and adjudicate on cases in district courts.[81]

As a result of this process, nearly one quarter of the whole judicial personnel in district courts was made up of probationary judges acting as *de facto* judges.[82] In some courts probationary judges constituted even the majority of judicial personnel.[83] At the same time they did not have sufficient guarantees of their impartiality and independence, as they were officially subordinated to the Minister of Justice, and their legal guarantees stemmed from the AOC and not the Constitution. Furthermore, probationary judges were criticized for lacking sufficient independence, professionalism and life experience. The problem remained unaddressed for a long time due to potential disastrous consequences for the justice system and financial advantages resulting from proba-

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[79] The apprenticeship was regulated by the Ordinance of the Minister of Justice of 25 June 1998 on judicial and public prosecution apprentices (amended).

[80] Article 135 AOC stated that "Minister of Justice may, upon the consent of the college of the regional court, entrust the apprentice judge (*asesor sądowy*) exercise of judicial functions in a district court, for a limited period of time, not exceeding four years."

[81] There were two major reasons for this. First, due to low salaries judges wanted to be promoted to higher courts. However, promotion resulted in fewer judges adjudicating on cases in lower courts. This area was steadily supplemented by apprentice judges. And, second, the exercise of judicial power by apprentice judges was cheaper, as they earned much less than ordinary judges.

[82] As of 2 September 2006, there were 5,237 ordinary judges in district courts and 1,637 apprentice judges, who constituted 23.81% of the judicial adjudicating personnel.

[83] The authors know of a situation where an apprentice judge was the head of the Civil Law Division in the court.

tionary judges working *de facto* as regular judges. Nevertheless, in 2005 the institution of probationary judges started to be questioned in legal literature[84] and then by the litigation of strategic cases before the Constitutional Court.[85] The problem of the status of probationary judges was mentioned in a special report prepared by the International Bar Association's Human Rights Institute (IBAHRI) and the Council of Bars and Law Societies of Europe (CCBE) concerning the threats to the judiciary in Poland,[86] as well as in a report by the Council of Europe Commissioner for Human Rights, who stated that he "was informed by a number of lawyers and judges during his visit that 'probationary judges' (*asesorzy*) were being assigned cases which were beyond their experience and competence. Probationary judges are young trainee judges who were being called to adjudicate complex cases and make difficult decisions, for example, concerning pre-trial detention."[87]

The Constitutional Court decided to abolish the institution of probationary judges.[88] It declared that the status of probationary judges did

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[84] Adam Bodnar and Andrzej Rzepliński raised concerns regarding the case of criminal charges of paedophilia against Andrzej S., a famous sexologist. It appeared that the case was going to be adjudicated on by a 30-year old apprentice judge in the District Court of Warsaw-Mokotów. Cf. A. Bodnar/A. Rzepliński, Czy asesor powinien orzekać w głośnej sprawie Andrzeja S.?, Rzeczpospolita of 14 July 2005.

[85] Constitutional complaints submitted to the Constitutional Court by AD Drągowski S.A. and by Józef W. Both of them were reviewed jointly under the number SK 7/06.

[86] IBAHRI-CCBE, Justice under Siege: a report on the rule of law in Poland, November 2007, at 28. The IBAHRI and CCBE delegation noted that members of the legal community in Poland are opposed to assessors on the grounds that they are appointed by the Minister of Justice and are therefore considered "political" and "dependent", thereby jeopardizing the independence of the judiciary. However, the IBAHRI and CCBE expressed concern about the implications of the legislation, which appears to bestow judicial powers on persons not suitably qualified for judicial office.

[87] Memorandum to the Polish Government. Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, Strasbourg, 20 June 2007, CommDH (2007) 13, 10.

[88] Judgment of the Constitutional Court of 24 October 2007, No. SK 7/06. The English summary of the judgment, Helsińska Fundacja Praw Człowieka, available at <http://www.hfhrpol.waw.pl/precedens/images/stories/sk7_06_gb_final_2.pdf>.

not guarantee its entire independence from the executive. This institution was therefore not compatible with Article 45 of the Polish Constitution guaranteeing a fair trial before a "competent, impartial and independent court", because probationary judges did not enjoy the guarantees of stability similar to regular judges. The regulation of the status of probationary judge did not provide the minimum and maximum terms of their employment and the exercise of judicial power.[89] Probationary judges may have been recalled during their judicial training. In the Court's opinion, recalling a probationary judge may have been compatible with the constitutional principles if the recalling conditions had been the same as for regular judges. What is more, the provisions of the AOC did not list the specific circumstances which justified such recalling. Moreover, the decision on dismissal of a probationary judge was taken by the MoJ, not by an independent court. The Constitutional Court concluded that, under such regulations, there were insufficient guarantees preventing the recall of probationary judges because of their judicial activity. The exercise of judicial power by people without strong guarantees of independence threatened the public trust in the administration of justice. The Court claimed that citizens who take part in judicial proceedings should perceive these proceedings as compatible with the fair trial requirements. The exercise of judicial power by probationary judges who did not enjoy guarantees of independence and stability similar to those of judges provoked speculation and suspicion undermining the courts' authority and the legitimacy of their judgments. From this point of view, the current status of probationary judges had a harmful influence on citizens' approach to the administration of justice.

On 9 May 2009, the judgment of the Constitutional Court came into force and the institution ceased to exist. By this time, there was a wide discussion on the model of judicial appointments in Poland and the

[89] In this context, the Constitutional Court referred to the ECtHR's judgments in the cases of *Benthem* v. *The Netherlands*, Judgment of 23 October 1985, Series A, No. 097; *Campbell and Fell* v. *United Kingdom*, Judgment of 28 June 1984, Series A, No. 080 and *Sramek* v. *Austria*, Judgment of 22 October 1984, Series A, No. 084. The judgment of the Constitutional Court concerning probationary judges and its rationale was generally supported by the European Court of Human Rights in *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, Decision of 30 November 2010, available at <http://hudoc.echr.coe.int/hudoc/>.

Parliament managed to pass a new law on the National School for the Judiciary and Prosecutor's Office (discussed above).[90]

III. Tenure and Promotion

1. Tenure

According to Article 179 of the Constitution judges are appointed for life. The AOC as well as the Constitution provides specific guarantees protecting judges against unfair deprivation of the office, suspension, or delegation to other posts. Such decisions which could be against the will of a given judge may be made only by the court and only in cases specified by law.[91] Before 9 May 2009 the tenure of a judge was preceded by a period as so-called probationary judge.[92] In our opinion the current system of judicial appointments is not sufficiently transparent for external viewers. In the opinion of the authors it is also not fully transparent to candidates. There are some allegations that some promotions depend on personal connections and good relationships with Presidents of the courts. However, such view is difficult to prove and is based on subjective views.

2. Promotion Requirements

In general the system of professional promotion of judges is complicated and not fully transparent. The following issues which are intertwined need to be discussed here: promotion to hold administrative positions in a given court (President and Vice-President of division of the given court, President of the court, visiting judge, or spokesman of the court); horizontal promotion (promotion to higher court judge due to seniority or experience, but still working in the same court); delegation to a higher court to perform judicial functions; and vertical promotion – promotion to a higher court. The system of promotion is intertwined, because very often in order to be promoted to a higher court, a judge

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[90] Law on the National School of the Judiciary and Prosecutor's Authority of 23 January 2009, Journal of Laws (*Dziennik Ustaw*) No. 26, item 157.

[91] Article 180(2) Constitution.

[92] See the debate and developments described *supra* at B. II. Selection, Appointment and Reappointment of Judges.

must perform certain administrative functions (or be delegated to adjudicate in a higher court).[93]

The system of promotion is generally criticized, as it creates a bureaucratic structure. Its indirect effect is the constant effort of judges to be promoted to higher instances, as it is one of the very few possibilities to get higher remuneration. Because of this fact, the Vice-Minister of Justice Janusz Niemcewicz in 2000 proposed a law reforming the AOC which aimed at replacing the current three ranks of judge (judges of district courts, regional courts and appeal courts) with one rank – judge of common courts (*sędzia sądu powszechnego*). However, this legislative change was blocked and did not come into force.[94] It seems that one of the methods of reforming the justice system in Poland is to decide whether a model of judicial career should be based on stability of the office (i.e. a judge may for his whole life be a judge of a first instance court and there are methods other than promotion to award him and motivate him to work) or on continuous promotion (as it is now). One of the major problems with the promotion system in Poland is that it depends on the wish of the judge to be promoted. Accordingly, there is not a system of indication of judges who should be promoted. Quite otherwise – a judge wishing for promotion has to apply for it.

The decision on promotion to administrative functions is made by a President of a given court. In fact, however, he/she has to obtain an opinion of the college of the given court, which has a crucial meaning in the process of appointment. With respect to the highest judicial administrative positions (Presidents and Vice-Presidents of courts) the MoJ takes the decision, but the appointment requires favourable decisions by the general assembly of judges.[95]

3. Criteria and Assessment

The major problem is lack of specifically prescribed criteria for professional promotion of judges, except for appointment to higher courts (when it is the role of the NCJ to assess the candidate). In consequence,

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[93] See the comments on delegation *supra* at B. II. Selection, Appointment and Reappointment of Judges.

[94] See comments by Janusz Niemcewicz during a conference organized on 12 May 2010 by the Helsinki Foundation for Human Rights and Forum for Civic Development, entitled "Perspectives of Justice System in Poland".

[95] See comments *supra* A. Executive Summary.

a lot depends on the organs of judicial self-government (general assembly of judges) or the colleges of given courts. Obviously, such criteria as professional performance, disciplinary proceedings, overall assessment of the work (on the basis of the work of visiting judges) or statistics regarding adjudicated cases are taken into account. However, the decision to appoint to certain administrative position is made by secret ballot and is not preceded by a complex evaluation of the candidate on the basis of clearly specified conditions.

4. Transparency of the Process

The process of judicial promotion to higher instances or administrative posts is not sufficiently transparent. Because of this fact, recently the MoJ proposed the introduction of so-called periodic assessments.[96] Periodic assessments were to be made with respect to all judges, and would be one of the means of assessing the performance of the judge for the purposes of future promotion. However, the idea of introducing periodic assessments provoked radical reaction on the part of judges, as a threat to their independence, as well as an unnecessary burden on the judiciary (need to create a new system of assessment and to delegate judges to deal with it). It seems that the MoJ will not support the idea any longer due to judicial protest. In exchange the regular system of visiting judges assessing the work of colleagues is proposed.[97]

5. Horizontal Promotion

"Horizontal promotion" (*awans poziomy*) of judges was introduced by the Law of 29 June 2007 amending the AOC.[98] It provided a possibility for judges with at least 15 years' experience to obtain professional promotion (and higher remuneration) and at the same time not to change

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[96] Proposed amendments were announced on 12 May 2009. Draft law and justification to the law, Ministerstwo Sprawiedliwości available at <http://www.ms.gov.pl/aktual/usp_projekt.pdf>; <http://www.ms.gov.pl/aktual/usp_projekt_uzasad.pdf>.

[97] See e.g. K. Sobczak, *Minister wycofuje się z ocen sędziów*, Lex, available at <http://lex.pl/?cmd=artykul,5018,title,minister-wycofuje-sie-z-ocen-sedziow>.

[98] Law of 29 June 2007 amending the AOC (*Ustawa z dnia 29 czerwca 2007 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw*), Journal of Laws (*Dziennik Ustaw*) of 2007, No. 136, item 959.

their place of work (the court in which judge was employed). As a consequence, judges in district courts could be horizontally promoted to be "regional court judges in the district court". Consequently judges in the regional courts could be promoted to be "appeal court judges in the regional court". As a consequence of such horizontal promotion, judges were entitled to the remuneration of judges of regional courts or appeal courts, but they could perform their services in the same place as they did before the promotion.

Before the entry into force of the Law of 29 June 2007 on 1 July 2008 the government changed. The new MoJ did not want to pursue a policy of introducing promotions to *de facto* non-existent positions. Therefore, the MoJ proposed the abolition of horizontal promotion and the introduction of the three grades of financial promotion. For this purpose the law abolishing horizontal promotion has been prepared and passed by the Parliament using the fast track procedure. On 25 June 2008 the Parliament adopted the law abolishing horizontal promotion. However, the Parliament did not manage to pass the law before the entry into force of the Law of 29 June 2007, i.e. 1 July 2008. Therefore, it opened a time window for judges to apply for horizontal promotion. The President opposed the abolition of horizontal promotion and therefore started awarding such promotions, following the entry into force of the Law of 29 June 2007, upon relevant motions of the NCJ. He also vetoed the law abolishing horizontal promotion, however, this was revoked by the Parliament on 19 December 2008 and horizontal promotion was effectively abolished as of 22 January 2009.

The abolition of horizontal promotion and the method of introducing such changes were criticized by many institutions, including the Polish Judges' Association *Iustitia*[99] and the President of Poland. The latter decided in February 2010 to submit a motion to the Constitutional Court challenging the decision of the Parliament to abolish horizontal promotion.[100] Most probably, the President of Poland was interested in supporting horizontal promotion, because first, a relevant law was passed when the Law and Justice party was still at power (and this was the party generally favoured by the President), and second, it was a method of building support among judges, as horizontal promotion

[99] There were many statements concerning this issue made by the Polish Judges' Association *Iustitia*. See e.g. position of 1 March 2009, available at <http://www.iustitia.pl/content/view/425/74/>.

[100] The motion of the President of Poland to the Constitutional Court is registered as K 7/10.

meant increase in remuneration. It was claimed that in fact horizontal promotion is the only method of rewarding judges with long service working in small towns, not having a chance of promotion to higher courts. The MoJ responded that the system of financial promotion should be based on length of service, but should not be connected with the creation of artificial positions.

IV. Remuneration

1. Remuneration

An essential change in the way in which judges' salaries are determined was introduced after 1989. Adequate remuneration for judges was intended to become one of the guarantees of their independence and was elevated to a constitutional principle.[101] However, this has generated controversy concerning the proper level of pay for judges. The profession of judge is an attractive one from an economic standpoint when compared with those of other professionals, such as teachers, whose remuneration is set within the state budget. Moreover, judges are entitled to privileges, including job security and retirement benefits, which other professionals, including legal advisers and lawyers, do not enjoy. The salaries of judges are fully comparable to those of prosecutors, as they are bound up with each other by virtue of legislative provisions. The basic pay of judges of equivalent courts is equal. In addition to basic remuneration, judges may receive functional allowances, which are awarded to court Presidents and Vice-Presidents, visiting judges, judicial training managers, and various other officials. It is difficult to compare judges' remuneration to that of lawyers in private practice (attorneys, legal advisors or notaries). Certainly, there are many private lawyers in major cities who earn much more than judges. However, in smaller towns judges' remuneration in many instances is quite comparable.

The constitutional principle concerning judges' remuneration is very general, and in practice the concept of *remuneration consistent with the dignity of judicial office* is controversial. Because provisions of the Constitution are applied directly unless otherwise provided, many judges have lodged in courts individual claims concerning their level of remuneration. Accordingly they used the court remedy as a method of in-

[101] Article 178(2) Constitution.

creasing their salaries. There were also numerous cases pending before the Constitutional Court which concerned the level of judicial remuneration. Only some of them ended with a judgment. The general principle established in the jurisprudence of the Constitutional Court is that the Constitution does not establish the amount of remuneration for those holding judicial office in an unequivocal manner and cannot form self-evident grounds for judges' claims against the state. The general and simply unspecified nature of the criterion *remuneration consistent with the dignity of judicial office* unambiguously points to the necessity of stating them with greater precision; they must, therefore, be stated more specifically in ordinary legislation.

In the judgment of 18 February 2004, the Constitutional Court dealt with the problem of postponement of increases in judicial remuneration.[102] Due to the serious financial difficulties of the state budget in 2001, the Parliament decided to change the regulations providing for increases in the salary of judges. Those regulations were already adopted, but were waiting to come into force. The Parliament did not delete the new regulations totally, but provided that the introduction of so-called promotion remuneration rates for judges with a certain period of experience would take place later than expected. Also the growth rate would be smaller than previously adopted. The Constitutional Court emphasized the importance of judges' salaries for the proper administration of justice and their special constitutional position. It held that the legislator had a certain level of flexibility in the determination of judges' salaries. However, this flexibility was considered to be constrained by several points of reference. Judges' salaries should significantly exceed average remuneration in the public sector; it should exhibit a long-term tendency to increase at a rate no less than that of average public sector remuneration; be especially protected against exceedingly detrimental fluctuations in the event of serious state budget difficulties; and should not be reduced by way of normative regulations. Due to the fact that the increase had not yet entered into force, the Constitutional Court concluded that such change did not violate the principle of acquired rights and did not find such postponement in increase of salaries as a violation of the Constitution.

One of the most important problems in 2007-2009 was massive protests by judges concerning the level of remuneration. It should be underlined

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[102] Judgment of the Constitutional Court of 18 February 2004, No. K 12/03, English summary of the judgment, Trybunal Konstytucyjny, available at <http://www.trybunal.gov.pl/eng/summaries/documents/K_12_03_GB.pdf>.

that for the last few years judges' remuneration had not been increased. In their protests, judges demanded a principle that their remuneration would depend on the average salary in Polish business, and any change in the level of average salary would have an immediate consequence for the salary of judges. Second, they wanted a significant increase in the level of remuneration. The methods they used to protest show the level of their desperation. In addition to typical means of protests, such as open letters or declarations, judges started to organize so-called "days without hearings", when they came to courts just to do research and paperwork. As a result of protests on 20 March 2009 the Parliament passed a law increasing the level of remuneration by 1,000 PLN (approximately 250 EUR) for each judge. Moreover, the Parliament has managed to pass the amendments to the AOC which provide for new rules concerning judicial remuneration.[103] The most important points in this regard are that the remuneration of judges of equal status (e.g. district court judges) may be different only as a result of their length of service and the function they held. The basic remuneration of judges is calculated taking into account the average salary in Poland as announced by the Head Statistical Office in Poland, which average is multiplied by different indicative rates; those indicative rates depend upon the position of the judge, length of service and functions. The specific quota of indicative rates is determined in the attachment to the law amending the AOC. The addition for length of service starts to be payable after six years' service. It is equal to 5% of the judge's principal salary and increases by 1% for every additional year of service, up to a maximum of 20%. The MoJ upon consultation of the NCJ is responsible for setting down the functions for which additions to the remuneration are awarded.

These changes may be regarded as an important step in reforming judicial remuneration in Poland. Nevertheless, it does not mean that judges' remuneration is already at a sufficient level. The Polish Judges' Association *Iustitia* as well as many other institutions still claim that the level of judges' remuneration should be increased, especially with respect to lower court judges. Since that time the remuneration of judges has slightly increased. However, the problem still exists. In the opinion of the authors, the major cause of the problem is a discrepancy in remuneration between higher court and lower court judges. Certainly the

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[103] Law of 20 March 2009 amending the AOC (*Ustawa z dnia 20 marca 2009 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw*), Journal of Laws (*Dziennik Ustaw*) of 2009, No. 56, item 459.

latter should earn more as the current level of remuneration creates a lot of frustration, including resignation from the judiciary by many young judges. They emphasized that the increase in remuneration which took place in 2009 was only temporary and did not mean the finalization of efforts in this regard. Furthermore, when relevant changes were adopted judges were promised that that was not the end of the process and that the next increases would take place in 2010. However, it seems that currently the Government, due to the financial crisis, is stepping back from this position and is not planning increases in remuneration. Therefore, on 7 September 2009 the Polish Judges' Association adopted a resolution demanding urgent action by the MoJ and undertaking further work on increases in the level of remuneration. There are no specific problems with payment of salaries.

It should be mentioned that one of the ways implemented recently to increase judicial remuneration, which provoked a lot of controversy and discussion, was the "horizontal promotion" (*awans poziomy*) of judges. It was introduced by the Law of 29 June 2007 amending the AOC.[104]

2. Benefits and Privileges

By virtue of the AOC judges have certain financial and other privileges. The most important ones being that social security contributions are not paid out of judicial remuneration. There are additional free working days in addition to those provided under general provisions of the Labour Code;[105] jubilee awards;[106] salaried time off for health reasons – up to six months – upon consent of the MoJ; several benefits and special privileges in the event of health problems and accidents at work; preferential loans for housing purposes; and compensation for travel costs in the event of having to live in a town other than the seat of the court. In

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[104] Law of 29 June 2007 amending the AOC (*Ustawa z dnia 29 czerwca 2007 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw*), Journal of Laws (*Dziennik Ustaw*) of 2007, No. 136, item 959. See supra B. III. Tenure and Promotion.

[105] Six free working days after ten years of service and 12 additional free working days after 15 years of service.

[106] Jubilee awards are given in the amount of 200% - 400% of basic remuneration – awarded after 20 years of service and after each five year consecutive period (growing every five years by 50%).

the event of a judge's death, the closest family members have a right to a special retirement pension.

3. Retirement

Detailed principles and procedures for determining and paying remuneration and family remuneration to retired judges and prosecutors and members of their families were laid down by ordinance of the MoJ.[107] It sets the remuneration of a judge *emeritus* at 75% of the basic pay received in his/her last post, plus a seniority bonus. A judge must retire upon turning 65 unless the NCJ, acting upon a motion by the judge in question and in consultation with the college of the relevant court, consents to his/her continued service. The length of an extension may vary, but in any case cannot go beyond the age of 70. There are no clear criteria for approving or refusing an extension, and it is therefore possible that judges will receive extensions if the NCJ consents. The NCJ's decision not to extend employment may be challenged in the administrative courts. Again, however, there are no clear criteria as regards the grounds for administrative courts to review the decision. The constitutionality of the NCJ's discretion to decide on retirement was questioned by the President in a petition to the Constitutional Court in 1998. The Constitutional Court stated that the basic question in this case was whether the introduction of that measure of flexibility was compatible with the principle of a judge's irremovability. That would be impermissible if, as during the period of the Polish People's Republic, consent to further judicial service were to be given by a political organ (MoJ), situated outside the organizational system of judicial authority. This provision, however, gives that prerogative to the NCJ, the constitutional task of which is to protect the independence of judges and the composition of which guarantees that a judge's fate is to be decided mainly by other judges. In the opinion of the authors there are no grounds for alleging that the composition, manner of operation or tasks

[107] Ordinance of the Minister of Justice of 16 October 1997 on the detailed rules on retirement benefits (*Rozporządzenie Ministra Sprawiedliwości w sprawie szczegółowych zasad i trybu ustalania i wypłacania uposażeń oraz uposażeń rodzinnych sędziom i prokuratorom w stanie spoczynku oraz członkom ich rodzin z dnia 16 października 1997 r.*), Journal of Laws (*Dziennik Ustaw*) of 1997, No. 130, item 869.

of the NCJ constitute a threat to use that forum to engage in activities violating the principle of judicial independence.[108]

4. Restrictions on Commercial Activity

The AOC provides for detailed restrictions as regards conducting any activity of professional employment outside his/her judicial functions. In fact the only exception which is allowed is employment at the higher school as an academic teacher or researcher. Consent for such employment (as well as undertaking any other activities which may result in earning money) is made by the President of the relevant court with respect to ordinary judges and by the MoJ with respect to Presidents of regional and appeal courts. Any activity undertaken by the judge may not be in conflict with his/her independence and dignity of the office.

The AOC also imposes on judges an obligation to submit a declaration on the state of their property. Such declaration is submitted every year to Presidents of appeal courts (Presidents of such courts submit their declarations to the NCJ). They are subject to revision by appeal courts' colleges. Declarations on property are secret and are not disclosed to the public, except with the judge's consent. There are discussions in Poland whether these provisions should change and provide for disclosure of all such declarations. It seems, however, that changes in law in this regard are not expected soon.

V. Case Assignment and Recusal

Poland does not yet have a computerized system for allocating cases. In general, the current rules do not provide sufficiently transparent and neutral criteria for allocating cases. The college of the regional court (or the college of the appeal court) specifies the general rules for allocating cases to judges, but in non-criminal matters cases are assigned by the chairmen of individual court departments.[109] The chairman is supposed

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[108] Judgment of the Constitutional Court of 24 June 1998, No. K 3/98.

[109] § 49 Ordinance of the Minister of Justice of 23 February 2007 on Regulation of internal operation of ordinary courts (*Rozporządzenie Ministra Sprawiedliwości z dnia 23 lutegi 2007 r. Regulamin urzędowania sądów powszechnych*), Journal of Laws (*Dziennik Ustaw*) of 2001, No. 98, item 1070, as amended.

to ensure a certain degree of fairness in the internal allocation of cases on account of case differentiation;[110] since the chairman's decisions are discretionary they sometimes lack transparency – the lack of random assignment of civil cases is criticized by the legal community and is raised as one of the problems threatening judicial independence.[111] There is no clear reason why the random selection of cases exists for criminal and not for civil cases. It was the decision of the legislator and certainly one should consider changing it.

In criminal courts cases are assigned to the judges randomly.[112] Two systems apply: incoming cases are assigned to the judges according to the inflow of cases to the given court and the transparent alphabetical list of judges of a given court or by lottery.[113] An exception to the first, generally used system is possible only when a judge is ill or because of some other important cause. If it happens, then it has to be indicated in the minutes of the first hearing of the case.[114] The panel of judges is selected by lottery with respect to cases involving potential sentences of life imprisonment or 25 years' imprisonment. In those cases a lottery is organized upon the motion of the prosecutor or the defence. Both prosecutor and attorney may be present during the lottery.[115] However, judges are not selected randomly with respect to adjudication on security measures (such as pre-trial detention). In such a case the decision on selecting the judge was made by the President of the court which raised concern in 2005-2007, when probationary judges were quite often requested to give decisions on pre-trial detention. One could claim that the President of the court (and one should consider that the MoJ has certain influence over the appointment of Presidents of courts) could have had a certain influence on the selection of probationary judges, who would issue favourable decisions as regards pre-trial detention. The MoJ has certain influence over the appointment of Presidents of

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110 Id., § 49(1).

111 See comment by W. Żurek, in: T. Wardyński/M. Niziołek (eds.), Independence of the Judiciary and Legal Profession as Foundations of the Rule of Law. Contemporary challenges, 196 (2009).

112 Article 351 Act of 6 June 1997 Code of Criminal Procedure (*Ustawa w dnia 6 czerwca 1997 r. Kodeks postępowania karnego*), Journal of Laws (*Dziennik Ustaw*) of 1997, No. 89, item 555, as amended.

113 Id., Article 351(1), (2) and (3).

114 Id., Article 351(1).

115 Id., Article 351(2), (3).

courts, as organs of the self-government of the judiciary only give their opinion on candidates presented by the MoJ. Only in case of a negative decision by the self-government of the judiciary and the NCJ may the MoJ not appoint a President of the court. This problem of steering cases with the appointment of probationary judges to adjudicate on them does not exist now, as they no longer serve in the judiciary.

Although court Presidents are fairly powerful and have broad supervisory responsibility over administrative matters, there is no evidence of their attempting to influence or supervise judges' adjudication directly. Nevertheless, there is still a certain level of discretion left for the Presidents of courts to decide who will hear cases, in particular regarding the application of security measures.

In general, civil courts have more flexible rules as regards the change of a judge or reassignment of the case than criminal courts. In civil cases the chairman of a court department may change a judge, but only in "exceptional cases" with respect to the rule of "immutability of the bench".[116] In criminal cases, a change of judge may result in the re-opening of proceedings. The decision on re-assignment in criminal cases is made by the President of the court.[117] In general it happens very rarely that judges are re-assigned cases. In criminal cases any re-assignment of a judge means a need to begin the trial once again. Re-assignment happens more often in civil cases, mostly due to the length of proceedings. When the case is pending, the judge may be promoted (or change court) and a new judge needs to be assigned. However, it does not make it necessary to hear the case once again. In all types of proceedings there are two possibilities of recusal of a judge.[118] First, there are listed conditions which should lead to the recusal of a judge (e.g. relative of a party). Otherwise, the proceedings in a case could be invalid. Second, the law provides a general clause which provides for discretionary recusal for situations which create a justified doubt as re-

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[116] Article 206 Act of 17 November 1964 – Code of Civil Procedure (*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*), Journal of Laws (*Dziennik Ustaw*) of 1964, No. 43, item 296, as amended; § 50 Ordinance of the Minister of Justice of 23 February 2007 on Regulation of internal operation of ordinary courts.

[117] Article 350(1) Act of 6 June 1997 – Code of Criminal Procedure (*Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego*), Journal of Laws (*Dziennik Ustaw*) of 1997, No. 89, item 555, as amended.

[118] See for instance Arts. 48-54 Code of Civil Procedure and Arts. 40-44 Code of Criminal Procedure.

gards the impartiality of the judge in a given case. Recusal may be moved by the interested judge or party. The decision is made by a panel of three judges from the court in which a given case is adjudicated on, but without the participation of the judge in question. In the event of recusal, the case is transferred to another judge in the same court. If it is not possible to adjudicate it in a given court, then the case is transferred to a court of equal rank.

VI. Judicial Conduct Complaint Process

Ways of giving opinion on judges' work are complaints and motions. By virtue of the Constitution[119] and Code of Administrative Procedure[120] every administrative organ has to review complaints or motion. Anybody may direct complaints or motions to the administrative organ. Complaints lodged in the MoJ and ordinary courts (district, regional and appeal) are dealt with by those institutions. The MoJ publishes "Information about mode of receiving and handling complaints and motions addressed to the MoJ" annually.[121] It includes a section on complaints directed to the MoJ and a section on complaints directed to the courts, both with a general description of the types of complaint, detailed statistical information, examples of particular complaints and information on how complaints are dealt with. For the purpose of reviewing complaints lodged with MoJ there is a special Section of Complaints and Motions. Complaints sent to the Ministry are usually submitted directly by citizens or through various bodies, deputies (MPs) and senators. Complaints considered by the Ministry mostly refer to the contents of judgments, the length of proceedings, the execution of judgments, administrative actions of chairpersons of justice units, the

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[119] Article 63 Constitution.

[120] VIII "Complaints and motions" – Arts. 221-259 of the Act of 14 June 1960 - Code of Administrative Procedure (*Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego*), unified text – Journal of Laws (*Dziennik Ustaw*) of 2000, No. 98, item 1071, as amended.

[121] The most recent Information about the mode of receiving and handling complaints and motions addressed to the Ministry of Justice in 2008 as well reports covering previous years, together with detailed statistical tables, may be obtained from the MoJ website at <http://www.ms.gov.pl/ministerstwo/sprawy.php>.

culture of the work of the courts. Most of the complaints – after review – are deemed as unfounded.[122]

Usually as a result of complaints the MoJ may ask for a case-file and review it. The most often used way, however, is to direct a complaint to the entity in question and ask for an explanation. The role of the MoJ is then to assess whether the given answer is satisfactory and addresses all the concerns raised.[123] In 2008, there were 30,145 complaints lodged in the MoJ, half of them referred to other organs. The MoJ found 290 (1.9%) complaints grounded, 31% unfounded and 67% were dealt with in other ways (for instance information was provided).[124] Another group of complaints is directed to courts. They concern similar issues to those directed to the MoJ, such as length of proceedings, content of judgments, execution of judgments, and culture of the work of courts. In 2008 there were 17,626 complaints lodged in the courts. 11% of them were found to be grounded, 72% unfounded and 17% were dealt with differently.[125] In courts the complaints are looked into directly by Presidents and deputy Presidents or appointed inspector judges. Complaints are investigated based on the analyses of the complaint, analyses of the case file, requests for clarification directed to chairmen and supervisors.

In both procedures (within the MoJ and courts) if a complaint is found to be grounded special measures are taken – these include the institution of *administrative supervision* over the particular case from the procedural point of view – meaning the organization of the trial. In cases being supervised periodic reports are prepared by the Presidents of courts reporting on the progress of the case – this does not deal with the substance but with the procedural aspects.[126] Apart from written complaints, complaining in person is possible both in the MoJ and courts. In courts clients are received at fixed times by the President, the Vice-President and inspector judges. Information about hours of reception is clearly displayed. On the basis of the analysis of these data the MoJ draws conclusions and sends them with the data to relevant de-

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[122] Information for 2008, id.

[123] The authors do not consider this review a threat to judicial independence; it is rarely applied and focuses on administrative elements.

[124] Information for 2008 (note 121).

[125] Id.

[126] Although this procedure makes pressure from the substantive point of view possible, the authors have no information that happens in practice.

partments as well as to Presidents of appellate courts so that they can carry out these recommendations. Written information on the manner of use of the conclusions is to be submitted by them to the MoJ in next reported period. The information about complaints, its analyses and recommendations are also the subject of seminars and training for judges organized by the courts.[127]

One of the most important measures for dealing with the problems of the judiciary is a complaint on the length of proceedings, introduced as a result of the *Kudła* v. *Poland* judgment of the European Court of Human Rights.[128] The Law on the complaint on violation of the right to have a case heard within a reasonable time provides for the ability to complain to a higher court about the length of proceedings.[129] Such court may adjudicate on financial compensation for unduly lengthy proceedings in a case. Regarding the time taken to handle complaints both courts and the MoJ are bound by the terms of the Code of Administrative Procedure.[130] According to the statistics, 6.3% of complaints were handled tardily by the MoJ and 4% by courts.[131]

There are no special sanctions provided as a result of review of complaints. However a complaint may be a ground for giving a reproach to a judge (*wytyk*). This way they may have a certain impact on the promotion of judges as information about a reproach is placed on the file of a judge. In addition, the Presidents of courts, inspector judges or the MoJ may request the opening of disciplinary proceedings against a particular judge as a result of the review of the complaint. The complainant is generally informed in writing about the result of the particular type of complaint.

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[127] Information for 2008 (note 121).

[128] ECtHR, *Kudła* v. *Poland* [GC], Judgment of 26 October 2000, 2000-XI.

[129] Act of 17 June 2004 on the complaint on violation of the right to hear a case within a reasonable time (*Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki*), Journal of Laws (*Dziennik Ustaw*) of 2004, No. 179, item 1843, as amended.

[130] Act of 14 June 1960 – Code of Administrative Procedure (*Ustawa z dnia 14 czerwca 1960 r. – Kodeks Postępowania Administracyjnego*), unified text – Journal of Laws (*Dziennik Ustaw*) of 2000, No. 98, item 1071, as amended. Without delay, one month as a maximum, two months in exceptional situations (Article 35 of the Code of Administrative Procedure).

[131] Information for 2008 (note 121).

VII. Judicial Accountability: Discipline and Removal Procedures

Disciplinary proceedings against judges are regulated by the AOC[132] and may take place in the case of professional offences, flagrant contempt for legal regulations, or undermining the dignity of the office.[133] Undermining the dignity of the office is defined as "any other behaviour that the judge (unethical, immoral, and scandalous) both in the service and outside service – also in private life, which brings discredit to the position of the judge".[134] When appointed a judge takes an oath to uphold basic standards of ethical behaviour, swearing to uphold the law, conscientiously fulfil his/her duties, impartially mete out justice in accordance with his/her conscience and legal regulations, keep state secrets and be guided by the principles of dignity and honesty.[135] A judge is required, first and foremost, to perform the judicial duties in accordance with the oath. A judge is also obligated, both on and off duty, to uphold the prestige of judicial office and avoid anything which could undermine the dignity of the office or confidence in judges' impartiality. Any violation of the above principles may in fact lead to disciplinary proceedings.

Disciplinary proceedings are instituted by the disciplinary spokesmen. There is one main disciplinary spokesman elected by the NCJ (a four year term) and a number of vice spokesmen, judges elected by the college of each court of appeal[136] and each regional court[137] from among the judges of the same college (a two year term).[138] Re-election is not ruled out by law, and there are no special rules for dismissal. He/she is responsible for all actions in disciplinary proceedings and then for accusing before the disciplinary court (the spokesman after the investigation takes a decision on bringing case to the court and it is a discretionary decision; however the refusal may be challenged in the disciplinary court).[139] The disciplinary spokesman starts the investigation *ex officio*

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132 Arts. 107-133 AOC.

133 Article 107 AOC.

134 NCJ Information Bulletin No. 14, 2007, at 17, available at <http://www.krs.gov.pl>.

135 Article 66 AOC.

136 There are 11 courts of appeal.

137 There are 45 regional courts.

138 Article 112 AOC.

139 Article 114 (5)-(7) AOC.

or at the request of the MoJ, the President of an appellate court or regional court, the college of such a court or the NCJ.[140] Disciplinary courts are appellate courts in the first instance and the SC on appeal.[141] Disciplinary courts consider cases with three judges sitting on a panel, and are made up from among all the judges of the given court except the President, the Vice-President and the disciplinary spokesman. The judges are appointed to a particular case by lot.[142]

Until a couple of years ago disciplinary proceedings took place behind closed doors but changed rules provide that after the enactment of a new law in 2001 they are open to the public.[143] The defendant may designate a defence counsel from amongst the judges or advocates.[144] Both the defendant and the disciplinary spokesman have the right to appeal against the verdict of a disciplinary court of first instance. In general all rules concerning fair trial are applicable to disciplinary proceedings – relevant provisions of the Code of Criminal Procedure apply to disciplinary proceedings.[145]

Disciplinary sanctions include admonition, reprimand, removal from a post (such as President of the court), transfer to another place, and expulsion from judicial service.[146] Disciplinary proceedings are quite frequently used. There are no detailed data available concerning disciplinary proceedings but the analyses of the relevant documents – reports of the NCJ[147] and SC[148] (which acts as a disciplinary court of appeal) shows that there are about 150 disciplinary cases a year. There is no evidence of abuse of the disciplinary procedures which would endanger the independence of the judiciary. However there are cases which raise doubts as to their grounds. Sometimes the accusing of a judge (especially claiming corruption) by a party may initiate proceedings which

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[140] Article 114 AOC.

[141] Article 110 AOC.

[142] Article 111 AOC.

[143] Article 116 AOC.

[144] Article 113 AOC.

[145] Article 128 AOC.

[146] Article 109 AOC.

[147] NCJ Information Bulletin No. 14, 2007, at 17.

[148] Report on the activities of the SC – Disciplinary Court for 2008, available at <http://www.sn.gov.pl>.

seem not to be well founded.[149] Due to this problem the Association of Polish Judges *Iustitia* established a special "Team for monitoring Disciplinary and Immunity Procedures" in order to monitor disciplinary cases in which judges feel that their independence may be at stake.[150]

VIII. Immunity for Judges

By virtue of Article 181 of the Constitution judges have immunity, without distinction between official and unofficial actions. In particular, judges may neither be subject to criminal responsibility, nor deprived of their liberty without the consent of the court specified in the statute (disciplinary court).[151] The only exception is the possibility of arrest and detention in a situation where a judge is caught when committing a crime and arrest is necessary for the proper conduct of the proceedings. However, even in such a case, the President of the court in which the judge works should be notified. He/she has the power to order the judge's immediate release.[152] But a judge's immunity can also be lifted by the disciplinary court according to the AOC.[153]

One of the most controversial amendments to the AOC, passed during the term of the Parliament in which the "Law and Justice" party was in power (2005-2007), concerned changes in the procedure for derogation of judicial immunity. In particular, responding to populist arguments that judges stay unpunished if they commit a crime, the amendments to the AOC provided that courts will have to adjudicate on the derogation of judicial immunity within 24 hours after submission of the motion by a prosecutor. The amendments to the AOC, when they were discussed in the Parliament, caused huge outrage in the judicial community and

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[149] See for instance the description of such a case: M. Ejchart, Udział Helsińskiej Fundacji Praw Człowieka w postępowaniu w sprawie o uchylenie immunitetu sędziemu [Participation of the Helsinki Foundation for Human Rights in Proceedings concerning Deprivation of Judicial Immunity], in: Ł. Bojarski (ed.), Sprawny Sąd. Zbiór dobrych praktyk [Effective Court. Collection of Good Practices], 209 (2008).

[150] The working plan and composition are described at <http://www.iustitia.pl/content/view/451/167/> (14 December 2009).

[151] Article 80 AOC.

[152] Id.

[153] Id.

among legal circles as disproportionate, unnecessary and highly populist. They were compared to the other idea of the then Minister of Justice Zbigniew Ziobro – the introduction of courts able to adjudicate on cases of petty crime within 24 hours. The danger of these changes in the procedure for derogation of judicial immunity was exemplified by the use by the First President of the SC of his prerogative to stand and to present its concerns in the Polish Parliament. He used this prerogative for the first time. Following changes to the AOC, the First President of the SC submitted a motion for constitutional control review to the Constitutional Court. The major claim was violation of the Constitution by the introduction of summary and simplified procedures for consideration of a motion requesting the derogation of judicial immunity and limitation upon access by the judge his/herself to records of proceedings for derogation of immunity. The First President of the SC also claimed violation of the legislative procedure in relation to the law, as the legally required opinion of the SC was not requested at any stage of the proceedings.

The Constitutional Court in its judgment of 28 November 2007 emphasized the value of judicial immunity for the functioning of a democratic state and its importance in a democratic state.[154] It decided to quash the majority of the challenged regulations, for both procedural and material reasons. In the opinion of the Court the very fact of filing a motion requesting the derogation of immunity of a judge may result in harming a judge's reputation. Even if such motion is found to be groundless in the course of follow-up proceedings and the judge regains the power to adjudicate, his/her good reputation and readiness to exhibit independence and firmness have been affected. Such situation was considered to have a *chilling effect* on his/her independence.

[154] Judgment of the Constitutional Court of 28 November 2007, No. K 39/07, English summary of the judgment available at <http://www.trybunal.gov.pl/eng/summaries/documents/K_39_07_GB.pdf>.

IX. Associations for Judges

There are two well-established national[155] associations of judges in Poland: the Polish Judges' Association *Iustitia*[156] (*Stowarzyszenie Sędziów Polskich Iustitia*), and the Association of Judges of Family Courts in Poland (*Stowarzyszenie Sędziów Sądów Rodzinnych w Polsce*). Membership of both associations is voluntary. Those associations are of private character and they are not regulated by any special acts. They are subject to the general law on associations.[157] *Iustitia* was created in 1990 as a private association of judges. Its objectives, as specified in its statute, are as follows: the realization of the principles of rule of law; the strengthening of the independence and impartiality of courts and judges, as well as taking care as regards the authority of judges; the representation of the professional and social interests of the judicial community; pursuance of the full protection of the rights and freedoms of an individual; co-operation with international and domestic organizations of lawyers, especially associations of judges; shaping public opinion; co-operation in the legislative process with the Parliament and other organs, within the scope of *Iustitia*'s objectives. *Iustitia* was the association that was at the forefront of changes in the justice system, provoking discussions, projects and ideas contributing to the continuing reform, as well as to the strengthening of the judiciary as a profession. For example, *Iustitia* was actively engaged in the preparation of the ethical code for judges, in different educational programmes, in the establishment of post-graduate studies on EU law for judges. In the last three years one has been able to observe the evolution in objectives of *Iustitia*, which is connected with the growing number of members, as well as with the greater impact of young judges on the scope of interests of *Iustitia*. Accordingly, *Iustitia* started to be more visible in the claim of the judicial community for higher remuneration, in the organization of protests, in negotiations with the government and lobbying for greater spending on the justice system. Some of the protest methods

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155 In May 2010 a new association of judges was established – Association of Judges THEMIS. The Association THEMIS aims to be an alternative to the Polish Judges' Association *Iustitia*. However, currently it has quite limited activity as compared to *Iustitia*. There are also some local associations.

156 *Iustitia*, available at <http://www.iustitia.pl/>.

157 Act of 7 April 1989 Law on Associations (*Ustawa z dnia 7 kwietnia 1989 r. Prawo o stowarzyszeniach*), Journal of Laws (*Dziennik Ustaw*) of 1989, No. 20, item 104, as amended.

proposed by *Iustitia* raised serious concerns and protest among the legal community. It seems that *Iustitia* is now in the process of defining its future objectives – to what extent it will act as a guarantor and promoter of best values connected with the judiciary and to what extent it will continue to act as a kind of trade union for the judiciary. *Iustitia* does not have special public subsidies. Generally, it is financed out of the contributions of its members and out of grants obtained for realization of some projects. It does not have a regular staff. Only one person is employed as a director of the office. *Iustitia* currently has 2,839 members in 33 local chapters, as well as two honorary members. Its membership base constitutes approximately 25% of all the judges in Poland. The Association of Judges of Family Courts in Poland was created in 1987. The major source of funding for the Association is the contributions of its members. The Association currently has 220 members who are organized into local chapters.

X. Resources

The Constitution provides that judges shall be provided with appropriate working conditions.[158] Since the new procedure for the adoption of a budget for the judiciary was adopted (see above) one can observe a significant change in the material situation of the judiciary. In general there are no significant problems as regards the technical equipment in Polish courts. Courts are to a great extent computerized, which was not the case even a few years ago (major changes have taken place in last five to six years). In general one can see a major improvement. The standard is still, however, low, as compared to countries which are most advanced in the use of new technologies. The most important example is the procedure for preparing the minutes of any court hearings. There are still courts in which such minutes are handwritten. There is also no system of computerized, electronic voice recording of hearings, although the MoJ is actively working on it and has prepared relevant draft changes to the law on civil procedure which were accepted by the Council of Ministers in February 2010 and will be discussed in Parliament.[159] Another example is court websites. The Helsinki Foundation for Human Rights and the Forum for Civic Development undertook a

[158] Article 178(2) Constitution.

[159] MoJ, available at <http://www.ms.gov.pl/aktualnosci.php#akt100223>.

monitoring project in 2008 on the condition of websites of Polish courts. The project showed that many court websites are made in an unprofessional way, lack important information, are not standardized etc.[160] Polish courts also lack such techniques as the submission of court briefs in electronic form or the scanning of case files and access to them via the web. Basically, all communication with courts (including the submission of pleadings) is made in a traditional way.

Recent appropriations have not provided adequately for the indispensable resources that courts require – in part this is the result of more than four decades of underinvestment. Not many new court buildings were constructed in the post-World War II period (except for the SC); usually old buildings were renovated or other buildings were adapted to meet the needs of courts. In connection with the expansion of judicial competences and the concomitant increase in workload during the 1990s, this produced a constant deterioration in working conditions. In smaller courts usually every judge has his/her own office, but conditions are considerably worse in courts in larger cities; the situation is most critical in Warsaw, where some judges' chambers have had to be converted into courtrooms. As already mentioned above, in 1998 the Helsinki Foundation for Human Rights conducted monitoring on district courts' working conditions and published terrifying results of the dramatic financial and material situation of district courts. Since that time many things have changed and improved. Nevertheless, the recent monitoring of commercial courts undertaken in 2008 (report of 2009) shows that there are still problems in this area.[161] For example, judges complain that some of them do not have their own offices and that sometimes it is quite difficult for them to work in courts. As a consequence they have to take case files home. Judges complain also of a lack

[160] D. Sześciło, E-sądy po polsku. Badanie i ranking stron internetowych sądów okręgowych, apelacyjnych i wojewódzkich sądów administracyjnych (E-courts in Poland. Monitoring and ranking of websites of Polish regional courts, courts of appeal and regional administrative courts), Warsaw 2008. Report is available (in Polish) at <http://www.for.org.pl/upload/File/raporty/Raport_o_e-sadach_FINAL.pdf>. See also the second edition of the report – ranking of best websites of Polish courts, available at <http://www.for.org.pl/upload/File/raporty/Raport_e-sady_II_marzec_2010.pdf>.

[161] A. Bodnar/M. Ejchart (eds.), Sądy gospodarcze w Polsce. Raport z realizacji programu "Monitoring sądów gospodarczych – Courtwatch" (Commercial courts in Poland. Report from implementation of the Program "Monitoring of commercial courts in Poland") (2009). Report is available (in Polish) at <http://www.hfhrpol.waw.pl/pliki/MSG.pdf>.

of sufficiently equipped libraries and access to the newest commentaries, legal books or the legal press.[162]

It seems that the biggest problem of the judiciary in terms of resources is the lack of professional and well-trained staff. Judges do not have enough assistants and secretaries. Sometimes there is only one assistant helping three or four judges. There is a proposal raised by the Helsinki Foundation for Human Rights as well as by *Iustitia* that every judge should have one secretary and one judicial assistant.

The implementation of any changes as regards resources to a great extent depends on money. It is obvious that money spent on the judiciary does not sufficiently take its needs into account (for instance the big issue is low salaries of court staff causing, especially in big cities, problems with attracting well educated candidates). However, the problem is that some of the money is simply wrongly redistributed, as Poland is one of the leaders in Europe as regards the percentage of GDP spent on the judiciary.[163] Many reforms as regards the proper use of resources could be made at local level, without the involvement of the MoJ. There are courts which are exceptional leaders as regards the maximum use of resources, or seeking aid from the local authorities or EU funds. Nevertheless, even such attitudes will not resolve some systemic problems, like lack of staff or not enough computerization.

C. Internal and External Influence

I. Separation of Powers

The formal guarantees of separation of powers and judicial independence are generally satisfactory. Constitutional guarantees are included in Article 10 of the Polish Constitution on the separation of powers principle,[164] Article 173, which provides that courts and tribunals shall con-

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[162] Id.

[163] According to research done by CEPEJ, Poland is third among all Council of Europe members, spending 0.54%. See Figure 12. Total annual public budget allocated to all courts and public prosecution (without legal aid) in 2006, as a percentage of per capita GDP, in: CEPEJ, European Judicial Systems (2008).

[164] 1. 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. 2. Legislative power shall be vested in the *Sejm* and the *Senate*, execu-

stitute a separate power and shall be independent of other branches of power, and Article 178, which formulates the principle of independence of individual judges stating that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes" There is also a rich body of jurisprudence of the Constitutional Court, which repeatedly ruled in support of judicial independence as described above. There are a number of instruments thanks to which the judiciary is immune from the influence of the legislative and executive branches. As described above, they include: constitutional separation of powers, participation of the judiciary in preparation of its budget, the role of the NCJ, appointment and promotion, security of tenure and the constitutional guarantee of adequate working conditions and judges' remuneration.

As far as judges' accountability is concerned the system of complaints as well as disciplinary responsibility were described above. The appointment and promotion procedure (and the evaluation function of the NJC as well as in practice of the court President) also includes the element of accountability as discussed above. The judiciary as a whole is accountable as a public body managing the public funds. A special institution – the Supreme Chamber of Control (*Najwyższa Izba Kontroli*) (NIK) – executes control over the spending of public money by the judiciary (as a part of the state budget) and publishes reports.[165] This is the regular procedure and does not interfere with judicial independence.

There are some other methods of ensuring judges' accountability which consist of *administrative supervision over the judiciary*. The supervision is carried out by inspector judges (*sędzia wizytator*)[166] but the MoJ or the NCJ may initiate particular control. Also results of the supervision

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tive 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.

165 Najwyższa Izba Kontroli, available at <http://www.nik.gov.pl>.

166 Inspector judges work in special court divisions (*wydział wizytacji*) in courts of appeal and regional courts. These divisions are responsible for supervision of the administrative activities of courts, see §§ 14-15 of the Ordinance of the Minister of Justice of 23 February 2007 on Regulation of internal operation of ordinary courts. Inspector judges are nominated by presidents of courts from among the most experienced judges, see §§ 9-11 of the Decree of the Minister of Justice of 22 October 2002 on the mode of performing the supervision over administrative activity of courts full time and not limited to a certain term.

are used by the MoJ in its policy briefs. The Ministry exercises permanent supervision over the Presidents of courts from the administrative point of view, requires detailed performance statistics, points out deficiencies and calls for improvement (this relates mainly to the problem of backlogs in courts, delays and scheduling hearings). As provided by the AOC, supervision actions over the administrative activity of courts are in particular: inspections (*wizytacja*) including of the full range of activity of a court or selected division(s) of that court, as well as the court's work culture; specific inspections (*lustracja*) regarding selected issues arising out of court activity; assessments of the administrative activity of courts, based in particular on analyzes of statistics, lists of *old* cases (defined as cases not decided within three months since being lodged), appellate procedure and the consideration of complaints; inspections regarding the enforcement of judgments; inspection of arrangements for secretariats and office work; and post-inspection meetings and training seminars for judges and other court staff.[167] Supervision actions are performed at first by inspector judges. These actions include: problem and thematic inspections and specific inspections in courts; inspecting (watching) trials and delivering remarks and observations made during them to judges and other court staff; considering the legitimacy of complaints; participation in deliberations and training courses of judges and other court staff; and initiating the explanatory and disciplinary procedures by persons and bodies entitled to do so. Apart from the above, judges may be inspected *ad hoc*. The President of a court may command inspector judges to prepare materials for the assessment of judges on account of an intended motion for the promotion of a judge or received information about the incorrect work of a judge, complaints, or significant delays shown in court statistics.[168] *Ad hoc* inspections may also be initiated by the NCJ.[169]

The inspector judge during his periodic inspection[170] evaluates the activity of the entire court division, checking lists of cases of individual judges if it seems necessary. *Ad hoc* inspection may be a detailed check

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[167] Article 38(1) AOC and Decree of the Minister of Justice of 22 October. 2002 on the mode of performing supervision of the administrative activity of courts.

[168] Id., Arts. 12-13.

[169] Article 3(1) Act on the NCJ.

[170] At least every four years, § 15 of the Decree of the Minister of Justice of 22 October 2002 on mode of performing the supervision over the administrative activity of courts.

of the work of an individual judge – reading the dossier, files of cases from the judge's list, participation in trials. On the basis of a reading of the well prepared opinion issued by an inspector judge one can point to the following elements, also being the criteria of opinion: the history of the professional career of a judge, starting from graduation; effective time worked during the period in question; the number of cases in the list, including the number of "old" cases; the average monthly caseload; the number of fixed sessions and cases heard during a session; comparative information about the caseloads of other judges in the department, which helps in the assessment of the effectiveness of a judge's work; the number of concluded cases and the manner of their conclusion (including settlement); information about the time spent on preparation of detailed written justifications (reasoning) to rulings and marking cases where delays in the preparation of written justification occurred; the number of judgments appealed against and information about final verdicts – the number of appeals dismissed and the number of judgments quashed with information about reasons for the quashing (sometimes in detail); assessment of the results of work in comparison to that of other judges; information about complaints against the judge and reproaches (*wytyk*) by the President of the court and reproaches within the appellate procedure (both described below); and a general opinion on commitment to work, scrupulousness and reliability, level of preparation of trials, knowledge of the law, logic of thinking and argument, the level of justifications and sometimes an opinion of the person concerning e.g. social sensitivity, manners etc.

Another possibility of ensuring the accountability of judges is a reproach (*wytyk*). When a transgression of efficiency of court procedures is affirmed (e.g. protracted duration, exceeding the deadlines for the elaboration of a legal reasoning) the Minister of Justice and the President of the court may submit a written reproach and demand the removal of the effects of the transgression. The judge whom the reproach concerns may, within seven days, submit a written reservation to the organ which has issued the reproach, which does not exempt him/her from removing the effects of the transgression.[171] Yet another possibility exists within the appellate procedure and relates also to adjudication (instance reproach). If an appellate or regional court, when considering an appeal, finds an obvious breach of the law by the court of first instance (clear and evident breach of a provision of law stemming, for instance, from a lack of knowledge, or a mistake), it reproaches this

[171] Article 37(4) AOC.

breach to the relevant court, irrespective of other entitlements regarding the appeal procedure. Before the reproach, the appellate or regional court may demand an explanation from the judge presiding at the trial at first instance.[172]

II. Judgments

1. Basis

By virtue of Article 178(1) of the Constitution judges in performance of their functions are independent and are bound only by the Constitution and legislative acts. They cannot infer as a basis for their judgment any other sources of law, as e.g. natural law or principles of morality or equity. However, in many cases the statutory provisions use general clauses which allow judges a certain leeway for interpretation and discretion. For example, in criminal cases it is possible to discontinue a case due to the very little harm done to society by the criminal act (*znikoma szkodliwość społeczna czynu*). It is up to the judge to assess whether in a given case this provision may be applicable. An additional basis of decision making is the jurisprudence of higher courts interpreting the legal provisions (however precedents are not formally binding in Poland).

2. Practice

The number of convictions, acquittals, discontinuances of proceedings, and conditional discontinuances of proceedings, publicly available on the Internet website of the MoJ,[173] are the following: the number of convictions in last four years: 2005-2008 is between 90-91%. The number of acquittals is between 2.0-2.3 % (10,000-11,000 cases); the number of discontinuances of proceedings in courts between 2.0-2.4% and the number of conditional discontinuances between 4.6-5.4%. That means in the opinion of the authors that courts exercise their power independently.

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[172] Article 40(1) AOC.

[173] Statistical information on activities of public prosecutors' offices in 2008 (*Informacja statystyczna o działalności powszechnych jednostek organizacyjnych prokuratury w 2008 r.*), MoJ, available at <http://www.ms.gov.pl/statystyki/statystyki.php>.

3. Structure

There are mandatory elements as regards the text of a judgment. In particular judgments should contain a dispositive part, including the names of the parties, the number of the case etc., the procedural history and factual basis of the case, an overview of applicable provisions and the applicability of provisions to the given case and justification of the final solution of the case.

4. Public Access

The Constitution states that judgments shall be announced publicly.[174] However, it does not mean that all judgments are publicly available. As regards judgments of the SC, only selected judgments are published. Some of them are available on the Internet,[175] some via specialized commercial legal research software. Selected judgments of the SC are also published in special series of different chambers of the SC (e.g. so-called Green Books (*Zielone Zeszyty*) include the most important judgments of the Civil Chamber of the SC).[176] It is possible to access all judgments of the SC by asking employees of the SC library for help or by visiting the SC and accessing the database called SUPREMUS in the SC. Non-governmental organizations claim that all judgments of the SC should be freely available on the Internet, and not just selected ones.

In general, judgments of the district courts, regional courts and courts of appeals are not publicly accessible via the internet. However, some of them are published in specialized commercial legal research software, especially when they concern novel or unique issues. There are also special legal periodicals covering the jurisprudence of the given court circuit (e.g. in Krakow). Furthermore, some courts manage websites where selected judgments are available. Selected judgments are also published on websites of non-governmental organizations (e.g. the Helsinki Foundation for Human Rights) or legal research websites.[177] The

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[174] Article 45 Constitution.

[175] Sąd Najwyższy, available at <http://www.sn.pl>.

[176] Sąd Najwyższy, available at <http://www.sn.pl/orzecznictwo/index.html>.

[177] E.g. some of the judgments concerning human rights' protection are published on the website of the project *Prawa człowieka w orzecznictwie sądów polskich* (Human Rights in the Case-Law of Polish Courts), available at <http://www.prawaczlowieka.edu.pl>.

most advanced system as regards the availability of judgments is the system of administrative courts. Basically all judgments of Regional Administrative Courts and the Supreme Administrative Court are easily available on the internet; with a powerful and effective search engine (e.g. it is possible to search for words in the justifications of judgments).[178] All judgments of the Constitutional Court are available on its website.[179] There are also other free Internet databases of judgments.[180] Nevertheless the most comprehensive databases of judgments are managed by private legal publishers.[181]

The issue of accessibility of all judgments of Polish courts is widely discussed in NGO circles. They complain that there is no freely accessible programme allowing access to sources of law by every citizen. Furthermore, they claim that all the judgments of Polish courts should be accessible through the web, not just judgments of selected courts.[182] As an answer to those concerns, the Governmental Centre for Legislation (*Rządowe Centrum Legislacji*) in 2009 proposed the creation of a database containing legal acts and case law. This database will include all judgments of the Constitutional Court (which does not bring any additional value, since all those judgments are easily accessible via the website of the Court) as well as the SC.[183] Nevertheless, the creation of such a database (if it happens) does not resolve a basic problem – the accessibility of all judgments of Polish courts on the web.

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[178] The search engine is available at <http://www.nsa.gov.pl/index.php/pol/NSA/Orzecznictwo/Baza-orzecze%C5%84>.

[179] Trybunal Konstytucyjny, available at <http://www.trybunal.gov.pl>.

[180] For instance Lex, available at <http://www.prawo.lex.pl> – latest judgments (theses only) of the SC, Supreme Administrative Court, appellate courts and the Constitutional Tribunal; website of the SC <http://www.sn.pl> – only selected theses of resolutions of the SC, no search engine.

[181] Wolters Kluwer (managing the "LEX" program, most commonly used in Poland), Lexis-Nexis (the Lex Polonica program) and C.H. Beck (the Legalis program).

[182] E.g. statement by Piotr Waglowski, managing the "Internet and Law" portal, available at <http://www.vagla.pl>, during the conference organized by the Institute of Public Affairs. The report of the conference is available at <http://wiadomosci.ngo.pl/wiadomosci/459875.html>.

[183] Cf. Information by G. Makowski, Access to sources of law will be easier (*Dostęp do źródeł prawa będzie łatwiejszy*), available at <http://wiadomosci.ngo.pl/wiadomosci/470944.html>.

Article 45 of the Constitution guarantees the right to a public trial and is an almost 100% replication of Article 6 of the European Convention on Human Rights providing for some exceptions only for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. In any case judgments are to be pronounced publicly. In principle, there are no significant problems with participation in hearings, except for lack of sufficient access for the disabled in some of the courts or the improper practice of guards in some smaller courts of requesting the presentation of ID cards at the entrance. The issue of access to court files raised a serious public debate in 2000-2001. The matter was aired after a statement by the Inspector General of Personal Data Protection – Ewa Kulesza, who by interpreting the Act on Protection of Personal Data, came to a conclusion that court files should not be made available to the public since they contain sensitive data and judges who did this would commit violation of the Act[184] and constitutional guarantee of the right to privacy.[185] In reaction to this statement the President of the Regional Court in Lublin banned the showing of court files to the media and the matter caused serious and long lasting discussion with state institutions, organizations for the freedom of the press, as well as court and academic authorities taking the floor.[186] Following this public discussion there were certain amendments introduced into the Polish law which specified more clearly whether case files should be accessible and how. From information from journalists it appears that as a rule they have access to files at each stage of proceedings (with a few exceptions); however, according to the law, they cannot reveal information from the preparatory stage of proceedings before the case gets to court.

Parties to proceedings are informed by court letters and can seek information in court secretariats on the stage their cases have reached, trial dates, judges assigned to their case etc. In some courts there is a spokesmen who prepare a list of cases which may attract the special at-

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[184] Interview with E. Kulesza, Sensitive commodity, in: Wprost (Straight), 4 February 2001.

[185] Published in monthly magazine *Prawo i Życie* (Law and Life) No. 9/2000.

[186] Position of the Centre for Monitoring of Freedom of Press operating at Association of Polish Journalists; Open letter of 15 January 2001 to the Minister of Justice, available through the website of the Centre <http://www.freepress.org.pl>; Position of National Council of the Judiciary of 17 May 2001 on making court files available to journalists and the presence of a journalist at the trial.

tention of journalists (*Poznań*). Interested journalists are informed on a regular basis about the next hearings or outcomes of proceedings in cases.[187] The public is not informed in the sense of a list of all cases brought to the court but on the doors of session rooms are placed lists of cases to be heard there during the day with information on the names of the parties and the legal regulation which determines the nature of the case. That means that daily schedules are available for the public; however in order to receive more information, like a weekly schedule for instance, one would have to ask court clerks to provide it.

III. Improper Influence on Judicial Decisions

One of the major concerns regarding the independence of the judiciary in Poland was the hostility towards judges and verbal attacks on judges made by politicians of the Law and Justice party in 2005-2007. The Law and Justice party as early as in the political campaign declared that its aim was to have a moral revolution in Poland, and that one of the major changes would concern criminal policy. Therefore, Mr. Zbigniew Ziobro, one of the leading politicians of that party was appointed the new Minister of Justice. The judiciary and legal constraints were seen by this party as an obstacle in their attempt to introduce necessary changes. Therefore the judiciary was strongly criticized for its decisions. One could observe a radical decrease in standards of political manners, which resulted in attacks on the judiciary and also other professions, such as attorneys or medical doctors.[188] As an example, following the great tragedy connected with the collapse of the exhibition hall in Katowice, the Minister of Justice made a statement suggesting that the judge who adjudicated on the case of the insurance policy of the company which owned the exhibition hall was jointly responsible for the tragedy.[189] The former President of Poland, Lech Kaczyński, criticized

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[187] See Ł. Bojarski (ed.), Efficient court. Collection of Good practises. Part VI Courts and Media (*Sprawny Sąd. Zbiór dobrych prakyk, część VI Sądy a media*), 131 (2008).

[188] See the examples described below as well as reference to some positions of different organizations criticizing this approach.

[189] Cf. B. Wróblewski, Krajowa Rada Sądownictwa kontra Ziobro (National Council of the Judiciary versus Ziobro), Gazeta Wyborcza of 2 October 2006; E. Siedlecka, Sędziowie chcą postawić Ziobrę przed sądem? (Judges want Ziobro to stand in front of the court?), Gazeta Wyborcza of 1 March 2006.

judges, saying that they were irresponsible because of the low penalties awarded and for taking into account the interests of their "corporation" over moral principles.[190] Furthermore, the Prime Minister in a speech concerning claims for restitution of property in former German territories said that judges should follow the national interest and the Polish ratio of state.[191] There were also numerous statements in fact attacking and discrediting the judgments of the Constitutional Court and its judges. Such verbal attacks and criticism were the subject of protest by the judiciary[192] and the NCJ.[193] They were also commented on in the 2007 Report of the IBA and CCBE. One of the recommendations urges the new government "to end immediately the previous government's campaign of hostility against the judiciary, legal profession and prosecution system." [194] Therefore, in 2007, following the elections, one of the most important tasks for the new Minister of Justice was to create a certain level of understanding between the government and the judiciary and to make a so-called "good atmosphere" round the judiciary. It has in fact been achieved. This change in approach was noted in the 2008 follow-up report of the IBA and CCBE on Poland.[195]

In general, we cannot detect any special pressure by the media. The media are in general aware of judicial independence and in daily practice do not try to push courts to make a certain decision. If criticism appears it is usually after the judicial decision is given. We can observe a new phenomenon which is the emergence of Internet websites which

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[190] "*Nie może być tak, że przekonania pewnej niedużej mniejszości – bo sędziowie są drobną grupą społeczną w stosunku do całości – dominują nad ogólnymi przekonaniami moralnymi, a tak w naszym kraju też jest*" (It cannot be that the convictions of a certain small minority – because judges are a small social group as compared to the whole of society – dominate over general moral convictions; but that is how it is in our country) – Speech by Lech Kaczyński of 29 May 2007, available at <http://www.prezydent.pl/x.node?id=1011848&eventId=11028066>.

[191] Statement of 26 July 2007 by Jarosław Kaczyński in Narty village, where he met families living in flats with unregulated legal status, Polish Press Agency.

[192] Position of the Polish Judges' Association *Iustitia* of 1 September 2007, available at <http://www.iustitia.pl/content/view/291/74/>.

[193] Position of the National Council of the Judiciary of 8 February 2006.

[194] IBAHRI-CCBE, Justice under Siege: a report on the rule of law in Poland (2007).

[195] Follow up report to Justice under Siege: a report on the rule of law in Poland, September 2008, prepared by IBA and CCBE.

aim at the identification of corruption or malpractice in the justice system. Those websites tend to present the different activities of the courts and judges with the use of brutal language and are usually not objective. They belong rather to the margin of public life. Nevertheless, their mere existence is a new thing. They do not pose any threat to the independent judiciary but may rather be seen as public scrutiny over the judiciary, even if also as defamation.

There is an informal influence of more senior judges on decisions. In fact, it was one of the reasons for changing the system of judicial appointments (see the description of the probationary judges problem, above). The influence is not direct, but rather results from a set of different circumstances. The majority of judicial decisions are subject to appeal. This is a result of the two-level court system. At the same time, one of the criteria for assessment of the performance of an individual judge is the statistics of cases that are the subject of successful appeal. Therefore, a judge – when issuing a decision – usually considers how this decision will be assessed by a higher court in the event of an appeal. Such approach may result in opportunistic decisions and may be especially harmful in cases which are not typical and which need special attention. Judges and their individual decisions may also be assessed by so-called inspector judges (*sędzia-wizytator*) as described above. Their role is to review judicial decisions given by the judge. The opinions of inspector judges may have an impact on the promotion of judges. Moreover before the abolition of probationary judges institution, their work was subject to assessment by the President of the court. In most cases, the positive opinion of the President of the court was a precondition for a positive recommendation by the NCJ and appointment by the President to the position of a judge.

There are scholarly publications which emphasize the existence of corruption practices in the judiciary.[196] However, it is difficult to assess their range, as there are only a few cases of identified corruption. Corrupt practices may concern not just judges but also administrative personnel.

Ex parte communications do not take place as a rule. They are not directly prohibited but in general parties do not approach judges out of

[196] A. M. Wesołowska, Korupcja w wymiarze sprawiedliwości – symptomy i kulisy [Corruption in the justice system – symptoms and facts behind the scenes], in: E.W. Pływaczewski (ed.), Przestępczość zorganizowana. Świadek koronny. Terroryzm. W ujęciu praktycznym [Organized Crime. Crown Witness. Terrorism. Practical Aspects], 707 (2005).

court. If they need any information regarding the trial or to have access to the case file they contact the court service office or the secretariat of the particular court section. It is not properly researched but court clients in their complaints to the NGOs or on Internet fora complain that, especially in the smaller courts, lawyers (judges with prosecutors and advocates) spend time together talking about cases they are dealing with. Incidentally we still however see inappropriate relations with prosecutors (during court observation carried out by NGOs and reported by court observers). It still happens, and is a reminiscence of the socialist period, that the prosecutor is already in court room when the case is called and the rest of the parties and audience are waiting outside the court room. It might be seen as treating the prosecution office differently and should be avoided.

IV. Security

In our opinion security in courts in general is getting gradually better. Further improvements are needed, but most of them depend on the architecture of buildings and are not easy to implement. Usually the entry into courts is secured by special security checks and security guards. Security checks may make it clear whether the visitor to the court is carrying a weapon or some other dangerous instrument. However, based on reports of the Helsinki Foundation for Human Rights,[197] one may observe the following concerns: Sometimes security guards are not diligent in performing their tasks. Despite the existence of security checks they do not use them or do not check luggage thoroughly. As a matter of practice judges, prosecutors, court employees, attorneys, legal advisors or trainees in these professions do not go through the security check. They have only to present their professional ID. In our opinion, the identity of the ID holder is not always checked thoroughly. Most of the courts are located in old buildings, which fact prevents the installation of all the possible security measures. It is contemplated (and in some courts it is already done) to make the internal architecture of court buildings so that there are two zones – one is publicly accessible for court visitors; the second would be internal, accessible only to judges and court staff. However, such change requires significant reconstruction and is achievable in only a small percentage of court buildings.

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[197] See for instance Bodnar/Ejchart (note 161).

From time to time there are incidents concerning physical attacks on judges. They are, however, extremely rare. In September 2009 in Celestynów (near Warsaw) the judge, when performing external activities (a division of property in the house of a divorcing couple) was subjected to a shooting attack by one of the parties to the proceedings (who killed two other people). Following this tragedy, there have been discussions on increasing the level of security for judges. Furthermore, politicians promised to prepare an amendment of the law which would increase imprisonment for an attack on a judge or prosecutor to 14 years. In cases of threats to the judges (which happen very rarely) usually related to organized crime trials, they may also be given personal security. It has happened occasionally in the past, like for instance the permanent personal protection provided by the Government Protection Bureau (*Biuro Ochrony Rządu*) to judge Barbara Piwnik lasting for a couple of months.[198] Such protection may also concern judges' families.

D. Ethical Standards

The NCJ in 2003 adopted a set of professional ethical rules for judges.[199] It is the obligation of the NCJ to enact the set of ethical principles for judges and to ensure their compliance.[200] For this purpose in the event of getting reliable information on professional malpractice, including manifest and flagrant violation of law provisions as well as violation of the "dignity of the office", the NCJ has an obligation to request the opening of disciplinary proceedings.[201] Ethical rules have important authoritative value for judges; they rather have a character of general guidelines and are not practical and detailed. As such they do not provide for any sanction. Where disciplinary proceedings are begun against a judge for an unethical act, the legal basis for finding a disciplinary violation would be legally binding provisions on the status of a judge (such as *dignity of the office*) and not the ethical rules themselves.

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[198] Na celowniku, Wprost, available at <http://www.wprost.pl/ar/9494/Na-celowniku/>.

[199] Appendix to Resolution No 16/2003 of the National Council of the Judiciary of 19 February 2003, Krajowa Rada Sądownictwa, available at <http://www.krs.pl/main2.php?node=ethics>.

[200] According to Article 2(1) point 8 Act on the NCJ.

[201] Article 2(2) point 8 Act on the NCJ.

Those provisions would be interpreted in accordance with the set of ethical rules. The NCJ has issued a few official interpretations of the ethical rules concerning such issues as using the title of a judge when employed as an academic teacher, prohibition on judges undertaking financial activities, the provision of legal advice by retired judges and sending letters of recommendation by the Presidents of courts concerning judges' children, who failed to obtain enough points in the entrance exams to university recruitment appeal commissions.[202] An additional important source of ethical standards is the body of jurisprudence of the disciplinary courts and especially the Supreme Court as a court of appeal.[203]

Discussions on enacting the set of ethical rules started earlier than the adoption of the set by the NCJ. In particular, the Polish Judges' Association *Iustitia* as early as in 2002 undertook works which resulted in its adoption of the set of principles concerning judges' professional behaviour (*Zbiór Zasad Postępowania Sędziów*).[204] This set was the initiative of members of *Iustitia* and was supposed to be applicable only to *Iustitia* members (in its work the NCJ used *Iustitia*'s document to a great extent). In this sense *Iustitia* was in the forefront of future changes. Both sets of rules were enacted because of the harsh criticism of the judiciary in Poland. Their aim was to indicate that the community of judges is ready to be careful about compliance with ethical rules.

In our opinion it is difficult to assess whether judges are sufficiently trained as regards ethical issues. First of all, the National School for the Judiciary and Prosecutors' Authority began work only in October 2009. Currently, the School's curriculum is being prepared. It will include classes on ethics. However, it is not yet certain to what extent future judges will be taught ethics in the next few years, as the training programme is not ready for them. The review of current continuing education courses for judges who are already on the bench offered by the National School indicates that there are no special classes or seminars on judicial ethics. It seems that this limited approach to ethics is

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[202] Published by NCJ and available at <http://www.krs.pl>.

[203] A good classification of ethical violations based on jurisprudence may be found in T. Ereciński/J. Gudowski/J. Iwulski, Commentary to Article 107 AOC, in: J. Gudowski (ed.), Commentary to the Act on Common Courts' System (2009).

[204] Wortal Etyki prawniczej i zawodów prawniczych, available at <http://www.etykaprawnicza.pl/images/pdf/zbi%C3%B3r%20zasad%20post%C4%99powania%20s%C4%99dzi%C3%B3w%20-%20iustitia.pdf>.

connected with the current model of education to become a judge: Every trainee or apprentice, before becoming a judge with tenure, was under the supervision of a senior judge. It was in fact the unwritten task of a senior judge (eventually the President of the court or department of the court) to teach basic ethical rules to a future judge. As regards judges coming from other legal professions it is presumed that they know their ethical obligations, as they were members of self-governmental professional corporations with strong deontological principles. Therefore, it is presumed they do not need any special training when they become judges. To conclude, in our opinion the system of ethical education for judges needs serious reconsideration, as it was not seen as a priority for a number of years. Such education of both future judges and those in service should be based on best practices in other countries.

E. Supreme/Higher Courts

It seems that the major problem with respect to the election of judges to the SC or the Supreme Administrative Court is lack of transparency. Public opinion in general does not know (and is not sufficiently informed) when such elections take place, who the candidates are, what their qualifications are and what are the results. The situation with Constitutional Court judges is different, because they are elected by the Parliament. Accordingly they have to take part in the screening by the *Sejm* Committee on Justice and Human Rights. However, the election of judges to the Constitutional Court may become highly politicized. For example, in 2005-2007 leaders of the "Law and Justice" party declared that they were going to "take over" the Constitutional Court by appointing the majority of the judges.

The Helsinki Foundation for Human Rights, the Batory Foundation and the International Commission of Jurists (Polish Section) undertook a project aiming to make the election of judges to the Constitutional Court more transparent.[205] The project is an important success, since this coalition of NGOs requested from candidates disclosure of differ-

[205] The website of the project is available at <http://www.monitoringsedziow.org.pl/>. See also information on the recent monitoring of the new candidate seeking appointment as judge of the Constitutional Court, including the overview of the project, available at <http://humanrightshouse.org/Articles/13902.html>.

ent data concerning their professional qualifications as well as that they answer a set of questions during specially organized meetings. Interestingly some of the candidates treated this request by NGOs very seriously. Some other candidates ignored this initiative. Obviously it did not prevent the *Sejm* from voting in favour of appointing them as judges of the Constitutional Court. Nevertheless, such approach to NGOs' initiative was also symbolic, influencing the assessment of those candidates by the general public.[206] It does not mean, however, that candidates were not obliged to produce any information about themselves. Quite otherwise – they were required to do this by virtue of the Law on the Constitutional Tribunal and the need for the Polish Parliament to assess their candidacy (whether they meet the legal criteria for holding the relevant posts). However, such disclosure is usually not as detailed as requested by independent NGOs or the press.

F. Conclusion

In order to increase the guarantees of judicial independence we think that the following issues should be considered. There is an obvious need for a final decision on whether the MoJ or the First President of the SC should exercise administrative supervision over the courts. The current system, when the MoJ has such administrative supervision, causes important tensions with the NCJ as well as with judges. It is claimed that in a situation of political turmoil the possibility of supervision of administrative activities may lead to a restriction of the independence of courts and improper influence by politicians. We do not claim that one or the other system is better. We only claim that this issue is not finally resolved from the institutional point of view and may create further tensions.

One of the important guarantees of the independence of the judiciary is that of salary. Judges are still underpaid, which results in protests. The recently introduced system of judicial remuneration moves this problem forward from the institutional point of view but the question remains whether politicians will be eager to fulfil their promises. Nevertheless there is a need to increase judicial salaries. Judges should be pro-

[206] See Ł. Bojarski, Wybory sędziów Trybunału Konstytucyjnego (Elections of judges of the Constitutional Court), Institute of Law and Society (2010), available (in Polish) at <http://www.inpris.pl/img/files/raport_wybory_sedziow_tk.pdf>.

vided with sophisticated administrative, office and staff support (court clerks, secretaries, assistants). It will allow them to concentrate only on adjudication and study. Currently, they have to perform many organizational and administrative tasks which make the proper exercise of their function difficult. We suggest also the introduction of the system of automatic allocation of new cases. Only in highly exceptional situations (such as the need of special professional competences on the side of the judge) should there be exceptions and cases could be allocated not automatically. The Polish judiciary is also waiting for a constitutional explanation of the role of the President in the process of judicial nominations. The case concerning the blocking of ten judicial nominations is still pending before the Constitutional Court. The current situation, where the President may refuse the recommendation put forward by the NCJ, puts candidates for judges in a politically vulnerable situation. However, this problem is a part of the bigger issue – the transparency of and clear criteria for judicial promotion. In our opinion, the current promotion system is far from being fully transparent. Furthermore, there are no effective procedures allowing for representatives of other legal professions to join the judiciary. As a consequence, there is no inflow of fresh thinking, other perspectives and experiences into Polish courts, which decreases their capacity for the strengthening of the judiciary.

We also insist on the value of the education of judges as a guarantee of independence. We do not mean by this just education in the National School (preparing for the judges' exam), but also the continuing legal education of judges. In our opinion judges are not sufficiently trained, especially with respect to ethical issues, methodology of work, philosophy of law, and methods of judicial interpretation. As a result, there is a risk that their internal intellectual independence may not be sufficiently guaranteed, which may have a reflection in judgments issued by a particular judge.[207] Therefore, we recommend that the Polish authorities should insist more on providing comprehensive educational programmes to judges – both at the stage of preliminary training and later on – at the stage of exercising the judge's profession. The MoJ and the Polish Parliament when introducing reforms aiming at an increase in the effectiveness of the judiciary should take particular care of constitu-

[207] K. Gonera, Judicial independence as the Foundation of the Rule of Law: The Judge's Internal (Intellectual) Independence, in: T. Wardyński/M. Niziołek (eds.), Independence of the Judiciary and Legal Profession as Foundations of the Rule of Law. Contemporary challenges, Lexis-Nexis, 383 (2009).

tional and practical guarantees of independence. There is a risk that any positive reform in this area may be easily blocked if it encroaches too strongly on the judiciary.