



INSIGHTS

EU COURT OF JUSTICE STANDING UP TO ILLIBERAL DEMOCRACY: POLISH JUDICIAL “REFORMS” ON TRIAL

TWO FACES OF THE POLISH SUPREME COURT AFTER “REFORMS” OF THE JUDICIARY SYSTEM IN POLAND: THE QUESTION OF JUDICIAL INDEPENDENCE AND APPOINTMENTS

MICHAŁ ZIÓŁKOWSKI*

ABSTRACT: The present *Insight* compares the decisions of two chambers of the Polish Supreme Court regarding the domestic enforcement, under the terms laid down in the Polish Constitution, of a judgment of the Court of Justice, the independence of the judicial branch and the consequences of a judicial appointment. The starting point for the analysis is an overview of recent reforms of judiciary in Poland and the judgment of the Court of Justice in *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC] (judgement of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18). The first discussed ruling of the Supreme Court aimed to fully enforce that judgment of the Court of Justice, whereas the second sought to limit its actual impact.

KEYWORDS: independence – impartiality – Court of Justice – Polish Supreme Court – National Council of the Judiciary – Poland.

I. INTRODUCTION

The analysis discusses two decisions of the Polish Supreme Court against the background of the Court of Justice judgment in joined cases C-585/18, C-624/18 and C-625/18 *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*, which was rendered on 19 November 2019.¹ The decisions of the Supreme Court concerned the

* Max Weber Fellow, European University Institute; Assistant Professor, Kozminski University (Warsaw), michal.ziolkowski@eui.eu. This first version of this *Insight* was presented at the *European Papers* Roundtable “EU Court of Justice standing up to illiberal democracy: Polish judicial ‘reforms’ on trial” (22 November 2019, University of Salamanca). It partly draws from M. ZIÓŁKOWSKI, *Constitutional Crisis, Infinity Mirror Trap and The Polish Supreme Court on Trial*, Max Weber Programme Working Papers (forthcoming).

¹ Court of Justice, judgment of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC].



domestic application of the European and constitutional standards of impartiality and independence of national judicial authorities. The first decision adopted in December 2019² by the three-judge panel of the Supreme Court was a direct follow-up of the judgment of the Court of Justice of 19 November 2019. The second decision was adopted on 8 January 2020 by the Extraordinary Control and Public Affairs Chamber, added to the Polish Supreme Court as part of 2017-2019 “reforms” of the Polish judiciary, introduced by the Law and Justice (PiS) government.

Following my earlier contribution to the debate,³ I will compare two different interpretations of the Court of Justice’s judgment given by the two chambers of the Supreme Court. These interpretations reflect two different approaches to EU law and to the Polish constitutional law. They also represent two different visions of how the 2017-2019 “reforms” changed the judiciary in Poland. The first one is consistent with the Constitution and is EU-friendly, while the second tries to justify some of the unconstitutional changes in the Polish judiciary introduced by the Polish authorities dominated by the Law and Justice party.

II. THE “REFORMS” OF THE NATIONAL COUNCIL OF JUDICIARY AND THE SUPREME COURT

The Law and Justice “reforms” in Poland covered an important part of the judicial branch, including the Constitutional Tribunal as well as the courts of general jurisdiction.⁴ For the purpose of this analysis, I will briefly focus on changes in the powers and

² Supreme Court, judgment of 5 December 2019, case III Po 7/18.

³ M. KRAJEWSKI, M. ZIÓLKOWSKI, *The Power of ‘Appearances’*, in *Verfassungsblog*, 26 November 2019, www.verfassungsblog.de.

⁴ See more about the pending constitutional crisis in Poland: W. SADURSKI, *Poland’s Constitutional Breakdown*, Oxford: Oxford University Press, 2019, p. 162 *et seq.*; W. SADURSKI, *How Democracy Dies (in Poland): A Case-Study of Anti-Constitutional Populist Backsliding*, in *Sydney Law School Research Paper*, no. 1, 2018; M. WYRZYKOWSKI, *Bypassing the Constitution or Changing the Constitutional Order outside the Constitution*, in A. SZMYT, B. BANASZAK (eds), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989-2015*, Gdansk: Gdansk University Press, 2016, p. 159 *et seq.*; M. BERNATT, M. ZIÓLKOWSKI, *Statutory Anti-Constitutionalism*, in *Washington International Law Journal*, 2019, p. 487 *et seq.*; T. DRINÓCZI, A. BIENKACZAŁA, *Illiberal Constitutionalism in Hungary and Poland: The Case of Judicialization of Politics*, in A. BIENKACZAŁA, L. CSINK, T. MILEJ, M. SEROWANIEC (eds), *Liberal Constitutionalism – Between Individual and Collective Interests*, Toruń: Nicolaus Copernicus University in Toruń, 2017, p. 68 *et seq.*; L. GARLICKI, *Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland?)*, in A. SZMYT, B. BANASZAK (eds), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989-2015*, Gdansk: Gdansk University Press, 2016, p. 63 *et seq.*; W. SADURSKI, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralyzed Tribunal, to a Governmental Enabler*, in *Hague Journal of the Rule of Law*, 2019, p. 63 *et seq.*; T.T. KONCEWICZ, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, in *Review of Central and East European Law*, 2018, p. 116 *et seq.*; E. ŁĘTOWSKA, A. WIEWIÓROWSKA-DOMAGALSKA, *A ‘Good’ Change in the Polish Constitutional Tribunal?*, in *Osteuropa Recht*, 2016, p. 79 *et seq.*; A. CHMIELARZ-GROCHAL, J. SUŁKOWSKI, *Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland*, in *Przegląd Konstytucyjny*, 2018, p. 93 *et*

structures of only two of the constitutional authorities, namely: the National Council of Judiciary and the Supreme Court.

The changes affecting the National Judiciary Council were introduced in 2017⁵ but effectively entered into force the following year. The new law dissolved the existing Council and dismissed its members before the end of their terms. The new law changed the way its 15 members are elected.⁶ In the past, they were chosen by judges from among the judicial community. This was replaced by an ultimate power of the Sejm (the lower chamber of the Polish Parliament) to elect 15 members of the Council. Since the Sejm was to decide on majority within the Council, the balance between three branches of power, constitutionally provided in Art. 187, para. 1, of the Constitution,⁷ has been distorted. The new law also introduced a non-transparent procedure for selection of candidates to the Council.⁸ The “recomposed” Council started to work immediately during swift and sometimes extraordinary sessions in 2018. After very short interviews for the positions of Supreme Court judges, the Council recommended to the President of the Republic more than 39 candidates for appointment. Only a few of them were not appointed due to serious public charges against them, revealed after the Council’s decision. At the same time, the Council also negatively appraised a selection of the Supreme Court judges who were appointed in previous years. Moreover, the Council supported “reforms of the judiciary” in another

seq.; P. RADZIEWICZ, *On legal consequences of judgements of the Polish Constitutional Tribunal passed by an irregular panel*, in *Review of Comparative Law*, 2017, p. 45 *et seq.*

⁵ Act of 8 December 2017 Amending the Act on the National Judiciary Council and Others Acts, (Polish) Official Journal 2018, item 3.

⁶ For more see A. ŚLEDZIŃSKA-SIMON, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, in *German Law Journal*, 2018, pp. 1847-1851.

⁷ According to Art. 187, para. 1, of the Constitution: “The National Council of the Judiciary shall be composed as follows: 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 3) 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators”.

⁸ An NGO asked the Parliament for access to public information in order to check who supported candidates to the new National Council of the Judiciary. There were doubts whether candidates achieved sufficient support demanded by the law. The request of an NGO was declined by the Parliament. Consequently, the Supreme Administrative Court ordered publication of all files. The Parliament questioned the final judgement and asked for an intervention of the Data Protection Officer, who is also dependant on the government. The Officer started his own investigation with the result that the files remain unpublished. The National Council of Judiciary was not stopped by the doubts regarding its legitimacy and legality. During extraordinary sessions at the end of 2018, following quick and short interviews with candidates for the positions of Supreme Court judges, the Council recommended forty persons to be appointed by the President of the Republic. In the next two months, the President of the Republic appointed thirty-seven candidates as new Supreme Court judges. In 2019, the Council did not slow down and recommended new candidates who were immediately appointed. For more see: B. GRABOWSKA-MOROZ, K. ŁAKOMIEC, *‘Data Wars: the Phantom Menace’ – personal data protection in the context of rule of law backsliding*, in *Reconnect Blog*, 10 February 2020, www.reconnect-europe.eu.

way: it adopted a new interpretation⁹ of the code of judicial ethics indirectly warning the Polish judges against wearing in public t-shirts with the word “Constitution” on their front.¹⁰ On another occasion, the Council supported the governmental misinterpretation of the Court of Justice judgment of 19 November 2019.¹¹ Recently, acting hand in hand with the Ministry of Justice, the Council publicly criticised the Supreme Court for making a reference to the Court of Justice for a preliminary ruling.¹²

The changes regarding the Supreme Court took effect in 2018 when the new law on the Supreme Court entered into force.¹³ It lowered the retirement age for Supreme Court judges from seventy to sixty-five. That solution was directly applicable to acting judges without leaving them any right to decide whether or not to retire at the lower age. The new law imposed on acting judges, who were sixty-five or older, an obligation to obtain the consent of the Polish President to remain in service. The new law created a number of new positions in the Supreme Court by adding two new chambers to the Court’s structure: the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber. The Disciplinary Chamber was given the ultimate power to decide on disciplinary charges against all judges in the country, including the Supreme Court judges. The Extraordinary Control and Public Affairs Chamber was empowered to control general elections as well as to repeal final decisions of courts in a newly created extraordinary appeal procedure.¹⁴

The laws on the National Council of Judiciary and the Supreme Court gave rise to a number of questions and constitutional doubts concerning, without limitation, the labour law status of judges of the Supreme Court and the Supreme Administrative Court. A few of them decided to question the new laws before the Labour Law and Social Security Chamber of the Polish Supreme Court. All three claimants (judges of the highest courts) reached the age of 65 and, according to the new law, should have retired. In order to avoid that effect, one of those judges expressed her wish to continue her service at the Supreme Court. In accordance with the new law, she asked the President of the Republic for consent to remain in service. However, the newly appointed National Council of Judiciary was given the ultimate power to assess the judge’s motion addressed to the President of the Republic. Unfortunately for the judge, the National Council of Judiciary issued a negative opinion. The remaining two judges refused to ask

⁹ Resolution of the National Council of Judiciary of 12 December 2018.

¹⁰ Since 2015 the T-shirt has become a symbol of civic resistance against the violations of constitutional law.

¹¹ Resolution of the National Judiciary of Judiciary of 21 November 2019.

¹² Resolution of the National Judiciary of Judiciary of 13 December 2019.

¹³ Act of 8 December 2017 on the Supreme Court, (Polish) Official Journal 2018, item 5.

¹⁴ The new chamber with her new powers raised reasonable doubts and awareness also in a field of competition law – see more: M. BERNATT, *Rule of Law Crisis, Judiciary and Competition Law*, in *Legal Issues of Economic Integration*, 2019, p. 345 *et seq.*

for consent, arguing that it would have been a violation of the Constitution, in particular the principle of separation of powers. The President of the Republic sent to all three judges personal (and private) letters informing them about their retirement. The judges challenged the decisions of the National Council of Judiciary and the new law on the Supreme Court demanding a declaration that their employment relationship should continue. Moreover, they claimed to be victims of discrimination on the grounds of age, which is prohibited by Council Directive 2000/78 on equal treatment in employment and occupation.¹⁵ The panel of the Labour Law and Social Security Chamber referred the matter to the Court of Justice under the preliminary ruling procedure.

III. THE COURT OF JUSTICE JUDGMENT

The case before the Court of Justice concerned mainly the issues of independence and impartiality of two national bodies. One was involved in the process of appointing and assessing Polish judges (the National Council of Judiciary).¹⁶ The second was engaged in the process of prosecuting judges (the Disciplinary Chamber). The Disciplinary Chamber has jurisdiction to hear cases concerning judges' status,¹⁷ while the National Council of Judiciary has a crucial impact on the composition of the Disciplinary Chamber. This is the reason why the panel of the Labour Law and Social Security Chamber asked the Court of Justice whether the Disciplinary Chamber could be considered an independent court within the meaning of EU law. If not, the referring court asked whether it should provide effective judicial protection to the claimants by applying the previous jurisdictional provisions and examine the cases by itself.

¹⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

¹⁶ According to Art. 187, para. 1, of the Polish Constitution: “The National Council of the Judiciary shall be composed as follows: 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 3) 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators”.

¹⁷ It should be emphasized that the case started to be heard by the Labour Law and Social Security Chamber of the Polish Supreme Court because it had jurisdiction in all labour matters before the new law of the Supreme Court entered into force. The law modified also the competences of the Supreme Court Chambers and all labour law cases were moved to the Disciplinary Chamber (it was a clear intention of the political majority to provide the Disciplinary Chamber, newly added to the Supreme Court structure, with ultimate jurisdiction in all cases concerned any aspect of judges' status). However, when the case was brought to the Supreme Court, the new Disciplinary Chamber had not been appointed yet. That's why the judges did not want to wait and appealed to the existing Labour Law and Social Security Chamber, instead of the new Disciplinary Chamber of the Supreme Court.

The Court of Justice had at least three possible strategies to settle the case. The first strategy was suggested by Advocate General Tanchev.¹⁸ However, providing a minimum standard of judicial independence would have been a “very risky” choice.¹⁹ The second strategy was to give a direct opinion on the provisions and practices like those in Poland. The third strategy was to prescribe the test of the appearance of independence for national judicial authorities and to give the referring court tools to settle the pending case in accordance with EU law standards.²⁰ The strongest advantage of this last strategy was that the Court of Justice avoided a big leap in its case-law regarding the rule of law²¹ and organization standards in the judiciary. Instead of giving abstract interpretations of what independence and impartiality mean under the EU law,²² the Court opted for a “more complex argumentative and balancing approach”²³ largely based on the concept of “appearance” of independence.²⁴ This concept is based on the idea that the judicial authority “cannot give rise to reasonable doubts, in the minds of individuals, as

¹⁸ Opinion of AG Tanchev delivered on 27 June 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*.

¹⁹ M. KRAJEWSKI, M. ZIÓŁKOWSKI, *The Power of ‘Appearances’*, cit. Taking into account different soft-law sources, the European Court of Human Rights case-law as well as the Venice Commission opinions, AG Tanchev in fact suggested a standard of judiciary organization that would be a minimum set of rules and principles for the Member States regarding appointments of judges. However, the hypothetical European minimum standard of organization of the judiciary might have been questioned since the composition and competences of judicial councils is different in various EU Member States depending on the constitutionally-rooted concepts of the separation of powers. It might have also provoked opposition in the form of references to the constitutional identity and constitutional traditions of the Member States. Finally, by following Advocate General’s opinion, the Court of Justice might have faced a flood of referrals for preliminary ruling from different courts questioning their own systems of organization of the judiciary.

²⁰ *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC], cit., paras 147-152.

²¹ Court of Justice: judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*; judgment of 25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC]; judgment of 24 July 2018, case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)* [GC].

²² The Court of Justice borrowed the concept of impartiality from the European Court of Human Rights case-law (judgment of 25 February 1997, no. 22107/93, *Findlay v. the United Kingdom*, para. 73; judgment of 3 March 2005, no. 54723/00, *Brudnicka and Others v. Poland*, para. 38; judgment of 30 November 2010, no. 23614/08, *Henryk Urban and Ryszard Urban v. Poland*, paras 45-46). It should be, however, emphasised that the Court of Justice did not add any new elements. One may suggest that rather doing that, the Court of Justice used the concepts of impartiality and independence generously *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC], cit., paras 121 and 128).

²³ M. KRAJEWSKI, M. ZIÓŁKOWSKI, *The Power of ‘Appearances’*, cit.

²⁴ M. KRAJEWSKI, *The AG Opinion in the Celmer Case: Why the Test for the Appearance of Independence is Needed*, in *Verfassungsblog*, 5 July 2018, www.verfassungsblog.de; See also M. KRAJEWSKI, *Who is Afraid of the European Council? The Court of Justice’s Cautious Approach to the Independence of Domestic Judges ECJ 25 July 2018, Case C-216/18 PPU, The Minister for Justice and Equality v. L.M.*, in *European Constitutional Law Review*, 2018, p. 801 *et seq.*

to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges”.²⁵

The Court decided that it should be the Polish Supreme Court’s task to consider whether the Disciplinary Chamber, as well as the National Council of Judiciary, are independent and impartial. As it was observed: “the good news is that the ECJ gave to all Polish courts a powerful tool to ensure each citizen’s right to a fair trial before an independent judge, without undermining the systems of judicial appointments in the other Member States”.²⁶ Together with M. Krajewski we argued that it was probably the best way for the ECJ to maintain equilibrium in a pluralistic word of different constitutional solutions in the EU Member States:²⁷ “The bad news is that the test of appearance may easily be misused or abused. Rather than resolving the issue, the ECJ judgment opened a new chapter of the saga about judicial independence in Poland”.²⁸

IV. THE EU-FRIENDLY FACE OF THE SUPREME COURT

After the Court of Justice gave a green light for national courts to assess judicial independence under Art. 47 of the Charter of Fundamental Rights of the European Union, the panel of the Labour Law and Social Security Chamber ruled directly, and for the first time in Polish constitutional history, that the Disciplinary Chamber is not a court within the meaning of EU law.²⁹ The National Council of Judiciary was recognized as a non-independent and not-impartial authority. As a consequence, the Disciplinary Chamber could not hear any case regardless of the power given to it by the binding statutory provisions. The application of that provision would have been a direct violation of EU law. Therefore, the panel decided to hear and to adjudicate in the pending case by itself, excluding the Disciplinary Chamber. The claimant’s appeal was granted, and the decision of the National Council of the Judiciary was annulled.

As a result, the panel of the Labour Law and Social Security Chamber enforced the judgment of the Court of Justice, and called other courts for a judicial review of the in-

²⁵ A.K. (*Indépendance de la chambre disciplinaire de la Cour suprême*) [GC], cit., para. 134.

²⁶ M. KRAJEWSKI, M. ZIÓŁKOWSKI, *The Power of ‘Appearances’*, cit.

²⁷ M. KRAJEWSKI, M. ZIÓŁKOWSKI, *EU Judicial Independence Decentralised: A.K. and others v Sąd Najwyższy (the Polish Supreme Court)*, in *Common Market Law Review* (forthcoming), and compare with slightly different assessment of the judgement offered by M. LELOUP, *An Uncertain First Step in the Field of Judicial Self-government ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A.K., CP and DO*, in *European Constitutional Law Review*, 2020, pp. 11-13. According to M. Lelup it was the first opportunity for the Court of Justice “to address [...] judicial councils and to elaborate on any standards to which they should adhere” (p. 11). Instead of doing that, the Court of Justice failed to develop criteria for judicial appointments and finally offered “protection that is lower than the one found in the case law of the Strasbourg Court” (p. 11). For criticism see: M KRAJEWSKI, M. ZIÓŁKOWSKI, *EU Judicial Independence*, cit.

²⁸ M. KRAJEWSKI, M. ZIÓŁKOWSKI, *The Power of ‘Appearances’*, cit.

²⁹ A.K. (*Indépendance de la chambre disciplinaire de la Cour suprême*) [GC], cit.

dependence and impartiality of new judicial authorities³⁰ and assessed the appearance of independence of the National Council of the Judiciary and the Disciplinary Chamber. The assessment was, however, slightly modified in comparison to what the Court of Justice said. According to the Court of Justice, a non-independent procedure of a judge's appointment alone does not determine the result of an assessment of independence of that judge,³¹ whereas the panel of the Supreme Court ruled that in case of the highest court's judges, the result of the test of appearance hinged on the impartiality and independence of an authority like the National Council of Judiciary.³² Therefore the visible lack of independence of the authority responsible for the appointment procedure has a considerable impact on the independence of the judges appointed in such a procedure.

The National Council of Judiciary was recognised as a non-independent body for the following reasons. Firstly, it was established with a violation of the constitutional provisions. The term of the previously elected members of the Council was terminated by the Parliament, whereas the constitution did not give the Parliament such power.³³ The composition of the new Council (established in 2018) violated the constitutional principle of separation of powers.³⁴ Secondly, the new members of the Council were elected in non-

³⁰ *III Po 7/18*, cit., para. 22.

³¹ The reason was that there are different models of judges appointments in the Member States (that is, by an authority like the National Council of Judiciary or the executive), so the Court could not claim that low level, or even lack of independence, at the beginning of the appointment means that judges lack independence.

³² *III Po 7/18*, cit., para. 25.

³³ *Ibid.*, paras 40-41.

³⁴ The Supreme Court observed that: "The mechanism of electing NCJ members was considerably modified by the amending statute of 8 December 2017 [...]. Pursuant to Article 1(1), the Sejm shall elect fifteen Council members for a joint four-year term of office from among judges of the Supreme Court, common courts, administrative courts, and military courts. When making its choice, the Sejm shall – to the extent possible – recognize the need for judges of diverse types and levels of courts to be represented in the Council. Notably, the provisions of the Constitution of the Republic of Poland have not been amended to the extent of NCJ membership or NCJ members' appointment. This means that a statute could only lawfully amend the manner in which Council members (judges) were elected by judges rather than introduce a procedure of election of NCJ judicial members by the legislature. The aforementioned amendment to the NCJ Act passed jointly with the new Act on the Supreme Court provides a solution whereby the legislature and the executive – regardless of the long statutory tradition of a part of the Council members being elected by judges themselves, reflecting the Council's status and mandate, and of the judiciary being recognized as a power separate from other powers under the Constitution of the Republic of Poland – gain a nearly monopolistic position in deciding the NCJ membership. Today, the legislature is responsible for electing fifteen members of the NCJ who are judges, with six other NCJ members being parliamentary representatives (four and two of whom are elected by the Sejm and the Senate, respectively). The new mechanism of electing NCJ members who are judges has resulted in the decision on appointment of as many as twenty-one of the twenty-five (84 %) of Council members resting with both parliamentary houses. Furthermore, the Minister of Justice and a representative of the President of the Republic of Poland are *ex officio* Council members: consequently, twenty-three of the twenty-five Council members are ultimately appointed by authorities other than the judiciary. This is how the separation of powers and the checks and balances between the legislative, executive,

transparent proceedings.³⁵ Thirdly, according to the panel: “that elected Council members have directly benefitted from recent changes. They have been appointed to [...] positions at courts whose presidents and vice-presidents have been dismissed *ad hoc*, or applied for promotion to a court of higher instance”.³⁶ The fourth reason was that the new Council directly supported the most recent reforms of judiciary in Poland, criticised the Supreme Court and its judges.³⁷ The Supreme Court referred to the publicly expressed opinions, official decisions of the Council and its members to show how they stood hand in hand with the legislative and executive.³⁸ Additionally, the Court noticed that the Council's impartiality and independence were questioned publicly many times by the NGOs, lawyers' associations as well as the judges of courts of general jurisdiction.³⁹

Declaring lack of independence and impartiality of the National Council of Judiciary became the first step for the panel of the Labour Law and Social Security Chamber in assessing the Disciplinary Chamber. It should be remembered that this chamber was *ab initio* introduced into the structure of the top court. It was also granted an extraordinary position, funds and powers. It was appointed from the scratch, after candidates were heard before the non-independent National Council of Judiciary. The Disciplinary Chamber was recognized as a non-independent body for the following reasons. Firstly, its members were recruited from among individuals with publicly visible and strong connections to the legislature or the executive loyal to Law and Justice party.⁴⁰ Secondly, the rules and principles regarding the appointment of the Disciplinary Chamber members were modified twice halfway through the appointment procedure. Both modifications were made to exclude other candidates from the procedure and deprive them of the right to appeal to an independent court.⁴¹ The National Council of Judiciary was given a guarantee that its choice of candidates to the Disciplinary Chamber could not be questioned before any national court. The third reason was that the Disciplinary Chamber supported the directly unconstitutional reforms of the judiciary system and criticised⁴² Polish judges for references for preliminary ruling submitted to the Court of Justice.⁴³

However, the judgment of 5 December 2019 is important for at least three other reasons. The panel of the Labour Law and Social Security Chamber of the Supreme

and judiciary branches have been distorted, while having been duly described under Article 10 of the Constitution of the Republic of Poland as a foundation of a democratic rule of law state model (Article 2 of the Constitution of the Republic of Poland)” (*III Po 7/18*, cit.).

³⁵ *III Po 7/18*, cit., paras 46-48.

³⁶ *Ibid.*, para. 49.

³⁷ *Ibid.*, paras 50-51.

³⁸ *Ibid.*, paras 51-53.

³⁹ *Ibid.*, para. 56.

⁴⁰ *Ibid.*, para. 66.

⁴¹ *Ibid.*, paras 67-68.

⁴² Resolution of the National Council of Judiciary of 13 December 2019.

⁴³ *III Po 7/18*, cit., paras 75-78.

Court opted for a realistic approach to law in time of constitutional crisis.⁴⁴ It called for an examination of the law not just as it is expressed in the newly added statutory provision, but as it is actually applied, particularly by the newly appointed public officers. According to the panel, when it comes to the assessment of impartiality and independence of authorities like the National Council of Judiciary or the Disciplinary Chamber, a court cannot limit itself to the wording of the binding statutory provisions.⁴⁵ Even a perfect constitutional law and strong guarantees of independence may fail to protect authorities from democratic and constitutional backsliding. A national court, therefore, has to take into account how the authorities exercise powers in a broader legal and social context. The panel did it and enumerated the acts and declarations of the National Council of Judiciary (as well as its members) that have undermined their appearance of independence and impartiality. The long list may serve now as a point of reference for other national courts applying the test of appearance of independence.

The judgment of 5 December 2019 seems to be underpinned by a dialogist vision of the relationship between EU law and national law. Without any strong attachment to the constitutional hierarchy and collisions of norms, and without any references to the doctrine of absolute supremacy of the Constitution,⁴⁶ the panel of the Labour Law and Social Security Chamber of the Supreme Court separated its role as dialogue partner for the Court of Justice (under the framework of preliminary ruling procedure) from its role as dialogue partner for the Constitutional Tribunal (under the constitutional framework).⁴⁷ On the one hand, the three-judge panel underlined its constitutional authority and legitimacy to hear the case. The judges referred to the direct application of the Constitution and the principle of primacy of the EU law enshrined in Art. 91, paras 2 and 3, of the Constitution⁴⁸ as well as to the principle of EU-compliant statutory interpretation, which is well-established in the constitutional case-law.⁴⁹ On the other hand, the three-judges panel fully applied the *Simmenthal* doctrine⁵⁰ and subsequent judgments

⁴⁴ *Ibid.*, para. 22.

⁴⁵ *Ibid.*, para. 26.

⁴⁶ Proclaimed in Poland directly by the Constitutional Tribunal in the accession judgement of 18 May 2005, case K 18/04.

⁴⁷ According to Art. 193 of the Constitution: "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court".

⁴⁸ According to Art. 91, paras 2 and 3, of the Constitution: "2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. 3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

⁴⁹ Constitutional Tribunal, judgment of 23 May 2003, case K 11/03.

⁵⁰ Court of Justice, judgment of 9 March 1978, case C-106/77, *Amministrazione delle finanze dello Stato v. Simmenthal*, para. 24.

of the Court of Justice,⁵¹ with particular attention to *Cordero-Alonso*⁵² and *Filipiak*⁵³ cases. The Supreme Court reminded that the constitutionality of a statutory provision, recognized by the national constitutional court, does not mean that this provision is also compatible with EU law. Moreover, a decision of national constitutional court to temporarily maintain in force the unconstitutional provision, cannot stop a national court, acting as a European court, from applying EU law.

All those remarks were necessary for the Supreme Court because the questions regarding the impartiality and independence of the Disciplinary Chamber and the National Council of Judiciary had not even been noticed either by the Polish President or by the Constitutional Tribunal. It should be remembered that the President appointed new judges without questioning the statuses of the Disciplinary Chamber and the National Council of Judiciary. The unconstitutionally composed Constitutional Tribunal held the provisions on the National Council of Judiciary to compliant with the Polish Constitution.⁵⁴ Neither the President of the Republic nor the Constitutional Tribunal waited for the judgment of the Court of Justice. Therefore, the Supreme Court had to confront itself with the national statutes being recognized as constitutional by the Constitutional Tribunal and complied with by the President of the Republic. Those statutes not only caused effects inconsistent with EU law (such as the creation of a non-independent judicial authority like the National Council of Judiciary), but – at the same time – they modified the structure and powers of the Supreme Court.

The main issue for the Supreme Court was to deny the effect of those statutes without provoking other constitutional authorities and involving the Constitutional Tribunal. The easiest answer from the EU law perspective was more complex from the constitutional law angle. Nevertheless, the Supreme Court followed the path of the two dialogues in which every court is simultaneously involved. One is with the Court of Justice, second – with the Constitutional Tribunal. According to the commented judgment, when it comes to human rights protection as well as to perception of judiciary independence, a national court has to choose the highest possible standard, no matter what the constitutional provision and interpretations say. As a consequence, courts may be involved in a dialogue with the Court of Justice only and avoid the Constitutional Tribunal. It seems that according to the discussed judgment, the Tribunal would remain the “court having the last say”, but not in all constitutional matters. The Supreme Court re-

⁵¹ Court of Justice, judgment of 8 September 2010, case C-409/06, *Winner Wetten* [GC].

⁵² Court of Justice, judgment of 7 September 2006, case C-81/05, *Cordero Alonso*.

⁵³ Court of Justice, judgment of 19 November 2009, case C-314/08, *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*.

⁵⁴ Constitutional Tribunal, judgment of 20 June 2017, case K 5/17.

served for itself at least the right to decide whether to act within the Union or national framework of human rights protection.⁵⁵

V. THE RESTRAINED FACE OF THE SUPREME COURT

The reaction to the above-mentioned judgment of the Supreme Court was almost immediate. Less than a month later, the Extraordinary Control and Public Affairs Chamber adopted its resolution,⁵⁶ also concerning the judgment of the Court of Justice of 19 November 2019.

The resolution of 8 January is a EU law-friendly decision, but only at the first sight.⁵⁷ The judges of the Extraordinary Control and Public Affairs Chamber underline that the judgment of the Court of Justice should be enforced and it is a duty of the Supreme Court to apply the test of appearance whenever necessary.⁵⁸ The judges also underline that there is no doubt that criteria provided by the Court of Justice should be applicable to the Disciplinary Chamber.⁵⁹ Its status may raise a reasonable doubt in the minds of individuals. Moreover, the judges share the view that the Constitutional Tribunal judgments regarding the status of the National Council of Judiciary should not refrain the Supreme Court from applying the Court of Justice judgment and its test of appearance.⁶⁰ However,

⁵⁵ The Polish constitution law has never reserved for the Constitutional Tribunal any monopoly to interpret the constitutional provisions similarly to the way international treaties do it for the international tribunals. Before the Constitution entered into force, the Tribunal was deprived of the power to give abstract and universally binding constitutional interpretations. The Tribunal was not even mentioned as a guardian of the Constitution by the then binding provisions (compare with Article 126). By 2015, the Tribunal archived that position in the Polish constitutional system by force of its arguments rather formal legitimacy.

⁵⁶ The Supreme Court (sitting as a panel of seven judges of the Extraordinary Control and Public Affairs Chamber), resolution of 8 January 2020, case I NOZP 3/19.

⁵⁷ The panel pointed out that "I. The Supreme Court, in reviewing an appeal against a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, examines – upon the grounds for the appeal and within its scope – whether the National Council of the Judiciary is an independent body according to the criteria as determined in the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, A.K. and Others versus the Supreme Court, paragraphs 139-144. II. The Supreme Court sets aside, within the scope of the appeal, a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, provided that an appellant proves that the lack of independence on the part of the National Council of the Judiciary did affect the contents of such a resolution or provided that – having regard to the constitutional prohibition of reviewing effectiveness of the act of appointment to the office of judge by the President of the Republic of Poland, as well as the relation resulting thereof – the appellant will demonstrate the circumstance indicated in paragraph 125, or jointly the circumstances listed in paragraphs 147-151 of the judgment referred to in point I of the resolution, indicating that the court in whose bench such a judge will sit will not be independent and impartial." (*I NOZP 3/19*, cit.).

⁵⁸ *I NOZP 3/19*, cit., para. 9.

⁵⁹ *Ibid.*, para. 15.

⁶⁰ *Ibid.*, paras 16-17.

the panel of the Extraordinary Control and Public Affairs Chamber did not mention that the Constitutional Tribunal had been unconstitutionally composed, which the panel of the Labour Law and Social Security Chamber did expressly one month earlier.

The EU-friendly disguise can be seen through upon a more careful reading of the resolution of 8 January 2020. The panel of the Extraordinary Control and Public Affairs Chamber limited the enforcement of the judgment of the Court of Justice by using a very particular (and pro-governmental) interpretation of the constitutional provisions. According to the resolution, appointment of judges cannot be questioned before any court or any authority in Poland regardless of the nature and scope of violation of the law.⁶¹ The appointment of a judge is a "personal"⁶² power (prerogative)⁶³ of the President of the Republic. There are no dedicated statutory appellate proceedings in which the appointment could be changed, challenged or annulled.⁶⁴ In the panel's opinion, any mistake or violation of law made before the appointment has no effect on the judicial authority and legitimacy once the President of the Republic has made the decision. In other words, lack of independence and impartiality of the National Council of Judiciary, which selects candidates for judges, as well as that candidates' own lack of independence or impartiality from the executive during the appointment proceedings cannot undermine the independence of the candidates-turned-judges. The test of appearance of their independence cannot be applied to reasons and facts from the period before their appointments.⁶⁵

The resolution of 8 January 2020 differs from the judgment of 5 December 2019 for a host of reasons. First, the resolution presents a different approach to the EU law and its relationship with constitutional law. The judges of the Extraordinary Control and Public Affairs Chamber opted for a more traditional and hierarchical approach. They underlined an absolute primacy and application of the Constitution.⁶⁶ They also directly referred to limitations of EU law, expressed mainly in Art. 4 TEU.⁶⁷ The second difference between the two decisions concerns the standards of EU law regarding the appointment of judges. Whereas the judgment of 5 December 2019 focused on the functional guarantees for judicial independence under the Art. 47 of the Charter of Fundamental Rights of the European Union, the resolution of 8 January 2020 underlined the EU's lack power to regulate, or even direct, how the appointment of judges should take place in the Member States.⁶⁸ The judges of the Extraordinary Control and Public Affairs

⁶¹ *Ibid.*, para. 32.

⁶² *Ibid.*, paras 36-37.

⁶³ It should be underlined that similar arguments and interpretation of the Polish constitutional provisions were presented by the Polish Government in the case *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC], cit.

⁶⁴ *I NOZP 3/19*, cit., para. 32.

⁶⁵ *Ibid.*, para. 32 *in fine* and para. 33.

⁶⁶ *Ibid.*, paras 18 and 21.

⁶⁷ *Ibid.*, para. 19.

⁶⁸ *Ibid.*, para. 24.

Chamber pointed out that “Article 19 TEU does not specify the criteria of appointment, the appointing entity; neither does it release the Member States from the constitutional obligation to guarantee judicial appointments’ democratic legitimacy. Nor is the matter regulated by any other provision of EU law”.⁶⁹ The third difference worthy of mention is that, according to the resolution of 8 January 2020, the independence and impartiality of the newly appointed judges (including members of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber) cannot be evaluated by reference to lack of independence and impartiality of the National Council of Judiciary. According to the judgment of 5 December and the judgment of the Court of Justice, this is the starting point for the evaluation. The fourth difference is that the panel of the Extraordinary Control and Public Affairs Chamber did not share the legal realism of the panel of the Labour Law and Social Security Chamber. More specifically, the resolution of 8 January 2020 skipped the constitutional crisis context and precedent-setting nature of the issues heard by the Supreme Court. Instead, the panel underlined the role of the President of the Republic as the guardian of the Constitution,⁷⁰ the constitutional authority of the National Council of Judiciary,⁷¹ and the binding force of the new law.⁷² Last but not least, according to the judgment of 5 December 2019, the test of appearance applies to all newly appointed judges and covers all facts regarding their appointments and activity. The test was also developed for all national courts acting as European courts. According to the resolution of 8 January 2020, the test is addressed only to the Supreme Court⁷³ and it covers the facts and activities of the newly elected judges only after their appointment. This would mean that an important part of the Court of Justice directions⁷⁴ would have no effect in the Polish system.

To sum up, the newly appointed judges sitting on the panel of the Extraordinary Control and Public Affairs Chamber reacted directly to the judgment of the panel of the Labour Law and Social Security Chamber. They limited the enforcement of the judgment of Court of Justice as well as the judgment of 5 December 2019 to protect the effects of the 2017-2019 “reforms” of the judiciary in Poland, but also to protect the validity of their own appointments, their authority as well as their appearance of independence. As a result, the panel pointed out that the test developed by the Court of Justice and applied in the judgment of 5 December 2019 should not be applied under the Polish constitutional law with respect to the past. As for the future, the test was limited by the newly appointed judges so severely that it is almost impossible to carry it out.

⁶⁹ *Ibid.*, para. 24 *in fine*.

⁷⁰ *Ibid.*, para. 34.

⁷¹ *Ibid.*, paras 40-41.

⁷² *Ibid.*, para. 41 *et seq.*

⁷³ *Ibid.*, para. 59.

⁷⁴ A.K. (*Indépendance de la chambre disciplinaire de la Cour suprême*), cit., paras 125 and 147-151.

VI. CONCLUSIONS

The disagreement between the two (“old” and “new”) chambers of the Supreme Court, discussed above, resulted in a situation without precedent. On 23 January 2020, sixty judges of the Supreme Court after an extraordinary joint session of three (“old”) chambers of Poland’s top court adopted a new resolution.⁷⁵ It mainly followed the Supreme Court judgment of 5 December 2019 and the judgment of the Court of Justice. Firstly, the Supreme Court ruled that the Polish courts of general jurisdiction could be recognised as unlawfully composed when those courts delivered rulings with the participation of judges selected by the non-independent National Council of Judiciary. The lawfulness of a court’s panel should be assessed on a case by case basis and with respect to the concept of judicial independence provided by the Polish Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights. The Supreme Court limited this effect to the judgments rendered after 23 January 2020. Secondly, the Supreme Court ruled that the National Council of Judiciary was not independent and the Disciplinary Chamber was not a court in the sense of constitutional law and EU law. Thirdly, the Supreme Court declared that newly elected judges of the Supreme Court, in particular judges of the Disciplinary Chamber, could not lawfully sit on panels of the Supreme Court.

Unfortunately, the resolution of 23 January 2020 did not settle the disagreement between “old” and “new” chambers of the Supreme Court regarding the assessment of judicial independence in Poland. The resolution was ignored by the unconstitutional and non-independent Disciplinary Chamber as well as by the National Council of Judiciary.⁷⁶ Moreover, the new law on courts,⁷⁷ which entered into force on 14 February 2020, expressly prohibited all courts in Poland⁷⁸ from applying the test of appearance in any cases concerning judges who were appointed after 2018, and with the active involvement of the non-independent National Council of Judiciary. Therefore, the bad out-

⁷⁵ The Supreme Court (sitting as a panel of the Civil Chamber, the Criminal Chamber and the Labour Law and Social Security Chamber), resolution of 23 January 2020, case No. BSA I-4110-1/20. For more see M. KRAJEWSKI, M. ZIÓŁKOWSKI, *EU Judicial Independence*, cit.

⁷⁶ For more on the current situation see: A. APPLEBAUM, *The Disturbing Campaign Against Poland’s Judges*, in *The Atlantic*, 28 January 2020, www.theatlantic.com.

⁷⁷ Act of 20 December 2019 Amending the Act on System of Courts of General Jurisdiction, the Act on the Supreme Court as well as Other Acts, Official Journal 2020, item 190.

⁷⁸ The new law introduced new disciplinary offences. One of these offences is an act that questions the lawfulness and legal consequences of a judge’s appointment. Moreover, according to the new law, a judge cannot question another judge’s power to hear cases, even if the latter does not give the appearance of independence. The new provisions expressly prohibit judges from undermining the legitimacy and authority of the Constitutional Tribunal and the National Council of the Judiciary. The sanctions for a violation of those provisions are clear. The judge may be moved to another court or removed from office (see Arts 42a and 107 of the Act of 27 July 2001 on the System of Courts of General Jurisdiction; as amended).

look for the judiciary in Poland is more likely to become true as the restrained face of the Supreme Court is more likely to dominate in the nearest future.⁷⁹

In April 2020 the unconstitutionally composed Constitutional Tribunal gave its helping hand to the political majority, to the Disciplinary Chamber and to all “new” judges of the Supreme Court. For the first time in the Polish constitutional history, the Tribunal unlawfully suspended the Supreme Court’s panels to prevent “old” judges from the application of the Court of Justice judgement.⁸⁰ Then the Tribunal ruled that the Supreme Court’s resolution of 23 January 2020 is unconstitutional and has no effect.⁸¹ If that was not enough, the politically captured Tribunal ruled that the Supreme Court’s interpretation of EU law and the Constitution was a violation of the Parliament’s power to adopt statutes.⁸² Careful reading of the Polish Constitution⁸³ and statute on the Supreme Court⁸⁴ should be sufficient to claim that the Tribunal had no power to question the Supreme Court constitutional position and powers to interpret and apply the law. However, almost everything is possible when the political majority, and captured Constitutional Tribunal, have been playing “constitutional hardball”⁸⁵ for a long time and now start to act outside the constitutional system (“outside any procedures”).⁸⁶

⁷⁹ It should be noted that the President of Poland appointed one of the “new judges” as the First President of the Supreme Court. She cannot be considered an independent judge in light of the judgment of the ECJ in *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC], cit., and the subsequent rulings of the Polish Supreme Court. See M. KRAJEWSKI, M. ZIÓLKOWSKI, *Can an Unlawful Judge be the First President of the Supreme Court?*, in *Verfassungsblog*, 26 May 2020, www.verfassungsblog.de.

⁸⁰ Constitutional Tribunal, decision of 28 January 2020, case Kpt 1/20.

⁸¹ Constitutional Tribunal, judgement of 20 April 2020, case U 2/20.

⁸² Constitutional Tribunal, decision of 21 April 2020, case Kpt 1/20.

⁸³ Art. 188 of the Constitution limits the Tribunal’s power to rule on unconstitutionality of normative acts only (i.e. statutes, international treaties or Government’s acts). The Supreme Court’s resolution, giving the interpretation of binding statutory provisions, cannot be recognised as a normative act even in a very progressive conceptual framework of judicial activism. Moreover, the Supreme Court is directly empowered in the Constitution to give interpretations of the law, which is formally and substantially different from Parliament’s act (Art. 183 of the Constitution).

⁸⁴ Art. 87 act on the Supreme Court directly provides the Supreme Court power to adopt resolutions in order to give an abstract interpretation of binding provisions. That kind of resolutions is binding for all panels of the Supreme Court.

⁸⁵ A term borrowed from by M.V. TUSHNET, *Constitutional Hardball*, in *John Marshall Law Review*, 2004, p. 523 *et seq.*

⁸⁶ To quote (in)famous Jarosław Kaczyński, when he silenced the Speaker of the Sejm during a parliamentary debate. In 2017 Kaczyński took the floor, ignored the parliamentary conventions and violated the Rules of Procedure. After he was asked by the Speaker as to the legal basis of his intervention, he honestly replied: “outside any procedures” and continued his speech to the parliament.