

Case Note

COURT COMPOSITION AND ITS INVARIABILITY AS ELEMENTS OF A COURT ESTABLISHED BY LAW DURING COVID-19 PANDEMIC: LESSONS FROM POLAND

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Key words: COVID – 19 pandemic, panel of judges, composition of the court; collegial composition; the principle of an invariability (stability) of the panel of the courts

ABSTRACT

Background: *The article discusses systemic and processual changes in provisions referring to the panels of judges in Poland. The statutory regulation adequate during the COVID-19 epidemic contains regulations whereby a single-judge panel is proper in the first and second instance. At the*

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which meets the following prerequisites: a) organizational ones, i.e. it is lawfully established, independent (sovereign) and impartial and exercises the function of adjudication, namely is competent to hear the cases covered by its jurisdiction under the rule of law, b) procedural ones, i.e. trial before this court is provided for by the law, c) functional ones, i.e. it has full authority in cases covered by its competence and jurisdiction to give legally binding decisions which may not be amended or repealed by non-court bodies' may be deemed a 'court as defined in Art. 6(1)'. Under Art. 6(1) ECHR the issue of proper court composition is contained in the phrases 'fair trial' by 'a tribunal established by law'⁴.

In the European law (Art. 2 and 19(1)(2) of the Treaty on European Union (hereinafter - TEU⁵) it is incontestable that the requirement for independence of judges forms a part of the essential content of the right to fair trial, which itself carries significant importance as it guarantees the protection of all the rights derived by individuals from the EU law⁶. Case law of the Court of Justice of European Union (CJEU) unambiguously indicates that the right of recourse to independent court includes in its content also the composition of the adjudicating court. Thus, it refers to the right to have the case heard by a neutral judge. In the recent time, a very important decision referring to delegated judges CJEU held that Art. 19(1)(2) TEU, interpreted in the light of Art. 2 TEU and Art. 6(1 and 2) of the directive of European Parliament and Council (EU) 2016/343 on reinforcement of some aspects of presumption of innocence and the right to be present during the criminal trial⁷ should be interpreted in such a way that it conflicts with the national law. Under the national law, the justice minister of a member state may, under the criteria which were not made public, on the one hand, delegate a judge to the criminal court of a higher instance for a definite or indefinite period of time, and, on the other hand, may, at any time under the decision which states no grounds therefor, end the delegation of such a judge irrespective of the fact whether it was made for indefinite or definite period of time⁸. So, in this judgement the discretionary influence of the Justice Minister - General Prosecutor on the court composition was blocked.

The comparative context indicates that the rule of court composition invariability in civil proceedings is not an absolute, but a prevailing European standard; however, it is desirable especially in terms of **appellate courts and supreme courts**⁹.

- 4 *Dolińska-Ficek and Ozimek against Poland* App no 49868/19 and 57511/19 (ECtHR, 8 November 2021) <
- 5 Treaty on European Union (consolidated version O.J EU of 2012 C326, p 13).
- 6 Case *T PPU v LM*, C-216/18 (2018), ECLI:EU:C:2018:586. See also: K Gajda-Roszczyńska, 'Judicial independence as a constituent of the concept of "court of law" in the context of amendments to the Law on the organization of common courts introduced in the years 2015–2018' in K Gajda-Roszczyńska, D Szumiło-Kulczycka (eds), *Judicial management vs independence of judiciary* (Wolters Kluwer 2018) 26 et seq.; K Gajda-Roszczyńska, 'Test sześciu warunków unijnego standardu pojęcia „sądu” a polski wymiar sprawiedliwości – rozważania na kanwie wyroku TSUE z 27.02.2018 r. w sprawie C-64/16 Associação Sindical dos Juizes Portugueses' (2018) 3 *Iustitia* 6 et seq.
- 7 Directive of the European Parliament and Council (EU) 2016/343 dated 9 March 2016 on reinforcement of certain aspect of presumption of innocence and the right to be present during criminal trial (O.J. EU L 65, p 1).
- 8 Joined cases from C-748/19 to C-754/19 Prokuratura Rejonowa w Mińsku Mazowieckim and Others CJ, judgement dated 16 November 2021, ECLI:EU:C:2021:931; Joined cases from C-748/19 to C-754/19 Prokuratura Rejonowa w Mińsku Mazowieckim and Others CJ, opinion of the Advocate-General, M. Bobek dated 20 May 2021, ECLI:EU:C:2021:403.
- 9 B Hacker, W Ernst, *Collective Judging in Comparative Perspective. Counting Voices and Weighin, Opinions* (Oxford 2020).

3 THE RULES REFERRING TO PANELS OF JUDGES IN THE CIVIL PROCEEDING

3.1 The Rules Referring to Panels of Judges in the Civil Proceeding

It is a rule in the Polish procedural civil law that in the first instance the court is composed of one judge unless a special provision stipulates otherwise (S. 47 para. 1 of the Civil Proceedings Code (CPC))¹⁰. In the first instance the following cases are heard by the court composed of one judge as the presiding judge and two lay judges: labour law cases for: a) determination of the existence, initiation or termination of employment relationship, determination of ineffectiveness of employment termination, reinstatement to work and reinstatement of previous work or pay conditions and claims sought therewith and compensation for unjustified or law-breaching termination of employment or dismissal, b) determination of breaching the principle of equal treatment in employment and claims connected therewith, c) compensation or redress with respect to mobbing; 2) family cases concerning: a) a divorce, b) separation, c) determination of ineffectiveness of establishing the paternity, d) dissolution of adoption. (S. 47 para. 2 CPC). This regulation concerns the composition of first-instance courts hearing cases during the contentious proceedings. In the non-contentious proceedings, the court is composed of one judge and two lay judges in adoption cases. Generally collegial composition includes lay judges, although collegial professional composition (3 judges) also exists. This is the case in issues concerning incapacitation where the regional court has jurisdiction as the first instance (S. 544 para. 1 CPC).

3.2 The Principle of the Collegiality of the Panels of the Courts of Appeal

In relation to the benefits resulting from collegial hearing of cases in the Polish procedural civil law there is a rule that in appeal proceedings the court is composed of 3 judges (appeal - S. 367 para. 3 CPC, complaint S. 397 para. 1 CPC, cassation complaint - S. 398. Appeal is the basic remedy for appealing against the substantive decisions. Under S. 367 para. 3 CPC the case is heard by three professional judges. Decisions concerning the evidence proceedings in a closed session are issued by the court composed of one judge. On 2 March 2006 para. 4¹¹ was added to S. 367 CPC. It provides for that 'the decision on granting or withdrawing the exemption from court fees, refusal to exempt, rejection of the motion for exemption and imposition of a duty on the party to pay the costs and punishment with a fine may be granted by the court at a closed session composed of one judge'. A deviation from the collegial composition of the court concerns only procedural issues, not related to administration of justice. A quest for fleeing swiftness of the proceedings led to the situation in which even before the pandemic in 2019 a provision was implemented which indicated that at a closed session the court is composed of one judge, except when giving a judgement.¹² In brief it was assumed that the appeal court takes all the non-substantive decisions being composed of one judge. The rule that the judgement is awarded by the court of appeal composed of 3 judges was, however, retained.¹³

10 Act dated 17 November 1964, Civil Proceedings Code (Dz.U. of 2021 item 1805 as amended).

11 The Act dated 28 July 2005 on Court Fees in Civil Matters (Dz. U. 2021.2257)

12 The Act dated 4 July 2019 on amending the law: Civil Procedure Code and Certain Other Acts (Dz. U. 2019.1469)

13 Only in summary procedure and in the European proceedings concerning minor claims the court hears the appeal being composed of one judge (S. 505¹⁰ para 1 and S. 505²² para 1 CPC).

It should be noted here that in the Polish law there is a provision allowing for each case to be heard by the court composed of three professional judges if the case is especially complex (S. 47 para. 4 CPC). This refers mainly to the legal complexity, but we cannot exclude the complexity resulting from convolution of facts. Three professional judges may also hear a case of a precedential nature.¹⁴ A ruling of the president issued under S. 47 para. 4 – being of system-wide nature – is, however, above all a jurisdictional act shaping the composition of the court in a given case.¹⁵ This provision was criticized in the literature and in practice it was used very rarely.¹⁶

The Polish procedural and systemic law concerning civil cases did not provide for the principle of invariability of court composition or random allocation of judges. Under the proximity principle expressed in the still applicable procedural provision, a judgement may be only awarded by judges who led the hearing directly preceding the awarding of the judgment (S. 323 CPC).¹⁷ In turn, cases were allocated according to the order they were filed in.

Since 2015 when the power in Poland was taken over by populist parties fighting with the independence of courts and the division of powers, a number of changes have been adopted, including procedural and systemic ones. They touch upon also the problem discussed here. Theoretically they were supposed to enhance the standard of legal protection, but the practice showed something completely different.

3.3 The Principle of Invariability of the Adjudicating Court Composition

In 2017 the national legislator simultaneously introduced to the Polish legal order two principles: **the principle of random allocation of judges to cases**¹⁸ and **the principle of invariability of the adjudicating court composition** (called also stability, steadiness principle). Since 12 August 2017 these two changes have been introduced to the Act -¹⁹ Law on Common Courts (LCCS) System. The first of them, namely the principle of random allocation of judges to cases, expressed in S. 47a para. 1 LCCS, under which cases are allocated to judges and assistant judges randomly, within particular categories of cases unless a case is to be allocated to the judge on duty²⁰. It is obvious that for the court to be competent and independent, it should be composed on the basis of objective and transparent criteria. Theoretically introduction of the principle of random allocation of the cases was to confirm this. It is not a new solution - it was used before in criminal cases (S. 351 CrimPC in its version before 12 August 2017). The principles of allocating civil cases were defined in the regulation of operation of common courts²¹. They were also based on the principle of randomization

14 J Gudowski, in T Ereciński (ed), *Kodeks postępowania cywilnego*, Komentarz, Volume 1 (Wolters Kluwer 2016) 344, AG Harla, 'Precedensowy charakter sprawy cywilnej w rozumieniu kodeksu postępowania cywilnego. Uwagi de lege lata i de lege ferenda' (2001) 4 Przegląd Sądowy 23.

15 Ibid para 14, 344

16 K Markiewicz, 'Właściwość sądu, skład sądu i wyłączenie sędziego w pracach Komisji Kodyfikacyjnej Prawa Cywilnego', 2015 (2) Polski Proces Cywilny 296–297

17 K Markiewicz, in A Marciniań (ed) *Kodeks postępowania cywilnego. Vol. II. Komentarz do art. 2051–424¹²* (Beck 2019) 600–602.

18 B Przymusiński, *Ustrój sądów powszechnych. Przepisy z wprowadzeniem* (Wolters Kluwer 2017) 44–45.

19 Law on Common Court System of 27 July 2001 (Dz.U. of 2020 item 2072 as amended).

20 M Pytlewska, 'System Losowego Przydziału Spraw jako gwarancja bezstronności prawa do sądu w kontekście Unii Europejskiej' 2019 (40) Prawo w Działaniu 265.

21 Justice Minister Regulation of 18 June 2019 – regulations of operation of common courts (Dz.U. of 2021 item 2046 as amended). K Markiewicz, 'Niezawisłość i niezależność jako gwarancja dostępu do ochrony prawnej' in K Flaga-Gieruszyńska, R Flejszar, E Marszałkowska-Krześ (eds), *Dostęp do ochrony prawnej w postępowaniu cywilnym* (Beck 2021) 27–48.

(order of receiving them), which met international requirements²². Everybody was able to determine how his/her case was allocated to a given judge. The newly introduced system contradicts the transparency of the process of allocating cases to judges. The central system of random allocation of judges is fully controlled by Justice Minister - Prosecutor General, i.e. by a party or a potential party to court proceedings, which contradicts international standards²³. Contrary to the previous system, parties to the proceedings have no control over the ministerial system of case allocation. It should be added that this system was not introduced in the Constitutional Tribunal and the Supreme Court. Politicians made sure they will have influence on the choice of presidents and entrusted these presidents with the authority to allocate cases.

At the beginning the Justice Ministry refused to provide non-governmental organizations with the algorithm of at-random selection and source code and the information where the servers are located. Provision of algorithm itself does not fully solve the problem²⁴. Due to concealment and impossibility to verify the correctness of all the data about the system of at-random selection²⁵ it may be still argued that the judges are not allocated to cases randomly²⁶.

The second principle of invariability of the court composition²⁷ was expressed in S. 47b LCCS, added in the light of S. 1 of the Act dated 12 July 2017 amending the Law on Common Court System and Certain Other Acts. According to this principle, the composition may be changed only if the case cannot be heard by the hitherto used court composition or there is a long-term obstacle in hearing the case by the hitherto used court composition. Special importance of the principle of invariability of court composition introduced by the legislator is confirmed by the grounds for the bill where it was stated that²⁸ 'Once randomly chosen court composition, irrespective of the fact whether it contains one or a few judges, shall not be changed before the case is terminated'. In legislator's opinion only joint application of these two principles guarantees impartiality of the court, equality of the parties and internal

22 'Recommendations of the Committee of Ministers of the Council of Europe No R (94)12' in Jerzy Jasiński (ed), *Sądownictwo. Organizacja – postępowanie – orzekanie, Vol IV* (Instytut Wymiaru Sprawiedliwości 1998).

23 See *Daktaras v Lithuania* App no 42095/98 (ECtHR, 10 October 2000) <<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%2242095/98%22%22%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%22CHAMBER%22%22itemid%22:%5B%22001-58855%22%22%7D>> accessed 24 February 2022.

24 S Wikariak, 'MS ujawniło algorytm losowania sędziów' <<https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8249422,nsa-ms-algorytm-losowania-sedziow.html>> accessed 20 January 2022.

25 Only the judgement of Supreme Administrative Court of Poland of 19 April 2021, III OSK 836/21, LEX no. 3184818 obliged the Justice Minister to hear the motion of the challenging Foundation (...) based in Z. dated 4 December 2017 for the provision of algorithm of the System of Random Allocation of Cases within 14 days from receiving the judgement together with case files. The source code still has not been revealed, which is underlined by the Civic Network Watchdog Polska. – in K Batko-Tołuć, 'Losowanie sędziów a zaufanie społeczne' <<https://siecobywatelska.pl/losowanie-sedziow-a-zaufanie-spoeczne/>> accessed 20 January 2022>; 'Realizacja projektów informatycznych mających na celu usprawnienie wymiaru sprawiedliwości' <<https://siecobywatelska.pl/wp-content/uploads/2021/09/P-19-038-LWR-410.023.02.2019-01.pdf>> accessed 20 January 2022>. See also *Odpowiedź SSP 'Iustitia' na Białą Księgę w sprawie reform polskiego wymiaru sprawiedliwości przedstawioną przez Rząd RP Komisji Europejskiej* (Warszawa 2018) <https://www.iustitia.pl/images/pliki/odpowiedz_na_biala_ksiega_pl.pdf> accessed 30 September 2021; K Markiewicz, 'The battle for free of Judiciary courts in Poland in the years 2015–2018' in K Gajda-Roszczyńska, D Szumiło-Kulczycka (n 6) 17–60; K Markiewicz, 'Czy w Polsce są wolne sądy? Ocena z perspektywy trzech lat walki o praworządność 2018 (4) *Iustitia* 186–204.

26 More information in P Semper, 'System do poprawy?' 2018 (3) *Iustitia* 148.

27 Ibid para 17, 600-601; .

28 Uzasadnienie poselskiego projektu ustawy o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, Sejm VIII kadencji, Sejm Paper no 1491.

ensure also impartiality of the court, equally of the parties and external transparency of case allocation³¹. There is no doubt that also according to the national legislator the right of recourse to court means not only the right of recourse to the court composition empanelled lawfully, ensuring its independence, but also its stability. It is worth mentioning that the principles of random allocation of cases and court composition stability were not introduced into the Constitutional Tribunal and Supreme Court as there already were court presidents appointed by the present government and it is their role to empanel the court composition according to their discretion, change it as they wish, which is to be discussed later on in this paper. Empanelling by CT President of the court composition hearing cases in CT, which breaches these principles, is a commonly known fact among Polish lawyers³².

4 THE PRINCIPLE OF INVARIABILITY OF THE ADJUDICATING COURT COMPOSITION DURING COVID – 19 PANDEMIC

Covid statutes concerned various procedural and systemic aspects. What is important is that in principle they limited the principles connected with the right of recourse to court in all of its aspects and this was not necessarily connected with epidemic restrictions.³³ What is important, they were introduced in the period of ruthless fight with Polish judges defending court independence³⁴. It was also a period when disclosure of data was compelled which showed a collapse of court functioning also at the level of swiftness of proceedings. Here it needs to be explained that the first Covid statute 'fought' with the pandemic in such a way that it introduced the provision prohibiting the disclosure of the existing data concerning courts' operation in the period before the pandemic!³⁵

Out of the numerous Covid acts the last one is important in terms of court composition, namely S. 15zsz(1)(1)(4) of COVID-19 Act in the wording agreed by the Act dated 28 May 2021 on amending the Act - Civil Proceedings Code and certain other acts which changed the composition of the court hearing the case from three judges to one judge and authorized the court president to order that the case be heard by the hitherto used composition³⁶. So, the problem concerns the change in court composition during the proceedings by the political factor by way of episodic statute but also permanent decrease in legal protection standard - particularly in 2nd-instance courts by replacing collegial composition with one-judge composition.

31 A Ołaś , 'Skład sądu' in T Ereciński (ed), K Lubiński, T Ereciński (vol eds), *System Prawa Procesowego Cywilnego. Postępowanie nieprocesowe*, vol 4, part 1, vol 1 (Wolters Kluwer 2021) 647; B Kolečki, in I HajdukHawrylak, B Kolečki, A Wlekińska (eds), *Prawo o ustroju sądów powszechnych. Komentarz* (Wolters Kluwer 2018).

32 Analiza działalności orzeczniczej TK w latach 2014–2017 opracowana przez zespół Ekspertów Prawnych przy Fundacji im. Stefana Batorego <<https://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Państwo/Raport%20ZEP%20o%20funkcjonowaniu%20TK.pdf>> accessed 30 September 2021, and K Markiewicz, 'Niezawisłość i niezależność' 40.

33 See K Gajda–Roszczyńska, 'Przebudowa wymiaru sprawiedliwości w czasach pandemii COVID-19 ze szczególnym uwzględnieniem postępowania cywilnego' 2022 (1) *Polski Proces Cywilny* 22-23 <<https://assets.contenthub.wolterskluwer.com/api/public/content/067af6f850d7463d94f217412c82a35d?v=ddf79089>> accessed 7 June 2022.

34 Ibid para 26.

35 S. 31zf of the Act dated 2 March 2020 on special solutions connected with counteracting, prevention and combating COVID-19, other infectious diseases and emergency situations caused thereby (Dz.U. of 2021 item 2095 as amended), hereinafter called COVID-19 Act, added by the Act dated 31 March 2020 on amending the Act on special solutions connected with counteracting, prevention and combating COVID-19, other infectious diseases and emergency situations caused thereby (Dz.U. item 568 as amended).

36 This issue is the subject matter of the legal question asked in case III CZP 73/21.

The Act dated 28 May 2021 on amending the Act - the Civil Proceedings Code and Certain Other Acts changed upon 3 July 2021 the COVID-19 Act in such a way that: in the period of pandemic risk or epidemic period announced due to COVID-19 and within a year from abolishing the last one of them, in cases heard according to the provisions of the CPC: in the first and second instance the court shall hear cases consisting of one judge; the court president may order that the case be heard by three judges if it deems it fit due to special complexity or precedential nature of the case (S. 15zszs¹ (1)(4)). S. 6(2) of the Amending Act provides for that cases which, before this Act became effective, were heard by the court with the composition other than of one judge, shall still be heard by the judge who was allocated the case, till the case is resolved in a given instance. This act became effective after the lapse of 14 days from the day it was published (s. 7 of the Amending Act). As a result of amending S. 15zszs1 (1)(4) of COVID-19 Act, which happened on 3 July 2021 in the period after this day the composition of the court hearing civil cases, if they were heard by a collegial composition, was changed, and the possibility of retaining such composition depends on court president's decision.

This regulation did not concern the proceedings in front of the Supreme Court as the body excluded from the structure of common courts, in which case it has nothing to do with (third) instance but with out-of-instance supervision over decisions in the legal scope³⁷. This stipulation refers not only to hearing extraordinary legal remedies³⁸, but also to complaints under s. 3941 Civil Proceedings Code as the Supreme Court does not have the role of the second instance in this case³⁹.

It should be noted that in legal comparative aspect democratic states which in their legal systems have the composition invariability principle, have not decided to introduce the changes due to pandemic⁴⁰. An exception involved Australia where in some cases participation of the jury during the interrogation was waived and the interrogation was conducted by one professional judge⁴¹.

A question arises whether the Polish legislator did not outstrip other countries in the fight against Covid, whether the actions of the Polish government and politicians did not result from the care about the health and life of the judges. To find out, we should start from the analysis of the grounds for the bill⁴² and the wider context of introduced changes.

It is known that pandemic can be justification for taking certain actions if they are really helpful in reaching the target declared in the Act title, namely counteracting, preventing and combating COVID-19, other infectious diseases and emergency situations caused by them⁴³.

37 S Włodyka, *Funkcje Sądu Najwyższego* (Kraków 1965) 9; T Zembrzuski, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym* (Wolters Kluwer 2011) 53 – 56.

38 T Zembrzuski, 'Komplementarność nadzwyczajnych środków zaskarżenia – skarga kasacyjna a skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia' in M Michalska-Marciniak (ed), *Wokół problematyki środków zaskarżenia w postępowaniu cywilnym* (Currenda 2015) 229.

39 T Zembrzuski, 'Przeciwdziałanie i zwalczanie epidemii COVID-19 w postępowaniu cywilnym, czyli pożegnanie z kolegią orzekania' 2022 (1) *Polski Proces Cywilny* 59 - 64.

40 A Nylund, B Krans, 'Conclusions on Civil Courts Coping with COVID-19' in A Nylund, B Krans (eds), *Civil Courts Coping with COVID-19*, 207.

41 D Bamford, 'Responding to COVID 19. Australian Civil Courts in 2020' in A Nylund, B Krans (eds), *Civil Courts Coping with COVID-19*, 7 - 9.

42 The grounds for the bill of the Act on Amendment to the Act - Civil Procedure Code and Certain Other Acts, Sejm IX kadencji, Sejm Paper no. 899.

43 K Gajda-Roszczyńska, 'Przebudowa wymiaru sprawiedliwości w czasach pandemii COVID-19 ze szczególnym uwzględnieniem postępowania cywilnego' 2022 (1) *Polski Proces Cywilny* 6 - 19. <https://assets.contenthub.wolterskluwer.com/api/public/content/067af6f850d7463d94f217412c82a35d?v=ddf79089>

The Polish legislator makes no attempt to hide the fact that Covid risk is rather an excuse and not the reason for introducing the said change. Indication in the grounds to the bill of the Amending Act that introduction of the amendment is 'dictated obviously by epidemic risk which is created by three people sitting next to each other in the court composition. It doesn't matter whether one or three judges hear the case'⁴⁴, may be interpreted only as the so-called declared but not real purpose of the changes. This results from the fact that this way of combating pandemic was introduced in the period when the Polish legislator resigned from legal regulations providing for Covid restrictions⁴⁵, and simultaneously the opinions of Advocates-General as well as decisions of the European Court of Human Rights (ECtHR) and CJEU appeared with respect to how to understand the notion of the court established by the statute. Sticking to the temporal aspect it should be underlined that it is a solution implemented not only in the period of epidemic risk or state of epidemic declared as a result of COVID-19 but within a year from the moment the last one of them was abolished. There is no justification, including a medical or organizational one, for setting the period of time during which the provision applies also within a year after the epidemic risk or state of epidemic ceased. This regulation, commonly criticised at the stage of consultative works, gives rise to a conclusion that such changes had another purpose than protection of judges' health. In terms of the purpose it does not meet the standards of episodic regulations.

In the aspect of coherence of the legal system it should be noted that the Amending Act leaves the collegial composition in administrative courts (province administrative courts and Supreme Administrative Court) and the Supreme Court, does not eliminate collegial court composition from all criminal cases⁴⁶. What is more, it keeps such court composition in administrative courts even if cases are heard at a closed session (S. 15zsz⁴ (3) of COVID-19 Act)⁴⁷. Internal contradiction is here obvious.

In the light of the court practice it is inexplicable that the bill introducing the changes was justified in this way, as judges have contact with each other all the time in court buildings, also multi-person offices and that a possibility was introduced for the court president to order that the case be heard by three judges and that the collegial composition was retained in criminal and administrative cases. It should be added, which will be discussed also later, that court presidents, deciding on the collegial composition, are not guided by any medical criteria and such decisions do not result in any sanitary restrictions while the case is heard at a hearing or at a closed session. It needs no comment that the stated legislative motive is only ostensible. This may be only analysed in the categories of excessive and unlawful influence of the administrative factor on court composition. This solution is in fact commonly criticized during the consultative procedure. There is no doubt that these changes have a different purpose which may only be guessed.

In conclusion, the change in court composition should be interpreted as a normal statutory change whose real purpose was different than combating the pandemic. This completely

44 The grounds for the bill of the Act on Amendment to the Act - Civil Procedure Code and Certain Other Acts, Sejm IX kadencji, Sejm Paper no. 899.

45 So it is hard to detect reasonable and proportional reasons for introducing such systemic changes breaching the right of recourse to a competent court established by the law.

46 See D Szumiło-Kulczycka, 'Wpływ pandemii COVID-19 na realizację prawa do sądu w sprawach karnych w Polsce' 2022 (1) Polski Proces Cywilny 196 <<https://assets.contenthub.wolterskluwer.com/api/public/content/1b9ca462e02c4d3a8a1a5bf6ce2be99?v=fd786e91>> accessed 22 February 2022.

47 See the opinion of KIRP (National Council of Legal Advisers), 6–8; the opinion of NRA (National Bar Association), 14–15; similarly the opinion of SC, p. 4–5. Opinions available at <<https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=899>> accessed 22 January 2022. The opinion of The Polish Judges Association 'Iustitia' <<https://www.iustitia.pl/dzialalnosc/opinie-i-raporty/4114-opinia-stowarzyszenia-sedziow-polskich-iustitia-o-projekcie-ustawy-o-zmianie-ustawy-kodeks-postepowania-cywilnego-oraz-niektorych-innych-ustaw>> accessed 22 January 2022.

changes the evaluation perspective of these amendments. The analysis of the consequences of changes should answer the question whether introduction of this ordinary act - and not 'a Covid act' - improved or limited the standard of legal protection. This statement is important because as we know, although each EU state is entitled to reorganize its courts, including also the court composition, it should not allow for deterioration of legislation in this aspect from the moment it acceded EU and reduction of protection of EU values and weakening of the rule of law (*non-regression principle*, Art. 2 TEU). Court of Justice stated such a principle - connecting the adoption by the member state of common EU values with being granted the membership (Art. 49 TEU)⁴⁸. As it results from the model case law of CJEU, the following factors will be analysed in order to assess whether possible reorganization of courts is compliant with EU law requirements: 'cumulative evaluation' of all essential circumstances and determination of 'real purposes' of introduced changes⁴⁹. Evaluating these changes, the following criteria should be taken into account: the purpose, proportionality and effects of such changes in the context of guaranteed right of recourse to court. The period of time when they were introduced is another evaluative factor. It should be underlined that the changes made during the pandemic should be of temporary, proportional nature and should be aimed only at quick recovery from pandemic.

In my opinion it is indisputable that the analysed changes breached the principle of collegial court composition of courts of appeal. The author of the bill indicates that

there are no objective or verifiable data allowing for assumption that the judgement awarded by one judge is less fair than by collective composition or that the case was less scrupulously analysed by one judge than by three judges. Such suppositions are deeply unfair for judges and what they prove only is lack of knowledge about how judges work. It would also mean a peculiar vote of mistrust for knowledge and skills of hard-working judges in first-instance courts who in fact having less experience and presumably knowledge than their peers from a higher instance must settle the case equally thoroughly and scrupulously⁵⁰.

Justification is an unsuccessful attempt to negate the practical experience and the legal doctrine. It is an obvious fact for all, apart from the bill creators, that collegial (three-person) court composition ensures higher professionalism and level of guarantee required both in special cases and in appeal proceedings⁵¹. This is also implicitly conceded by the bill creator if he/ she allows for cases to be heard in exceptional circumstances by collegial court composition. It is a common assumption that collegial court composition ensures higher adjudication standard, and at the same time ensures a higher level of guaranteeing the parties the right of recourse to court in the aspect of the right to fair trial and the right to be awarded judgement. Literature and case law share the opinion that collegial court composition constitutes the guarantee of court independence and enhancement of its sovereignty. One-person court composition is more exposed to any pressure and other attempts of unlawful

48 Case C-896/19, *Repubblica v Il-Prim Ministru* (2021), ECLI:EU:C:2021:311; P Filipek, 'Reorganizacja sądownictwa polskiego w świetle wymogów prawa unijnego i standardów orzeczniczych Trybunału Sprawiedliwości Unii Europejskiej' in S Biernat (ed), (*nad?*) *Użycie art. 180 ust. 5 Konstytucji RP* (Warszawa 2021) 61–62; S Biernat, 'Wykorzystanie art. 180 ust. 5 konstytucji dla spłaszczenia ustroju sądownictwa powszechnego: prognoza ostrzegawcza' in S Biernat (n 48) (*nad?*) *Użycie...*, 70.

49 Joined cases C-585/18, C-624/18 and C-625/18, *A.K. v. National Council of the Judiciary and CP and DO v. the Supreme Court* (2019), ECLI:EU:C:2019:982, point 152; Case C-824/18 *A.B. et al. v National Council of the Judiciary* (JS judgement 2021), ECLI:EU:C:2021:153, point 138; Case C-619/18, *European Commission v Republic of Poland* (2019), ECLI:EU:C:2019:531, point 87.

50 The grounds for the bill of the Act on Amendment to the Act - Civil Procedure Code and Certain Other Acts, Sejm IX kadencji, Sejm Paper no 899.

51 A Olaś, 'Kolegialność a jednoosobowość – skład sądu I instancji w procesie cywilnym: doświadczenia i perspektywy' 2020 (3) *Polski Proces Cywilny* 497 and the literature quoted therein.

exertion of influence on the way of proceeding and the content of the decision ('it is more difficult to corrupt a higher number of judges, in the same way as it is more difficult to corrupt a higher amount of water'). Hearing the case by collegial court composition gives a higher guarantee of independence and impartiality of judges and scrupulous and comprehensive analysis of a specific case by them⁵².

Taking into account the nature of systemic and procedural changes in the last years, aimed at undermining court independence and guarantees of broadly defined fair trial, we should assume that also these changes were motivated by the same purpose. There is no doubt that this measure will result in weaker control of the adequacy of court composition in relation to the accusations concerning faultiness of allocation of judges. This lowers the legal protection standard due to deprivation by collegial court composition of the possibility to control the nomination procedure of one of the court members who was appointed to the position of a judge during defective procedures with the participation of 'neo-NCJ'⁵³. It should be noted that this measure is also dangerous because of the fact that adjudication by such persons in courts of appeal, as the last instance - and this problem refers mostly to them, due to the collegial court composition principle applying to courts of appeal - may lead to regarding the decisions granted by them as void⁵⁴. There are cases where correctly appointed judges refused to adjudicate together with incorrectly appointed persons, which generally resulted in the instigation of a disciplinary action towards them⁵⁵. So, it should be borne in mind that the hitherto used practice by disciplinary ombudsmen consisting in starting disciplinary proceedings for awarding a judgement will be significantly facilitated when the case is heard by single judge.

Finally, it should be noted that the said legislative measure eliminated from civil cases the social factor in the form of lay judges. It should be added that elimination of lay judges from hearing the cases means elimination of the social factor (e.g. in divorce matters) from justice administration, which breaches the principle defined in S. 182 of the Polish Constitution. In accordance with the view of the Constitution Tribunal the content of S. 182 of the Polish Constitution states that it is not possible either to completely exclude the civic factor from this function (administration of justice) or to narrow its role to such an extent so that it will have only a symbolic scope⁵⁶. The provision of S. 15z (1) (1)(4) of COVID-19 Act leads in fact to temporary suspension of application of S. 182 of the Polish constitution and statues established in order to implement it.

So, it should be concluded that the changes caused the reduction in legal protection standard, in particular in proceedings initiated by appellate measures.

The provisions amended on the initiative of Justice Minister provide for that retaining the standard of hearing the cases by collegial court composition is permissible. In accordance with the amended provisions court president may order that the case be heard by three

52 E Waškowski, *System procesu cywilnego* (Wilno 1932), 157; A Olaś, 'Skład sądu' in T Ereciński (ed), K Lubiński, T Ereciński (vol eds), *System Prawa Procesowego Cywilnego, Postępowanie nieprocesowe*, vol. 4, part. 1, vol. 1, (Wolters Kluwer 2021) 647.

53 The National Council of Judiciary empanelled according to the provisions of the Act dated 8 December 2017 Amending the Act on the National Council of Judiciary and Certain Other Acts (Dz.U. z 2018 item 3).

54 Case C-487/19, *Waldemar Żurek v state CJ* (2021), ECLI:EU:C:2021:798.

55 In February 2022 the President submitted a bill presumably meeting the expectations of EC with respect to CJEU decisions dated 14 and 15 July 2021. The bill includes a prerequisite for disciplinary liability consisting in 'refusal to administer justice'. Refusal to adjudicate with a judge who in ECHR's and CJEU's opinion was not correctly appointed, so a lawfully appointed court, results in disciplinary liability. In this way the Polish judges are faced with an alternative: either they adjudicate with incorrectly appointed judges or may be deprived of their post.

56 CT judgement dated 29 November 2005, P 16/04, OTK-A 2005/10, item 119.

judges if he/she deems it fit due to special complexity or precedential nature of the case. Retaining the collegiality principle depends on an arbitrary decision of the court president, so an administrative factor quoted by the Justice Minister - General Prosecutor (S. 23–25 LCCS). Thus, a potential party to the proceedings (S. 7 CPC) and the body supervising courts (S. 8–9a LCCS) have influence on the composition of the court hearing the case. Such regulations of the status of court presidents - particularly in the current political situation, taking into account the position of the Justice Minister being simultaneously the General Prosecutor - give obvious grounds for assuming that in this way a possibility was created for the administrative factor and executive power to have excessive influence on the constitutional and European standard, namely hearing the case by the court having statutorily established composition. It should be noted that the competences of the court president, as an administrative factor, should be limited to actions of administrative nature (S. 8 and S. 9a para. 1 LCCS), and the issue of proper court composition is not included in this group. This is confirmed by the fact that a number of procedural decisions which do not interfere in such important rights and values, as the ones mentioned above, referring *inter alia* to the change of mode and type of proceedings (s. 201 para. 2, S. 505(1) para. 3 CPC) require simultaneously the decision of the court. The introduced regulation, being a copy of the relict from the past - S. 47 para. 4 CPC – was already criticized in the literature⁵⁷. We may remind ourselves the procedural and systemic position of the Justice Minister - General Prosecutor, well described in CJEU judgement, in which it was deemed that delegation by Justice Minister of a judge to the court composition does not meet the EU law standards of the right of recourse to statutorily established court⁵⁸. Seeing the difference between both competences, the sum of ministerial entitlements and total context of court functioning should be taken into account, which requires critical evaluation of the administrative factor deciding on allocation of cases to judges and court composition.

In the Polish law the recently introduced regulation,⁵⁹ stating the systemic principle of the permanence of court composition and providing the exceptions from this principle is still valid. Court composition may be changed only if the case cannot be heard by the hitherto used court composition or there is a long-term obstacle in hearing the case by the hitherto used court composition (S. 47b para. 1 LCCS) or in case of a sudden obstacle (S. 47b para. 2 LCCS), if the necessity to take action in this case results from separate provisions or this is required to ensure swiftness of the proceedings. As SC explained in the above quoted resolution⁶⁰, the legislator introduced the principle of court composition invariability to ensure the swiftness of the proceedings. The principle underlines that once randomly selected, composition should not be changed until the proceedings are terminated (so the legislator referred this principle at the stage of devising the regulations already to the randomly selected composition even before any actions were taken by such composition in the case). However, exceptions from this principle were provided for in the Act and were dictated by organizational issues and the swiftness of the proceedings. It should be noted that the legislator found that even the change of the place where the judge works does not justify a deviation from the composition invariability principle, which shows how important the role of this principle is according to legislator's intention. Such contemplations lead to a conclusion that the provisions containing exceptions from the composition invariability principle should be strictly interpreted and a possible deviation from composition

57 A Ołaś, 'Kolegialność a jednoosobowość – skład sądu I instancji w procesie cywilnym: doświadczenia i perspektywy' 2020 (3) *Polski Proces Cywilny* 522–523; K Markiewicz, 'Właściwość sądu, skład sądu i wyłączenie sędziego w pracach Komisji Kodyfikacyjnej Prawa Cywilnego' 2015 (2) *Polski Proces Cywilny* 296–297.

58 S CJ judgement dated 16 November 2021 from C-748/19 to C-754/19.

59 S. 47b LCCS added by the Act of 12 July 2017 amending the Law on Common Court System and Certain Other Acts, which came in force 12 August 2017

60 SC resolution dated 5 December 2019, III UZP 10/19.

invariability principle. Therefore, its change in a given case should be justified by special, unforeseeable circumstances which could affect court's work organization or the swiftness of the proceedings. At the same time, it should be underlined that the provisions apply also to the stability of court composition hearing the cases in the Supreme Court (S. 47b LCCS in relation to s. 10 para. 1 of the Act dated 8 Dec 2017 on the Supreme Court).⁶¹

There is no doubt that the legislator imposed on himself/ herself and on courts far-reaching requirements with respect to deviations from this principle. Reading the provisions introducing the said change will help us to answer the question whether the provisions of S. 47b of LCCS and S. 6(2) of the Amending Act conflict with each other or whether the latter supplement the provision stating the exceptions from the rule. Literary interpretation of the Amending Act is simple, a change in the composition takes place in all cases. S. 6(2) of the Amending Act provides for that cases which before this Act became effective were heard by the court with the composition other than of one judge, shall still be heard by this judge who was allocated this case, till the case is resolved in a given instance. This act became effective after the lapse of 14 days from the day it was published (s. 7 of the Amending Act).

The clear-cut wording of these regulations is not the reason for ending the process of their interpretation. The principle of *clara non sunt interpretanda* was at present regarded as completely inadequate interpretation directive. Arguments of methodological, empirical and ethical nature were put forward against using it in practice and, in particular, the thesis saying that in case of linguistic clarity of the provisions it is prohibited to further interpret them using other rules than grammar rules, was refuted⁶². Adopting such an approach leads to undermining of trust to administration of justice and the state, as it excludes the possibility of considering the arguments allowing to challenge the results of grammatical interpretation due to their collision with the values whose implementation the law should support. So, interpretation of the regulations could not be limited only to their explicit wording, as a result of which there appeared a necessity to verify the content of such regulations also in the light of functional rules (*omnia sunt interpretanda*)⁶³.

It was found that the situation connected with COVID-19 was not a reason (lack of real purpose of combating pandemic), but merely an occasion for introducing the changes. Once again it should be emphasized that the decision the court president takes about the court composition is not determined by any epidemic-related criteria (they include: special complexity or precedential nature of the case) and the consequences of such administrative decision will not include taking any measures of sanitary or epidemiologic nature. Prerequisites for the court president regarding the court composition changes had been provided for in the CPC for several dozens of months (S. 47 para. 4 CPC) and it was not necessary to repeat them in the Amending Act if the change concerns the cases heard under CPC provisions. So it should be deemed that the nature of the changes and moment of their introduction (one year after pandemic breakout, when the Covid restrictions were being loosened and were functioning not only during the epidemic risk period or COVID-19-related epidemic state but within a year from abolishing the last one of them, do not allow for a conclusion that it was not possible for the case to be heard by the hitherto used composition or there was an obstacle preventing the case from being heard by the hitherto used composition (S. 47b para. 1 LCCS) or there was a sudden obstacle (S. 47b para. 2 LCCS). We cannot rule out a

61 Dz. U of 2021, Item 1904.

62 M Zieliński, 'Clara non sunt interpretanda – mity i rzeczywistość' 2012 (6) Zeszyty Naukowe Sądownictwa Administracyjnego 9, 15; Z Radwański, 'Uwagi o wykładni prawa cywilnego' 2009 (1) Ruch Prawniczy, Ekonomiczny i Socjologiczny 13–16.

63 Also in the decision of the RC in Poznań dated 10 November 2020, XV Cz 759/20, where a legal question was directed to SC concerning III CZP 103/20, LEX no 3268907.

possibility that it was an attempt to improve the efficiency of courts and find the way out of the judicial crisis resulting from the actions of the Justice Ministry or its negligence in the last years⁶⁴. However, this aspect was not stated in the grounds and if this was to be the case, it would be doubtful to solve the collision between the swiftness of the proceedings and the fairness of the proceedings to the benefit of the former one. What is important, such a measure would not match the purpose with which the Act was introduced, namely combating the pandemic. So, if there is lack of a clear *ratio* deserving legal protection, such a regulation should be regarded as an instrumental measure interfering in the composition of the courts hearing the case.

In other words, S. 47 para. 4 CPC not only remained in force but, because it was repeated in the episodic act, the role of the court president in determining the composition of the court hearing the case was emphasized. Simultaneously a number of provisions concerning the collegial court composition were changed, namely deleted. In short, a higher standard of legal protection in the Polish civil proceedings, previously a fundamental standard in the appeal proceedings, is now in the hands of the court president appointed by the Justice Minister⁶⁵. There is no doubt that such a change may be deemed a measure aimed at controlling the content of court decisions as it affects the scope of cases allocated to judges.

5 CONCLUSIONS

The changes concerning court composition were sudden and resulted in chaotic allocation of cases. They concerned the cases which court composition had already been determined and even cases already heard by the court of three judges. I am of the opinion that introduction of such regulations is in principle unacceptable due to a lower standard of legal protection. However, in order to minimize negative consequences, the legislator should have introduced the regulation concerning the change taking into account another temporal principle, namely the one enabling the continuation of hearing the case by the originally determined composition⁶⁶. Such a legislative measure would at least reduce the range of breached principles, and despite this would allow to avoid procedural paradoxes in relation to the change in court composition also in already pending cases. Such a paradox can be exemplified by a situation in which a decision issued by collegial composition (fully composed of professional judges or lay judges) before the Amending Act became effective, is subject to control after this Act became effective as a result of the appeal or complaint by the court composed of one judge. It leads to disruption of internal logic of mechanisms applied in civil proceedings, and finally may raise doubts in the society with respect to impartiality of the judge who sits alone and interferes in the content issued by collegial composition.

The substantive regulation of the Amending Act lowers the legal protection standard, also in the scope of court composition determined lawfully through lowering the quality of this protection and through the influence of the administrative factor of executive power on

64 A Begier, R Cebula, Ł Małecki-Tepicht, M Plaskacz, A Wypych-Knieć, U Żółtak, *Obietnice a rzeczywistość – statystyki sądów rejonowych po pięciu latach «reform» (2015–2020) (Iustitia Raporty 2021)*; A Begier, A Wypych-Knieć, Ł Małecki-Tepicht, *Sadownictwo w czasie COVID-19 – raport z badania oceny wpływu pandemii COVID-19 na wymiar sprawiedliwości w Polsce (Iustitia Raporty 2021)*.

65 *Nota bene* it is debatable how such composition should be selected after president's decision that the case should be heard by three judges: see the question in case III CZP 82/21, BOSN.

66 M Walasik, 'Intertemporalna reguła kontynuacji w prawie procesowym cywilnym' in P Grzegorzczak, K Knoppek, M Walasik (eds), *Proces cywilny. Nauka – Kodyfikacja – Praktyka. Księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi* (Warszawa 2012).

court composition. In turn the intertemporal regulation of the Amending Act is obviously incompatible with the said predictability and fair trial principles.⁶⁷

The Amending Act is of episodic nature but the problem discussed here is not. In Poland we still have the epidemic state announced because of COVID-19, and the legislator constantly modifies the regulations by way of episodic acts which are to regulate the social life in this period, not excluding court proceedings from this area. So it is important for the stability of the legal system to make sure that despite extraordinary situation the level of legislation will meet the standards of the rule of law, especially will not undermine the trust to the state and the law established by it, in particular when the law-enacting mode is shortened.⁶⁸ The consequences of the case being heard by the improperly empanelled courts of second instance constitute the reason for invalidity of the proceedings (S. 379(4) CPC) and can provoke cassation complaints (S. 398³ para. 1(2) CPC). If such a stance is admitted, this may result in repealing the decisions, prolonging the proceedings and lowering the authority of the courts and citizens' trust to the state, also to the judiciary. We should not disregard the fact that recent years in Poland are full of stories of defective decisions connected with court jurisdiction and composition; this refers to negligent legislation in the scope of procedural changes⁶⁹, problems with appointing the judges under the law and their independence and delegation in general and court presidents. The situation is also complicated by the fact that the Act dated 20 December 2019 on Amendment to the Act - Law on System of Courts, the Act on the Supreme Court and Certain Other Acts introduced to the Law on the System of Courts S. 42a under which it is inadmissible within the court or court bodies' operation to challenge the empowerment of the courts and tribunals, constitutional state bodies and the bodies of law supervision and control or to determine or assess by the court or another public administration body whether the appointment of the judge was compliant with the law or whether the judge so appointed is authorized to perform the administration of justice⁷⁰ The provisions contained in the Law on the System of Courts, which provide for the highest disciplinary penalties - moving the judge to another place of work or ex officio deprivation him/her of the right to be a judge (S. 109 para. 1a in relation with S. 107 para. 1(2-4) LCCS) for 'actions challenging the existence of the employment relationship of the judge, the effectiveness of the appointment of the judge or empowerment of the constitutional body of the Republic of Poland', namely for checking whether somebody is a judge, are synchronized with this. The fact that CJ decisions dated 14 and 15 July 2021 challenged the disciplinary system in Poland only supplements the above arguments, but these decisions are not executed by Polish authorities⁷¹.

Instead of summing up, it is worth noting that even guarantee provisions concerning the stability of court composition may be insufficient with respect to political and administrative influence. I mean here actions of court presidents appointed by the executive power. This is best illustrated by the case in which the Supreme Court asked for preliminary ruling in

67 K Markiewicz, 'Wpływ regulacji «covidowych» na zasadę niezmienności (stabilności) oraz kolegialność składów sądów odwoławczych', 2022 (1) Polski Proces Cywilny 38 <<https://assets.contenthub.wolterskluwer.com/api/public/content/808e0a1a41574ad1b596e1528fbec91e?v=38d0ccf8>> accessed 24 February 2022.

68 Decision of the RC in Poznań dated 10 November 2020, XV Cz 759/20, where a legal question was directed to SC concerning III CZP 103/20, LEX no 3268907.

69 See legal questions inter alia in cases: III CZP 82/21; III CZP 49/21, LEX no 3268908; III CZP 1/21, LEX no 3171965; III CZP 108/20, LEX no 3225666; III CZP 95/20, BOSN; III CZP 69/20, LEX no 3253399; III CZP 63/20, LEX no 3212835; III CZP 32/20, LEX no 3209917; III CZP 12/20, LEX no 3088895.

70 Act dated 20 December 2019 amending the Law on Common Court System, the Act on the Supreme Court and Certain Other Acts (Dz.U. of 2020, item 190 as amended).

71 Case C-791/19, *European Commission v Republic of Poland* (2021), ECLI:EU:C:2021:596; and case C-204/21, *European Commission v Republic of Poland* (2021) LEX no 3196955.

to combat the pandemic, will be removed. Otherwise the pandemic of lawlessness will stay with us much longer than Covid.

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