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The Disciplinary Chamber of the Supreme Court as an exceptional court in the meaning of Article 175, para. 2 of the Polish Constitution

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Article 175, para. 2 of the Polish Constitution only provides for the ability to establish exceptional courts during wartime. The Constitution also rules out the functioning of courts other than those specified in Article 175 of the Constitution. A feature of an exceptional court is organizational separation, autonomy with respect to other courts, a specific way of appointing judges to such a court, a special scope of cases examined in terms of time, entity and subject matter, and a specific procedure. The Disciplinary Chamber satisfies these features of an exceptional court, despite its nominal inclusion in the structure of the Supreme Court. As a result, fundamental doubts arise as to whether the rulings issued by this chamber are judicial decisions in the meaning of the Constitution.

In accordance with Article 175, para. 1 of the Polish Constitution,[1] justice in the Republic of Poland is administered by the Supreme Court, the ordinary courts, the administrative courts and the military courts.[2] At the same time, the second paragraph of this article explicitly states that exceptional courts or summary proceedings may only be established during wartime. In other words, under the Constitution, the establishment of an exceptional court during a period of peace is prohibited.[3]

In the above context, the question must arise as to the interpretation of the constitutional term, of "exceptional court", about what does such a court mean under the constitutional regulation. Since the Constitution clearly distinguishes an "exceptional court" from "summary proceedings", this "exceptionality" does not have to rely on an abridged form of proceedings

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended),

[2] One may wonder to what extent the Constitutional Tribunal and the Tribunal of State also operate in the justice system, as they are not specified in the list from Article 175, para. 1 of the Constitution. However, these are the bodies envisaged directly in the Constitution and assigning them tasks in the field of justice only results in supplementing the list from Article 175, para. 1 of the Constitution.

[3] The provision directly banning the establishment of exceptional or special courts was provided for in the draft Constitution submitted by the President of the Republic of Poland (Article 100). Other draft constitutions, progressed by the Constitutional Committee of the National Assembly did not contain such a regulation, although almost all contained the *numerus clausus* of judicial authorities administering justice. During the meeting of the Constitutional Committee of the National Assembly, Cimoszewicz proposed that the relevant provision should be replaced by the following: "No exceptional or summary court may be established in peacetime". This issue was briefly discussed at which time the then President of the Military Chamber of the Supreme Court drew attention to the need to introduce a separate prohibition of extraordinary procedures, taking into account the experience of martial law. Ultimately, Adam Strzembosz proposed that the prohibition should separately encompass exceptional courts and summary proceedings (Bulletin KKZN No. X, p. 226).

without elements of guarantees.[4] After all, the separation of an exceptional court applies to the status of that court and not to the procedure. In other words, "summary proceedings", which are banned during peacetime, can characterize the procedure applied by an ordinary court, the Supreme Court or a specially formed exceptional court.[5] If this was only about connecting the "exceptionality" of the court with the given procedure, there would be no need to separately refer to an "exceptional court" in Article 175, para. 2 of the Constitution. It is also known that the name given to the particular institution by the ordinary lawmakers or the executive authority does not prejudge the constitutional qualification of that institution.[6] A court in the constitutional sense may be a specific organizational unit established to exercise public authority, although the word is not contained in the name it uses. This rule works, all the more so, in the other direction. The lawmakers can call various organizational units "a court", which does not change the fact that they are only courts in the statutory and not the constitutional sense if they do not satisfy the criteria specified in the Constitution.[7] This is because statutory names do not create constitutional entities on their own. The same is true of exceptional courts. Their status is determined by constitutive features decoded at the constitutional level for this type of court and not by the name given to them by the lawmakers.

The lawmakers (or executive authority) can create a court as an organizational unit which satisfies the criteria provided for in the Constitution. It is especially about the formal guarantees of independence of the court and the impartiality of the judges adjudicating in this unit. The constitutional regulation means that courts cannot be created at the discretion of

[4] Although the impression is that this rapid procedure is the main feature by which an exceptional court is also defined, e.g. K. Szczucki (in:) Constitution of the Republic of Poland. Volume II Commentary. Articles 87–243, ed. M. Safjan, L. Bosek, nb 28 to Article 175, Warsaw 2016; G. Artymiak (in:) System of Criminal Procedural Law, vol. 5, Courts and other bodies of criminal proceedings, edited by Z. Kwiatkowski, Warsaw 2015, p. 212. However, this is not accompanied by any in-depth argumentation, but this feature of speed refers jointly to the extraordinary court and the summary procedure. G. Artymiak rightly states that, "apart from the constitutional formula expressed in Article 175 of the Constitution of the Republic of Poland (...)no further positive legal regulations are devoted to this category of courts. This is because these are exceptional courts appointed during wartime and most frequently applying the abridged procedure. Such a court is also sometimes traditionally referred to in democratic countries as a summary court and only deals with criminal cases."

[5] For example, according to W. Kozielewicz (in:) Summary proceedings –*de lege ferenda* remarks, Krytyka Prawa 2010/1, p. 330, summary proceedings are characterized by not appealable judgments, considerable simplification and acceleration of proceedings and, as in the past, a serious limitation of the principle of *nulla poena sine lege penali anteriori* (the submission of the case to summary proceedings meant that, in place of the penalty provided for in the Act for a given offence, there was a severe sanction provided for in the provisions of an act of law regulating the summary proceedings). It should be borne in mind, however, that this author defines the summary proceedings primarily in terms of the statutory regulations and not as a constitutional term.

[6] See: M. Safjan (in:) Polish Constitution. Volume I. Commentary. Articles 1–86, ed. L. Bosek, M. Safjan, Warsaw 2016, p. 97, together with the extensive literature cited there and the case-law of the Constitutional Tribunal regarding the so-called autonomy of constitutional concepts.

[7] This is the case with the concept of "medical court" used in the Act on practicing the profession of doctor and dentist for naming corporate bodies of professional liability cf. A. Zieliński, The right to a trial and organization of judicial power (in:) Book of the 20th anniversary of the case-law of the Constitutional Tribunal, ed. M. Zubik, Warsaw 2006, p. 485; L. Garlicki (in:) Constitution of the Republic of Poland. Commentary, ed. L. Garlicki, Warsaw 2005, vol. 4, commentary on Article 175, p. 9; K. Dunaj, Military courts as bodies of justice, Studia Iuridica Lublinensia 2015/24, p. 12.

the lawmakers, because such a court must belong to one of the categories specified in Article 175, para. 1 of the Polish Constitution;[8] if it were to be an exceptional court, then its creation in peacetime would be all the more prohibited.

In this case, more careful consideration needs to be given to the definition of this exceptionality and the reasons for such a clear constitutional prohibition to expand the list of courts beyond the scope set out in Article 175, para. 1 of the Constitution.

"Exceptionality" of a court can be understood in various ways. The analysis of the discussions held at the Constitutional Committee of the National Assembly presented earlier indicates that it was originally a court operating in accordance with the simplified rules, featuring a reduced standard of guarantees, primarily focused on the speed and efficiency of proceedings. The concept of "summary proceedings", which are prohibited in peacetime, which were subsequently separated during the Commission's works, forced the search for other criteria for defining an "exceptional court", all the more so that, in principle, the term is not discussed in the literature.

In the broadest sense of the term, an exceptional court is any court which is not an "ordinary" court, namely one provided for in Article 175, para. 1 of the Constitution. The prohibition to establish exceptional courts contained in Article 175, para. 1 of the Constitution would therefore supplement the prohibition inferred from the list contained in Article 175, para. 1 of the Constitution (treated as an exhaustive list), limiting this prohibition to peacetime. This is because, according to this interpretation, during wartime, it would be permissible to create courts other than those specified in para. 1.

In another sense, "exceptionality" would mean a specific feature or set of features of a given court, distinguishing it from the courts listed in Article 175, para. 1. This feature could be a special method of proceeding (not corresponding to the summary proceedings), a specific category of cases separated by a subject or subject matter criterion, organizational separation, the period for which the court was established, the special method of appointing courts or court benches and a specified criterion of the time range for cases. It is sometimes emphasized that these are courts adjudicating in a specific category of cases (criminal or property cases) that other courts could not cope with in the normal procedure or in the appropriate, short time required because of the circumstances.[9]

Ultimately, the term "exceptional" may be understood even more narrowly as the competence to settle a specific, individual case. In this sense, an exceptional court would be an *ad hoc* or *ad personam* court, appointed to settle cases that previously took place.[10] This is

[8] See J. Gudowski, Supreme Court. Constitutional position, functions and tasks (civil-law judge's view), Przegląd Sądowy 2015/1112, p. 22

[9] M. Brzeziński, States of emergency in Polish constitutions, Warsaw 2007, p. 2728

[10] It seems that the term was used in this sense in the Polish March Constitution: "Article 98. No one may be deprived of the court to which he is subject by law. Exceptional courts are admissible only in cases provided for by statutes, issued before committing a criminal act. Prosecution of a citizen and imposition of a penalty is only permissible under the applicable law. Penalties, combined with physical torment, are not allowed and no one can be subject to such penalties".

the meaning given to the term "exceptional court" in German literature,[11] although even in this case, the possibility of recognizing a court, the competence of which would be determined generally according to certain entity/subject matter criteria as being exceptional, but in a completely arbitrary manner cannot be ruled out. It is also emphasized that the particular threat to the functioning of exceptional courts arises from their appointment directly by the government or another body of executive power.[12] Sometimes, precisely such a method of appointing a court and its bench, with the influence of the political factor dominating (either on the side of the executive or legislative authority) and departing from the normal procedure for appointing judges (and courts) is considered the feature defining an exceptional court.

Given that, in accordance with Article 175, para. 2 of the Constitution, it is only permissible to establish an exceptional court during wartime, it cannot be accepted that this is an *ad hoc* or *ad personam* court, which is therefore appointed to settle a specific case, without generally defined competence regarding entities or subject matter. Such a court would constitute a denial of the constitutional right to a trial by a court with jurisdiction in the meaning of Article 45 of the Constitution. It should be emphasized that this right cannot be disabled or limited even during a state of martial law or a state of emergency (Article 233, para. 1 of the Constitution). The same reasons underlie the rejection of the ability of the war courts understood in this way to operate under the German Constitution.[13] This means that the concept "exceptional" has been included in the wording of Article 175, para. 2 of the Constitution used in a different sense.

Article 175, para. 1 of the Constitution specified the main body of the justice administration as the ordinary court. This court has been assigned the presumption of competence to administer justice (Article 177 of the Constitution). Other courts were separated either on the basis of a specific criterion of entities or subject-matter (military courts, administrative courts) or a functional criterion (Supreme Court, Supreme Administrative Court). Obviously, within the system of ordinary courts, there may be specific specialized organizational units of these courts for specific cases. Such a separation will not have the features of the appointment of an exceptional court if the court in question operates within the structure of the ordinary or military or administrative courts, the judges adjudicating in these courts will be appointed in accordance with the general principles, and its jurisdiction will be determined according to general and abstract criteria.

The exceptionality of the court is the derogation from the rule. This is organizational separation with a special procedure for appointing judges and special competence regarding entities or subject-matter or time, as well as autonomy (financial, administrative, organizational) with respect to other judicial authorities. An additional distinguishing feature may be different procedures, although this is not a decisive feature because of the independent prohibition to establish summary proceedings during peacetime.

[11] See R. Böttcher (in:) Die Strafprozessordnung und das Gerichtsverfassungsgesetz. Grosskommentar 25, neubearbeitete Auflage, edited by P. Riess, Berlin 2003, vol. 7, nb 5a, p. 62.

[12] R. Böttcher (in:) Die Strafprozessordnung ..., p. 63.

[13] As a violation of the right to a "statutory judge", see R. Böttcher (in:) Die Strafprozessordnung ..., p. 63.

The term “exceptional court” indicates the basic separation of that court in organizational and competence terms from the ordinary courts, namely those operating in accordance with the generally accepted rules. Given that Article 175, para. 1 of the Constitution is such a rule of fundamental significance, any court that does not match the list of courts specified in this provision has the status of an exceptional court and, as such, is inadmissible under the Constitution during peacetime.[14]

The prohibition to establish exceptional courts, except during an extraordinary period of wartime, is not difficult to justify. The creation of a court operating outside the constitutional structures of the judiciary carries the danger of political use by the entity establishing such a court. An exceptional court also constitutes a threat to the implementation of the principle of a competent court in the meaning of Article 45 of the Constitution. It should also be borne in mind that the judicial structures provided for in the Constitution create internal organizational mechanisms guaranteeing the independence of the courts and the impartiality of judges. The creation and functioning of an exceptional (special) court outside these structures is deprived of these guarantees. Such separation also gives the lawmakers (or the executive power) much greater abilities to arbitrarily decide on the cases examined and the procedure.[15] Separated from the general organizational structure of the courts referred to in Article 175, para. 1 of the Constitution, an exceptional court can very easily become dependent on the executive, for example through financial or administrative decisions.[16]

It should be borne in mind that the constitutional scope of public authority delegated to the courts is very important from the point of view of the individual’s constitutional rights and freedoms. In principle, the content of these rights in specific situations is ultimately determined by the courts. Only they are appointed under the Constitution to administer justice in individual cases. Parliament cannot take over this constitutional power of the courts. However, a special scope of discretion of the courts arises from the essence of “administering justice”, which cannot be replaced by any kind of algorithm. Justice is administered in the context of axiological decisions, balancing the values that are relevant to the particular case.

[14] It is worth noting here that a distinction is sometimes made between the terms “exceptional” and “special”. The latter term would be the opposite of the term “ordinary”. This led some authors to the claim that, for instance, military or administrative courts have the nature of such special courts, with a separate scope of cases, cf. G. Artymiak (in:) System of Criminal Procedure Law, p. 210. However, it is rightly pointed out that, essentially, the qualification of military or administrative courts as special courts excessively emphasizes their extraordinary character, whereas they have the same strong constitutional foundation as the ordinary courts. In the further part of the discussion, the term “special” will be the same as “exceptional” or “extraordinary”, cf. M. Masternak-Kubiak, Constitution of the Republic of Poland. Commentary, vol. 3, comments on Article 175; L. Garlicki (in:) Constitution..., commentary on Article 175, p. 7; K. Dunaj, Military Courts ..., p. 11 and the literature cited there in footnote 9, being aware that, at the statutory level, the term “special court” is used to refer to courts other than ordinary courts (see for instance Article 439, §1, item 3 of the Civil Procedures Code - CPC).

[15] It should be noted that the scope of cases heard by the ordinary courts is largely determined by the content of Article 175, para. 1 in connection with Article 177 and 178 and 184 of the Constitution.

[16] Obviously, similar threats can also appear in the case of traditional judicial structures, which has long been discussed not only in Poland. However, the scale of these threats is quite different because of the systemic and historical roots of these structures, as well as their size. The establishment and existence of an exceptional court, due to its ephemeral nature and, as a rule, a small number of staff and administrative employees, is extremely dependent on the current political needs of the executive making financial and administrative decisions regarding such a court.

This is ultimately done in the judge's conscience in complex mechanisms, which, on the one hand, has the objective of protecting the judge's decision-making process against external, non-trial influences and, on the other, guarantees maximum rationality and excludes a judge's arbitrariness and bias.

The authority of a judge must be exercised within the framework that guarantees the security of that authority for the rights and freedoms of the individual, so as to minimize the risk of arbitrariness, bias and non-substantive influences. These frameworks are also the structure of the judiciary provided for in the Constitution with corresponding functions, which cannot be formed arbitrarily. For this reason, for instance, the Supreme Court, as the court which makes final decisions, supervises the operation of ordinary and military courts regarding jurisprudence in accordance with Article 183 of the Constitution of the Republic of Poland and may only exercise any other additional powers on the basis of an explicit constitutional or statutory norm. It is not without reason that, in this provision, the Constitution states that they can only be specified "actions", which emphasizes the unique nature of these powers. Therefore, this cannot be a typical judicial activity involving the resolution of specific categories of cases as a court of the first instance. Even if the lawmakers provided for such powers of the Supreme Court, they would have to be reconciled, on the one hand, with the wording of Article 183, para. 1 and 2 of the Constitution and, on the other, the constitutional powers of the ordinary courts in this respect. It should be emphasized, however, that the constitutional basis for this scope of jurisdiction of the Supreme Court, which extends beyond judicial supervision, is sometimes sought in the wording of Article 175, para. 1 of the Constitution – this will be the subject of the further considerations.

It is worth emphasizing that the historical justification of the constitutional prohibition to create exceptional courts (special courts) refers to the experience of the totalitarian period, not only in Poland but also in other European countries. In this context, it is worth mentioning that the notorious German special courts (Sondergericht), which were created as early as in the Weimar Republic, were organizationally essentially of the nature of special criminal divisions of national courts.[17] On the other hand, the first post-war special court appointed by the Polish Committee of National Liberation by decree of 12 September 1944 on special criminal courts for fascist-Nazi criminals created such a court alongside the court of appeal in Article 2. Appointment to this court took place in a separate, discretionary manner.

As mentioned earlier, the names given to specific organizational units established by the executive or legislative authorities do not create constitutional reality. The fact that a given body is called a special (exceptional) court does not necessarily mean that it cannot be attributed to one of the categories of courts provided for in the Constitution. But this principle also works in the opposite direction – the establishment of an organizational unit, which will be specified as part of the structure of the ordinary courts or the Supreme Court, does not necessarily mean that no special constitutionally prohibited court was created. The status of a given unit will arise from its organizational features, the scope of its powers, the method

[17] M. Zeidler, Das Sondergericht Freiberg. Zu Justiz und Repression in Sachsen 19331940, Dresden 1998, p. 12 and analyzes cited in footnote 21 therein.

manner of appointing people to make decisions in that unit, as well as the location of this organizational unit with respect to other judicial authorities. It transpires from the earlier arguments that the criterion defining an exceptional court does not have to be a specific, simplified procedure for issuing decisions. In other words, the essence of this court does not include the fact that it applies a summary procedure, although most frequently, due to the said structural differences, certain modifications of the procedure can usually be identified.

After having considered these general constitutional conditions, it is now possible to move on to the analysis of the detailed regulations establishing the organizational unit, which the lawmakers called the "Disciplinary Chamber" in the Supreme Court.

The legal basis for its existence is the Act on the Supreme Court.[18] Article 3 of the Act on the Supreme Court provides that the Supreme Court is divided into chambers, one of them being the Disciplinary Chamber. Therefore, this regulation suggests that this chamber is an ordinary "organizational" part of the Supreme Court as the superior structure. However, the next provision of this Act, Article 4, refers to the specificity of the appearance of this chamber in the Supreme Court, because it clearly states that disciplinary proceedings will be conducted in the Supreme Court, which should have a special impact on the content of the internal regulations of the Supreme Court, for which the President is currently responsible for preparing.[19]

In accordance with Article 183, para. 3 of the Constitution, the constitutional authority of the state is the First President of the Supreme Court. The name of this authority suggests that this is the person representing the Supreme Court and that there may be other presidents of the Supreme Court, of which the First President has the leading function. This is obviously justified by the fact that the Supreme Court is an institutional constitutional body, so it must be represented by a specific person to whom the Constitution has additionally given the status of a constitutional authority (Article 183, para. 3 of the Constitution).

However, it transpires that the statutory structure of the Disciplinary Chamber makes the President of this chamber an authority that is independent of the First President of the Supreme Court, even in external relations. Such special competence of the First President of the Supreme Court is to report annually to the Sejm, the Senate, the President and the National Council of the Judiciary on the activities of the Supreme Court and significant problems identified in connection with it, including those "arising from case-law". This information applies to the activities of all chambers, except the Disciplinary Chamber. In this respect, the President of the Chamber presents his own information, which, he autonomously attaches to the information of the First President of the Supreme Court. Therefore, the first President of the Supreme Court is not only not the author of the information on the activities of this chamber, but also cannot change the content of the information prepared by the

[18] The Act on the Supreme Court of 8.12.2017 (Journal of Laws of 2018, item 5 as amended), hereinafter the Act on the Supreme Court.

[19] The conferral of this competence on the President raises fundamental constitutional doubts, but this is a matter for a separate study.

President managing the Disciplinary Chamber (Article 5, para. 1 of the Act on the Supreme Court). This is also how the competence was regulated on the presentation of remarks to the competent authorities about identified irregularities or loopholes in the law, which must be removed to ensure the rule of law, social justice and the coherence of the Polish legal system. Even in this case, the President of the Disciplinary Chamber has received independent, autonomous powers to present such remarks, regardless of the position of the First President of the Supreme Court on this. Therefore, despite the constitutional structure of management of the Supreme Court by the First President of the Supreme Court, in external relations, the Disciplinary Chamber is represented by its own President.

A regulation that the Supreme Court is to be represented in proceedings before the Constitutional Tribunal or in the work of the Sejm or Senate committees by the First President of the Supreme Court in consultation with the President of the Disciplinary Chamber is unusual.

Furthermore, it should be emphasized that the Act provides for the exclusive competence of the President of the Disciplinary Chamber to decide on the jurisdiction of that chamber in matters referred to or from the chamber (Article 28, para. 2 of the Act on the Supreme Court). This means full independence in determining its own jurisdiction and the scope of the cases heard, which cannot be modified to any extent by the First President of the Supreme Court or the membership of the Supreme Court. In the case of the same court, the allocation and transfer of cases between individual organizational parts (e.g. divisions) appears to be the natural right of the first president of such a court.

The most striking example of autonomy and separateness is the separate budget of the Disciplinary Chamber, the draft of which is adopted by the assembly of judges of the Disciplinary Chamber, and is only then technically attached to the draft prepared by the First President of the Supreme Court for the Supreme Court. Likewise, this budget is implemented in the Disciplinary Chamber completely independently of the Supreme Court. According to the clear statutory regulation, the president of this chamber has the rights of the minister responsible for public finance and any transfer of expenditure that would result in a reduction in the Disciplinary Chamber's budget requires the consent of the President of the Disciplinary Chamber. This decision is so categorical that it suggests that the condition of such consent also applies to activities performed by external entities. The legal and financial structure related to the Disciplinary Chamber makes it a separate budgetary unit with respect to the Supreme Court. In this sense, the Disciplinary Chamber has the same independent organizational status in relation to the Supreme Court as any other public entity with a separate budget (e.g. the Ombudsman or the Constitutional Tribunal).[20]

The organizational separation of the Disciplinary Chamber is also emphasized by the fact that it has a separate chancellery of the President of the Disciplinary Chamber, the internal

[20] An interesting matter is the adoption of the draft budget of the Disciplinary Chamber by the judges of this Chamber. In the case of the Supreme Court, the Board of that court adopts this draft. It is important that, while the President of the Disciplinary Chamber participates in this way (as a member of the Board) in adopting the draft budget of the Supreme Court, no body of the Supreme Court has any influence on the budget of the Disciplinary Chamber.

regulations of which are specified by the President of that Chamber, and not the First President of the Supreme Court. The same President of the Chamber appoints and dismisses the Head of his Chancellery, without any consultation with the First President of the Supreme Court. The Disciplinary Chamber may also have its own press officer reporting to the President of the Disciplinary Chamber, who receives autonomous powers, for instance to edit the Supreme Court's website regarding the chamber.[21] The clear statutory provision also specifies that labour law actions with respect to anyone performing official activities in the office of the President of the Disciplinary Chamber are conducted by the President of that chamber or a person authorized by him. This means that, essentially, the Disciplinary Chamber is a separate workplace in the meaning of the Labour Code. Therefore, although the administrative employees of the Disciplinary Chamber are described as Supreme Court employees, they are employed in a separate budget unit and therefore, it is the Disciplinary Chamber and not the Supreme Court that is their place of work. The employment contracts are signed with these employees by the President of the Disciplinary Chamber, as the budget holder, and not the First President of the Supreme Court.

The internal Rules of the Supreme Court essentially consist of two parts regarding the Supreme Court (the Chancellery of the First President of the Supreme Court) and regarding the Disciplinary Chamber (Chancellery of the President managing the work of the Disciplinary Chamber). This is not an internal act created by the Supreme Court itself, but a legal regulation imposed by an external entity, the President of the Republic of Poland, which thus creates the organizational autonomy of the Disciplinary Chamber. This once again emphasizes its separateness from the Supreme Court, because it has its source not in the decision of the court itself (or its bodies), but in external entities, namely the President of the Republic of Poland.

The statutory regulation also rules out the powers of the First President of the Supreme Court with respect to the Disciplinary Chamber with regard to appointing and dismissing the heads of the divisions of this chamber, giving opinions on the declarations of intent of the judges of this chamber who are aged over 65 to continue to hold office, performing activities of appointing lay judges in the Disciplinary Chamber, giving opinions on the announcement of the number of vacant judicial positions in the Disciplinary Chamber, transferring judges of the Disciplinary Chamber with their consent to adjudicate in a different chamber, submitting a request to the Minister of Justice to delegate an ordinary court judge to adjudicate in the Disciplinary Chamber or to perform the functions of an assistant judge or other activities or referring judges of the Disciplinary Chamber for medical examinations (see Article 20 of the Act on the Supreme Court).

According to the Act on the Supreme Court, the First President of the Supreme Court may order the immediate release of a judge of the Disciplinary Chamber taken into custody after being caught red-handed in the act of committing a crime only in consultation with the

[21] See § 6a of the Regulation of the President of the Republic of Poland of 29/03/2018 Rules of the Supreme Court (Journal of Laws item 660 as amended), hereinafter the Rules of the Supreme Court. This provision also envisages the ability to establish a separate press team.

President of the Disciplinary Chamber. The president of the Disciplinary Chamber is also notified of a judge of that chamber being taken into custody. This regulation clearly shows the intention of the lawmakers to treat the Disciplinary Chamber as a separate court. This is because, according to the wording of Article 181 of the Constitution, the president of the "territorially competent" court may order the immediate release of a judge taken into custody having been caught red-handed in the act of committing a crime. If the Act on the Supreme Court provides for this right to be exercised jointly by the President of the Disciplinary Chamber and the First President of the Supreme Court, the constitutionality of such a solution can only be upheld under the assumption that the President of the Disciplinary Chamber is also the "president of the territorially competent court", which assumes that the Disciplinary Chamber is a separate court.[22]

The *ratione materiae* jurisdiction of the Disciplinary Chamber has been specified in a special way. This chamber has become a court of first instance in disciplinary matters of the Supreme Court judges, in labour law and social security matters regarding Supreme Court judges and in matters regarding the retirement of a Supreme Court judge. This chamber is simultaneously a judicial authority that considers appeals in the first and only instance against decisions of corporate bodies regarding disciplinary matters of defence counsels, legal advisors, notaries public, ordinary court judges, military court judges, prosecutors of the Institute of National Remembrance, prosecutors and court bailiffs (as well as assessors, referendaries or applicants appearing in relevant acts of law regarding these legal professions). It should be borne in mind that, in principle, these powers of the Disciplinary Chamber have nothing to do with the function of the Supreme Court, which is the judicial supervision of the judicature of the ordinary courts. It is in fact substantive adjudication in matters which (apart from the disciplinary proceedings provided for in the Act on ordinary courts) were not previously the subject of adjudication by a court in the constitutional sense. The consideration of these cases by the Disciplinary Chamber is therefore the first court proceeding to implement the constitutional standard arising from Article 45 of the Constitution. The problem is that the Polish Constitution does not provide for such a separate "disciplinary court."[23]

[22] The whole of the regulation assuming that the rights specified in Article 181 *in fine* of the Constitution with respect to the judges of the Supreme Court are exercised by the First President of the Supreme Court is constitutionally questionable. However, this issue is outside the scope of this article.

[23] Before the establishment of the Disciplinary Chamber, the Supreme Court also heard disciplinary cases. However, this competence was unique in comparison with the number of cases heard by the Supreme Court as part of the judicial supervision of judgments of ordinary and military courts. The constitutional basis for adjudicating on disciplinary matters was found in the wording of Article 175, para. 1 of the Constitution, which provides that the Supreme Court also "administers justice", while, in accordance with Article 177 of the Constitution, the specified scope of matters may be reserved for examination by the courts referred to in Article 175, para. 1 of the Constitution other than the ordinary courts, see A. Górski, Remarks on the administration of justice by the Supreme Court (in:) Aurea praxis. Aurea Theoria. Memorial book in honour of Professor Tadeusz Ereciński, edited by J. Gudowski, K. Weitz, Warsaw 2011, vol. II. However, this interpretation can raise doubts in the light of Article 183, para. 1 of the Constitution, which clearly specifies the functions of the Supreme Court, indicating only that the Supreme Court may perform other activities specified in the Constitution and statutes. A broader consideration of the constitutional admissibility of substantive adjudication by the Supreme Court in disciplinary matters significantly exceeds the framework of this study. It is important that the scope of jurisdiction of the Disciplinary Chamber from the *ratione materiae* side has little to do with supervision over the operation

If a particular method of appointment to an exceptional court should be considered one of the fundamental distinguishing features of a court of this type, the Disciplinary Chamber satisfies this criterion canonically. The appointment of a given person to the office of judge in the Disciplinary Chamber takes place specifically for that chamber and not the Supreme Court in general. Recruitment is announced for vacancies not in the Supreme Court as a whole, but specifically in the Disciplinary Chamber (as with the other chambers). It is not possible for a judge to be transferred from another chamber to the Disciplinary Chamber without the consent of the President of this chamber. The detailed regulation is contained in Article 131 of the Act, which blocks the current Supreme Court judges from taking up office in the Disciplinary Chamber, and which disables the general provisions. The transfer to this chamber (until all positions are filled) can only take place with the consent of the President of the Disciplinary Chamber, at the request of the National Council of the Judiciary, by appointment by the President of the Republic of Poland. It is therefore a complete political blockade which does not exist in any other chamber, including the newly created Chamber of Extraordinary Control and Public Affairs. It was also rightly emphasized in the opinion of the First President of the Supreme Court of 6 October 2017 that the current ruling majority will define the membership of the Disciplinary Chamber for years.[24]

This means that appointment to the Disciplinary Chamber to the position of judge of this chamber is conducted autonomously in the procedure already specified in the new Act on the National Council of the Judiciary, i.e. an extremely politicized procedure due to the party election of Council members by a simple majority of the Sejm and acceptance that handing out the judge's nomination by the President is a prerogative and therefore discretionary. This also means that the entire membership of the Disciplinary Chamber has a completely different nature from the current membership of the Supreme Court because of the way it is appointed. This particular mode of appointment emphasizes the special and unique nature of the Disciplinary Chamber. The status of judges in this chamber is also special, if only considering the significantly higher salaries or the decidedly smaller amount of work.[25]

Another feature of the exceptional courts is also satisfied with respect to the Disciplinary Chamber, namely procedural separation. And this is not about the natural differences that exist in disciplinary proceedings compared to the general norms of criminal proceedings. These differences are fundamental.

Proceedings before the Disciplinary Chamber are fully inquisitional. Although the principle of the accusatorial procedure applies in these proceedings, the President of the Disciplinary Chamber may request the Disciplinary Commissioner to take up explanatory activities (although the presidents of the other chambers do not have such powers). Such a request may

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of ordinary and military courts regarding the adjudication referred to in Article 183, para. 1 of the Polish Constitution, which is the constitutional task of the Supreme Court.

[24] Opinion of the First President of the Supreme Court of 6 October 2017 on the bill on the Supreme Court submitted by the President of the Republic of Poland, http://search.sejm.gov.pl/SejmSearch/ADDL.aspx?DoSearchNewByIndex (access: 22 February 2019).

[25] See the opinion of the First President of the Supreme Court of 6 October 2017 to the draft law on the Supreme Court submitted by the President of the Republic of Poland, http://search.sejm.gov.pl/SejmSearch/ADDL.aspx?DoSearchNewByIndex (access: 22/02/2019).

also be made by the Prosecutor General and the National Prosecutor independently of him. Although the Disciplinary Commissioner can issue a decision to discontinue disciplinary proceedings, entities with the power to finally demand that explanatory activities are taken up may appeal to a disciplinary court against the Disciplinary Commissioner's decision (or in other words the Disciplinary Chamber with specific members). The decision of the disciplinary court and the indications contained in it are binding on the Commissioner. Ultimately, therefore, the President of the Disciplinary Chamber may obligate the Disciplinary Commissioner to conduct explanatory proceedings and if he refuses to do so, the President of the Disciplinary Chamber makes an objection in the complaint procedure with the disciplinary court in the Disciplinary Chamber, the members of which he appoints himself and, furthermore, in view of the automatic nature adopted in §83a, para. 2 of the Rules of the Supreme Court[26] and the small number of judges in the Disciplinary Chamber, he may participate in its examination chairing the adjudication panel (§89, para. 2 of the Rules of the Supreme Court). It should also be reiterated that the judgments of the Disciplinary Chamber, including those issued as a court of the first instance, are not subject to any review, even in the extraordinary procedure, since the ability to file a cassation complaint (including an extraordinary cassation complaint) against these rulings has been disabled.

Another distinctness of a fundamental nature is the ability of the President of the Republic of Poland to appoint an Extraordinary Disciplinary Commissioner to handle a specific case of a Supreme Court judge. This means that there may be a total deviation from the statutory general procedural rules in a specific, individual case. The Act also provides that the appointment of such an Extraordinary Commissioner is tantamount to a demand for explanatory action, which means that the President, who is a politician, can directly institute disciplinary proceedings against judges of the Supreme Court in specific individual cases. The same power was granted to the Minister of Justice (another politician) if the President does not exercise his powers within a specified period. It should be remembered that the appointment of such an Extraordinary Commissioner by law alone rules out the disciplinary commissioner appointed by the Board of the Supreme Court from activities.

The Disciplinary Chamber formally maintains two instances, but it is horizontal in nature, and due to the limited number of members of this chamber[27] it is of a seeming nature. On the other hand, disciplinary proceedings against people practicing legal professions are single-instance in nature and such judgments are not appealable in the ordinary procedure.[28]

The exceptional nature of the court can also be determined by the manner mentioned above of appointing its judges or judicial panels for hearing specific cases. A special feature of the Disciplinary Chamber in this context is the participation of ordinary people (lay judges)

[26] According to this provision, cases are automatically assigned in the order of their receipt to the judges of the given chamber in alphabetical order. It was clearly pointed out that when assigning cases, the President of the Supreme Court cannot omit a judge to whom the case should be assigned in alphabetical order.

[27] 16 people in accordance with the Rules of Supreme Court, but effectively there can be fewer of them (the Disciplinary Chamber currently consists of 10 members – remark added by the translator).

[28] Many other procedural differences were mentioned in the opinion of the First President of the Supreme Court of 6 October 2017 to the bill on the Supreme Court submitted by the President of the Republic of Poland, http://search.sejm.gov.pl/SejmSearch/ADDL.aspx?DoSearchNewByIndex.

appointed by the political body, namely the Senate, which elects "lay judges" to the Disciplinary Chamber by a simple majority of votes.

The features of the Disciplinary Chamber mentioned above require its qualification as an exceptional court in the meaning of Article 175, para. 2 of the Constitution or at least as a judicial body not provided for in Article 175, para. 1 of the Polish Constitution, which consequently leads to the conclusion that the transfer of powers to the judicial authority in disciplinary matters and other matters regarding the status of judges of the Supreme Court constitutes a clear breach of the Constitution.[29] It should also be remembered that the competence of the Disciplinary Chamber, the membership of which was appointed in a special way, also encompassed specific acts committed before the establishment of this chamber. In this sense, it satisfies the features of an exceptional court even in the narrow sense, as a court established ex-post, which is to rule on specific individual cases.

If the Act on the Disciplinary Tribunal, the system of which would correspond to the features of the current Disciplinary Chamber specified in the Act on the Supreme Court, were to be adopted, no one would have doubted that it was the establishment of an exceptional court in breach of Article 175 of the Constitution. This is because the Constitution does not provide for separate courts as disciplinary courts. In this situation, ordinary courts should rule in disciplinary matters, while the Supreme Court should only rule exceptionally, to the extent specified by Article 183 para. 1 of the Constitution. On the other hand, the organizational elements connecting the Disciplinary Chamber with the Supreme Court are so insignificant that they do not give rise to the acceptance, that we are dealing with an organizational unit of that court.[30] Certainly, the common building, canteen, car park and the common, albeit separately edited website do not create such foundations. Additionally, the participation of members of the Disciplinary Chamber in the collegial bodies of the Supreme Court does not create such grounds,[31] just as a statutory regulation providing for the involvement of members

[29] In this context, the statement by K. Szczucki (who otherwise represented the promoter of the bill in the parliamentary work, i.e. the President of the Republic of Poland) stating that "1. The regulation contained in Article 20 of the Act on the Supreme Court [the transfer of powers of the First President of the Supreme Court to the President of the Disciplinary Chamber – author's remark] is in line with the general assumption of the lawmakers involving the award of a special status to the Disciplinary Chamber manifested in its autonomy. In this respect, the provisions of the Act are an attempt to reconcile two aspirations: i.e. giving the Disciplinary Chamber far-reaching independence, while maintaining it in the structure of the Supreme Court. Therefore, the Disciplinary Chamber is not to be a separate court, but a part of the Supreme Court, although, due to the specificity of its substantive jurisdiction, in a way, placed alongside the other structures of the Supreme Court, see K. Szczucki, Act on the Supreme Court. Commentary, Warsaw 2018, vol. 1 to Article 20. In practice, this "undefined placement" means that there are no hierarchical links between the Disciplinary Chamber and the judicial or administrative structures of the Supreme Court, while its autonomy means organizational independence. K. Szczucki does not even try to show extent to which the Disciplinary Chamber has "been maintained: in the structure of the Supreme Court.

[30] In the opinion of the First President of the Supreme Court of 6 October 2017 submitted during the legislative work on the bill on the Supreme Court, providing for the creation of the Extraordinary Chamber, it was stated that this Chamber is in fact a supreme chamber and in fact a separate and independent court, which was only seemingly placed in the structure of the Supreme Court, http://search.sejm.gov.pl/SejmSearch/ADDL. aspx? DoSearchNewByIndex (accessed: 22 February 2019).

[31] The aim towards the autonomy of the Disciplinary Chamber with respect to the Supreme Court led the creators of these structures to the exclusion of the ability of the President of the Disciplinary Chamber to stand for election to the office of First President of the Supreme Court. According to § 10 of the Rules of the Supreme Court, the

of that Tribunal in the General Assembly and the Board (such a person is the First President of the Supreme Court, as the President the Tribunal of State) would not include the Tribunal of State in the membership of the Supreme Court.

What are the consequences of the thesis that the Disciplinary Chamber is an exceptional court in the meaning of Article 175, para. 1 of the Constitution and therefore judgments will be issued in some disciplinary matters by an authority that is not only not provided for in the Constitution, but rather explicitly prohibited in it?

The first issue is to establish whether, in the constitutional sense, judges will adjudicate within the structure of a court in the form of a Disciplinary Chamber which is not recognized by the Constitution. The solutions adopted in this respect regarding the method of appointing adjudicators in the Disciplinary Chamber give rise to fundamental doubts due to the deconstitutionalization of the body which, in accordance with the Constitution of the Republic of Poland, plays a fundamental role in the process of appointment to the office of judge, namely the National Council of the Judiciary.[32] At the same time, the Act, which formed the body in a manner which is in conflict with the Constitution, caused the whole process of appointing judges to office to be defective from the constitutional point of view.

It should be borne in mind that, according to the Constitution, the National Council of the Judiciary cannot be replaced by another body in the process of appointing a judge of an ordinary court, an administrative court or the Supreme Court or the Supreme Administrative Court. However, the Constitution does not introduce internal differentiation with respect to ordinary courts or the constitutional competence of the National Council of the Judiciary with respect to judges assuming office in individual organizational structures of the ordinary judiciary. This means that the Constitution does not prejudge the manner in which the process of appointing judges to specific judicial positions may be implemented within the structure of ordinary courts. Of course, there are many important reasons suggesting that, even in this case, the National Council of the Judiciary should play an important role, as judges are always appointed to office in a specific court. However, this applies to people who have the status of

President of the Disciplinary Chamber is, by law, a member and chairman of the returning committee at the General Assembly choosing candidates for the position of the First President of the Supreme Court. It is difficult to imagine that one of the applicants for the position of the First President of the Supreme Court could be such a chairman of the returning committee. However, if the President of the Disciplinary Chamber decided to run, the choice could not be made, as the adopted regulations do not provide for the ability to replace the President of the Disciplinary Chamber as chairman of the returning committee. The President of the Disciplinary Chamber was also given the ability to block the General Assembly's electoral work completely as the returning committee cannot work in his absence.

[32] See analyses showing a breach of the Constitution of the Republic of Poland with regard to the new Act on the National Council of the Judiciary, as well as questioning the compliance of the method of appointing current members of this body with the Constitution, in particular K. Grajewski, the National Council of the Judiciary in the light of the provisions of the Act of 8 December 2017 basic issues, "Krajowa Rada Sądownictwa" 2018/1 and the literature and legal opinions cited there. It is also important that the current National Council of the Judiciary itself, in its motion to the Constitutional Tribunal, raised the allegation that the basic regulations regarding the method of its appointment are in conflict with the Constitution (K 12/18), https://ipo.trybunal.gov. pl / ipo / view / Spraw.xhtml? & demo = documents & reference = K% 2012/18 (access: 22.02.2019).

judge. If this status was obtained in the constitutional procedure, the transfer from one court to another would no longer require satisfying such restrictive conditions.[33]

Meanwhile, the appointment to the Disciplinary Chamber (or the Supreme Court) of people who were not judges of this court or did not have the status of a judge at all is another matter. This is not a change of position within the structure of the ordinary courts (e.g. from a district court judge to a regional court judge). The previously mentioned breach of the constitutional procedure of appointing an extraordinary (special) court judge arising from the deconstitutionalization of the National Council of the Judiciary means that people adjudicating in the Disciplinary Chamber cannot correctly acquire the status of judges in the constitutional sense.

The unconstitutional status of the Disciplinary Chamber as an exceptional court and a defective procedure for appointing members of that court means that they do not have the basic guarantee of independence, which is irremovability. This feature is constitutive for the acceptance that a person holds the office of judge in the constitutional sense. The essence of the accepting certain legal regulations as being unconstitutional and certain events arising from the application of these regulations as having been made in breach of the Constitution, shows that, in a given time perspective, actions can be expected which have the objective of achieving a state of compliance with the Constitution or of changing the Constitution. This circumstance means that these facts made in breach of the Constitution cannot expect normal constitutional protection. Therefore, it is difficult to accept that constitutional guarantees of irremovability will encompass people who obtain the status of judge in a manner which is in conflict with the Constitution, either because of the unconstitutional procedure of appointment or because of being appointed to an unconstitutional court. In other words, the constitution ceases to be a guarantee of their irremovability, being replaced by variable political support of the groups in power at the given time[34] and therefore having a decisive influence on the adoption of ordinary laws. These laws and not the Constitution are currently the basis of the functioning of the Disciplinary Chamber and its judges.

The fact that the Disciplinary Chamber cannot be a court in the constitutional sense, because it is not provided for in Article 175, para. 1 of the Constitution, as an exceptional court, is prohibited in connection with the explicit wording of Article 175, para. 2 of the Constitution, and rules out the acceptance that the decisions of this chamber are of a judicial nature in the sense of Article 42, para. 3 of the Constitution, which, in terms of the protection of the presumption of innocence, also applies to disciplinary liability.[35] The presumption of

[33] However, the position of the Constitutional Tribunal expressed in the judgment of 8/05/2012 (K 7/10), in which it was stated that the same constitutional standards should apply to every appointment to a judicial position, including within the same structure of the judiciary, should be taken into account.

[34] This situation obviously affects the guarantee of independence, the awareness of the uncertainty about the stability of the status of a judge may, in the eyes of the public, lead to the assignment to the members of the Disciplinary Chamber incentives related to decisions made, which fall outside the standard of impartiality.

[35] See P. Wiliński, P. Karlik (in:) Polish Constitution. Comment. Article 186, ed. M. Safjan. L. Bosek, Warsaw 2016, vol. 1, nb 247 to Article 42 and the case law of the Constitutional Tribunal cited there.

innocence can only be overruled by a court judgment but only by a court that satisfies the constitutional features of such an authority.

What, therefore, are these decisions and what is the Disciplinary Chamber? Undoubtedly, the intention of the lawmakers was to give the Disciplinary Chamber the features of a court, as well as giving the decisions of the members of that chamber the features of court judgments. Furthermore, the legal regulation makes this chamber seemingly operate as another part of the Supreme Court. However, a statutory regulation is unable to give the Disciplinary Chamber the features of a court in the constitutional sense. An exceptional court (a court which is not on the list specified in Article 175 (1) of the Constitution) cannot be a court in the meaning of the Constitution in peacetime, as this would be in conflict with the principle of legalism. Therefore, a body of public authority was created by an ordinary act of law that makes legally binding decisions in individual cases. Disciplinary bodies in individual professional association operate in this same way by law. The lawmakers may create such bodies, only that their examination of individual cases will not meet the standard specified in Article 45, para. 1 of the Constitution; in other words, it will not be a court hearing. Given that the decisions of the Disciplinary Chamber cannot be the subject of cassation or other means of appeal, in cases in which such judgments are passed, the party will be deprived of the constitutional right to a trial. This is because this right is only implemented when a given case can be presented to a court in the constitutional sense (regardless of whether it is to be an ordinary court, administrative court, military court or the Supreme Administrative Court or the Supreme Court).

The establishment of the Disciplinary Chamber has therefore resulted in the exclusion of many individual cases from the scope of court jurisdiction, as in those cases the ability to file an appeal with the court was ruled out. In view of the nature of disciplinary rulings, this constitutes an obvious breach of Article 77, para. 2 of the Constitution, according to which an Act cannot close anyone's ability to file claims with a court for a breach of freedoms or rights. If courts ruled in a constitutional sense in the first instance (this applies in particular to disciplinary matters of judges), the exclusive competence of the Disciplinary Chamber to consider legal remedies means that the constitutional principle of two-instance appeal proceedings has ceased to be implemented in these cases (Article 176, para. 1 of the Constitution).[36]

This situation means that the right to a court hearing will be limited in a large proportion of disciplinary cases, which may be questioned in the future not only before the Polish authorities,[37] but also before international tribunals, including the European Court of Human

[36] It should be remembered that, due to the modification of the rules of disciplinary proceedings conducted in the cases of judges, the Disciplinary Chamber received extensive capability of altering the first instance ruling, even when the accused was acquitted by the first instance court (or the proceedings were discontinued). In such a situation, the reformatory rulings issued by the Disciplinary Chamber will not have the nature of court rulings (in the constitutional sense) and simultaneously the route of court proceedings to review these rulings will be closed.

[37] The restoration of the constitutional standard of the right to a court hearing in disciplinary proceedings will require the introduction of effective legal measures enabling the judicial review of disciplinary decisions

Rights, in the perspective of Article 6(1) of the European Convention on Human Rights.[38] The right to a court hearing referred to in the Convention is the right to a judicial authority which is in compliance with the principle of legalism, namely a judicial authority provided for in the constitution of the given state.[39]

ABSTRACT

Włodzimierz Wróbel - The Disciplinary Chamber as exceptional court in in the meaning of Article 175, para. 2 of the Polish Constitution

Article 175, para. 2 of the Constitution of the Republic of Poland provides for the ability to appoint exceptional courts during wartime. The Constitution also rules out the functioning of courts other than those specified in Article 175. A feature of an exceptional court is organizational separation, autonomy of other courts, a specific manner of appointing judges to such a court, a special range of cases recognized in terms of time, entity and subject matter, as well as a specific procedure. The Disciplinary Chamber satisfies these features of an exceptional court, despite its nominal inclusion in the structure of the Supreme Court. Therefore, there are fundamental doubts as to whether the judgments issued by this Chamber have the nature of judicial decisions in the constitutional sense of this notion.

Keywords: Supreme Court, Disciplinary Chamber, exceptional court, judge, Constitution, disciplinary procedure, justice

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previously issued by the Disciplinary Chamber. It is currently difficult to specify the nature of this measure of review.

[38] The Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4/11/1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993 No. 61, item 284, as amended) .

[39] See P. Hofmański, A. Wróbel (in:) Convention for the Protection of Human Rights and Fundamental Freedoms, ed. L. Garlicki, Warsaw 2010, vol. 1, nb 130 to Article 6, p. 313. A more extensive discussion of this issue would require a separate study.

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