

THE JUDICIAL WORKPLACE AND THE INTERSECTION WITH JUDICIAL INDEPENDENCE

Fourth Study Commission Questionnaire—2023

For most, appointment to judicial office represents not only immense personal achievement but also public acknowledgment of professional eminence. In this Fourth Study Commission analysis, we will look at the judicial workplace and examine aspects of appointment to judicial office, promotion within the judiciary, equitable allocation and distribution of judicial workload and removal from judicial office. This review also endeavors to consider how the judicial workplace is or is not comparable to other workplaces. Please answer the following in respect of your own country.

1. APPOINTMENT TO JUDICIAL OFFICE

A. Please describe the process by which a person is appointed to judicial office in lower courts, intermediate courts and superior courts pointing out any relevant differences between appointment in criminal civil or appellate courts.

The procedure of appointment of judges in Poland is pretty much the same in all types of courts. According to Article 179 of the Constitution of the Republic of Poland, judges are appointed by the President upon a motion from the National Council of Judiciary, after a competition. The National Council of Judiciary is the only body to conduct the competition and evaluate the candidacies.

Unfortunately, since 2018 this process has become highly political because of the changes in the process of appointment of the members of the National Council of Judiciary.

The National Council of the Judiciary (NCJ) has been established by the act of December 20, 1989 as the result of a project prepared by Solidarity (anticommunist opposition) lawyers. Based on the best practices of free European countries, the objective of NCJ was to protect the independence of courts and judges – a feature of the judicial system unknown to the communist regime. NCJ was entrusted with nominations of judges, participation in the nominations of courts presidents and strengthening/protecting the independence of judiciary from other powers. It was agreed that NCJ will be dominated by judges elected by judges. This rule was maintained by subsequent legislation. Polish Constitution of 1997 explicitly lists NCJ as the constitutional body, which – according to art. 187 section 1 consists of 25 members elected for 4-years term of office: According to the constitution NCJ's member are on the one hand: the First President of the Supreme Court, Ministry of Justice, President of Supreme Administration Court and representative of the President of Poland (all ex-officio) and on the other hand: 15 members-judges, elected from amongst judges of the Supreme Court, common courts, administrative courts and military courts, 4 members of the Parliament (lower chamber) elected by the lower chamber and 2 members of the higher chamber of the Parliament, elected by the higher chamber.

Up until December 2017, all the related legislation, detailing NCJ procedures, maintained the modalities of the election of judges as stipulated by the constitution, according to recommendation 2010/12 of the Committee of Ministers of Council of Europe CM/Rec (2010)12, OSCE Kiev Recommendation, Opinion no. 10 of the CCEJ and European Charter on Status of Judges (see: https://twojsad.pl/wp-content/uploads/2018/03/opinia_KW_CDL-AD2017031-en.pdf).

The constitutional role of the NCJ in the process of appointing judges is defined by two essential tasks: a/ to submit motions to the President of the Republic for appointment to judicial posts (Article 179 Constitution), and b/ to uphold the independence of courts and judges (Article 186(1) Constitution). The establishment and staffing of the NCJ should therefore ensure that it is capable of fulfilling its role in a manner that does not give rise to reasonable doubt as to the legitimacy and independence of that body, and consequently the legitimacy and the independence of those nominated by it.

Unfortunately, since the legal changes of 2017, the Polish National Council for Judiciary fails to duly perform on both above tasks, for reasons listed below.

1. *First*, the Act of 8 December 2017 amending the Act on the National Council of the Judiciary introduced new rules for the election of judicial members of the NCJ. The election of 15 judges, so far elected by their peers, was entrusted to the Sejm, contrary to the constitutional rule, according to which the Sejm elects only four members of the NCJ from among the members of the Sejm. The interpretation that the Constitution establishes the principle of the election of judges to the NCJ by their peers was confirmed by the Constitutional Tribunal (CT) in 2007. The CT indicated that the Constitution clearly states that members of the NCJ shall be judges elected by judges. Meanwhile, as a result of the legislative change in 2017, the legislature and executive branches granted themselves almost a monopoly over the formation of the NCJ, contrary to the constitutional principle of the separation and balancing of powers (Article 10 (1) Constitution). At present, 23 of all 25 members of the NCJ are appointed by these extrajudicial branches. As a result, they have gained excessive influence over the nomination process, and the NCJ lost the ability to contribute to making the nomination process more objective. Finally, three opposition parties refused to propose their candidates to the NCJ, due to unconstitutionality of the procedure. In this situation, a list of candidates including 9 judges was proposed by the ruling party Law and Justice and 6 judges proposed by their semi-ally, party “Kukiz 15”.
2. *Second*, with the same amendment, the legislature also decided to prematurely terminate the four-year term of the then judicial members of the NCJ, thus violating another constitutional rule (Article 187 (3) Constitution). These issues are also examined by the ECtHR in the pending cases: *Grzęda v. Poland* (43572/18), and *Żurek v. Poland* (39650/18). IUSTITIA fully maintains in this regard all the observations stated in the amicus curiae written comments submitted to these cases.
3. *Third*, the election of new NCJ members, held in spring 2018, was boycotted by the vast majority of Polish judges, thereby expressing a firm opposition to the unconstitutional measures introduced. As a result, out of a total number of about 10 thousand Polish judges, only 18 candidates applied for 15 positions. This defeated the objective of the representativeness of the NCJ’s composition which was provided by legislative and executive bodies as a reason to adopt changes. Another declared objective – the transparency of the election process – was compromised by the national authorities which for many months concealed the lists of support for the candidates to the NCJ and refused to make them public despite a binding decision of the Supreme Administrative Court (SAC) ordering disclosure. This made it impossible for the public to verify, whether candidacies for NCJ members were submitted in accordance with the law.
4. *Fourth*, the new membership of the NCJ consists of persons related to the executive, and especially – to the Minister of Justice. The new composition embraces either judges who were

current or past employees of Ministry of Justice or who's relatives were employees of the Ministry or newly appointed by the Ministry of Justice presidents of courts and/or their relatives. These new members were then in a relationship of professional dependence or personal gratitude to the executive. It is important to note, that a judge seconded to a Ministry of Justice and judge-president of the court, receive generous financial benefits in addition to basic salary. Many members of the NCJ were also promoted for higher level of judiciary during their membership in the NCJ.

5. *Fifth*, the new composition of the NCJ was formed even contrary to the rules adopted on 8 December 2017. For example judge Maciej Nawacki was elected to the NCJ by the Lower Chamber of the Parliament (Sejm) despite the failure to meet the formal condition of submitting a candidacy to the NCJ. There is a requirement of obtaining the minimum number of 25 judges' signatures or signatures of 2 thousand citizens. Meanwhile, Maciej Nawacki at the beginning provided 28 signatures (including his own support for his candidature) but 6 judges withdrew their support before the lists were presented in the Sejm. Hence, his participation in the adoption of resolutions of the collegial body undermines the legal force of all such acts of the NCJ.
6. *Sixth*, an analysis of NCJ's activities after it was re-staffed in 2018 may also be of importance for the evaluation of the present NCJ's genuine nature and its impact on the judicial nomination procedure. In the opinion of IUSTITIA, the National Council of the Judiciary does not fulfill anymore the constitutional role of the guardian of judicial independence. The NCJ does not intervene in cases of judges against whom politically motivated disciplinary or criminal proceedings are initiated or administrative measures applied. Despite having prerogatives in the legislative process to do so, the NCJ does not address the threats to judicial independence resulting from changes in domestic legislation. The NCJ does not take any action to defend the independence of the courts. Despite that it deals with such bizarre issues as whether the participation of a judge in a charity run constitutes a disciplinary delict.
7. *Seventh*, the nomination practice of the new NCJ raises serious doubts as well. Recommendations for judicial positions were given to many those judges who previously supported the candidacies of the new members of the NCJ by signing the lists of support – which the national authorities did not want to disclose. This indicates that there exist a pattern whereby the new members of the NCJ treat senior judicial appointments as a way of rewarding those who supported their candidacies to the NCJ.

It is worth pointing out the fact that the Court of Justice of European Union delivered a judgment of November 19th 2019 in joint cases C 585/19, C 624/18 and C 625/18 by which the Court concluded that the participation of the National Council of the Judiciary, in the context of a process for the appointment of judges, should, in principle, be such as to contribute to making that process more objective (see, by analogy, judgment of 24 June 2019 Commission v Poland (Independence of the Supreme Court), C-619/18, EU:C:2019:531, paragraph 115; see also, to that effect, ECtHR, 18 October 2018, Thiam v. France, CE:ECHR:2018:1018JUD008001812, §§81 and 82). That is however only possible when this body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment. The degree of independence enjoyed by the NCJ in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Article 186 of the Constitution, to ensure the independence of the courts and of the judiciary, may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of

independence and impartiality arising from Article 47 of the Charter. The Court gave concrete guidelines how to assess whether the NCJ exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary. The following circumstances – said the Court - may be relevant for the purposes of such an overall assessment: first, the NCJ, as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time; second, whereas the 15 members of the NCJ elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the legislature from among candidates capable of being proposed inter alia by groups of 2000 citizens or 25 judges, such a reform leading to appointments bringing the number of members of the NCJ directly originating from or elected by the political authorities to 23 of the 25 members of that body; third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed NCJ. For the purposes of that overall assessment it is also justified to take into account the way in which the NCJ exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive.

Since that time there were many more decisions, both from the Court of Justice of the European Union, the European Court of Human Rights and the Polish Supreme Court and Supreme Administrative Court, indicating that the National Council of Judiciary is not a body independent of the political power and therefore the judges nominated with its participation may fail to fulfil the notion of a court within the meaning of Article 6.1 of the European Convention of Human Rights.

Failure to comply with the requirements of independence and impartiality in case of persons appointed to judicial positions since 2018

8. All the above-mentioned deficiencies in the appointment process are of a serious nature. They indicated that the selection and appointment of judges since 2018 was in flagrant breach of the regulations and principles of national law and European standards. This affects all levels of courts in which the National Council of Judiciary nominates the candidates for judicial positions. Also, it cannot be remedied in any other way as to repeat the competitions.
9. The undue discretionary powers of the NCJ have been exercised in the procedure of appointing judges to all kinds of judicial positions. The process of selecting candidates and appointing judges, as well as the process of electing new members of the NCJ, demonstrates that the infringements were committed intentionally in order to ensure that the political authorities have a dominant influence on the appointments of judges. The procedure of qualification candidates to the judicial positions and issuing the President's acts of appointment, justify doubts as to the failure to meet the Convention requirements by persons appointed to the position of the Supreme Court judges.
10. All aforementioned irregularities in shaping and functioning of the NCJ – disqualify this body as an independent, objective initiator of motions to the President of the Republic for the appointment to judicial posts.
11. The flaws in the nomination process of the judicial members of the National Council of the Judiciary, resulting in the political power in control of 23 out of 25 members of the Council, make the nomination process contrary to the provisions of Article 187 of the Polish Constitution. As a consequence, the National Council of Judiciary who was in charge of the

nomination process of all judges involved in the cases pending before the ECHR, cannot be considered as the body provided for in the Constitution, just a mere substitute for it.

B. If applicable, please identify whether political influences of any description bear upon in any way the appointment of a particular person to judicial office.

The main political influence on the appointment process is due to the fact that 23 out of 25 members of the National Council of Judiciary are elected by the legislative power.

C. Is ethnic or gender diversity in any way relevant to appointment to judicial office, and if so, please describe why and in what respect each may be relevant.

We do not experience this kind of irregularities.

D. Describe whether and if so in what way the process of appointment to judicial office is independent of government.

It is formally independent, but as the National Council of Judiciary is totally dependent on the Sejm, in fact judicial appointments are performed indirectly by the parliament majority.

2. PROMOTION WITHIN THE JUDICIARY

A. Does scope exist for promotion within the judiciary and if so, please describe how and in what circumstances a magistrate or judge may be promoted.

All promotions undergo the same procedure in front of the National Council of Judiciary, with all its flaws. This is a serious problem, as the Council selects judges for the highest position in the courts, the Supreme Court included.

B. To what extent is political affiliation of political partisanship relevant to promotion within the judiciary.

Many people have been appointed to higher judicial positions or promoted who are loyal to the ruling party. For example, Mr. Tomasz Kosakowski, a lawyer from Olsztyn, participated in a competition to the Regional Court in Olsztyn. During that competition he paid 12,5 thousand PLN to the ruling party's (Prawo i Sprawiedliwość) election fund. He was indicated as the winner of the competition and appointed to a judicial position.

C. Describe the transparency involved in the process of promotion within the judiciary.

Formally all the deliberations of the National Council for Judiciary are transmitted online. However, there are some hearings that are made secret for unknown reasons. Also, the grounds for nominations are very unclear. It seems that the nominations have to be approved by the politicians from the ruling coalition in order to take place. In some competitions no candidate was chosen, even though they fulfilled the nomination criteria.

3. WORKLOAD WITHIN THE JUDICIARY

A. In broad terms, what are the requirements for magistrates and judges in relation to the number of sitting days per year or other measurement of judicial workload requirements?

In every department of every court there is a document entitled "division of duties". Depending on the level of the court, the division of duties is assigned by the president of the court with consultation with the "college" of the particular court.

This document specifies the minimum number of sessions each judge has to perform, the types of cases in which he or she has to adjudicate, extra duties and so on. This document is communicated to the judges who have a right to appeal to the National Judicial Council about the division within a week of receiving the division of duties.

B. If a judge is encountering trouble keeping up with the workload, describe the regime that applies by which –

(i) that judge's workload is allocated to other judges;

If the judge is present in the court (not absent for a long time due to illness, pregnancy etc.), there is no possibility to release him or her from the cases that were already assigned to him or her.

(ii) the overloaded judge can recover from workload arrears and from any other disabling factor that led to overload.

In exceptional cases it is possible for the president of the court to withhold assignment of new cases to a judge in order to make it possible to get rid of the arrears.

(iii) there are other mechanisms to address judicial delinquency.

The president of a court can give notice to a judge who is reluctant to do his or her work. Such notice can be appealed to the disciplinary court. If final, it can influence a judge's possibility to get promoted financially.

C. Are judges expected or required to assist other judges who may be adversely affected from overload so as to ensure that the business of the court is discharged in a timely manner.

There is no such procedure in the Polish system. Every judge is solely responsible for his or her workload, with the exception of long term absence in the office. Moving cases from one judge to another could even raise suspicions about the motives of such decisions, as assigning the case to a judge who will be more favourable to one of the parties.

4. REMOVAL FROM JUDICIAL OFFICE

A. Does a regime currently exist in your country pursuant to which a sitting judge may be removed from office. If so, please describe any such regime, giving all relevant details including-

(i) who decides that the judge is to be removed from office;

As a rule, judges are irremovable. The exceptions are laid down in the Constitution.

Article 180

1. Judges are irremovable.

2. A judge may be dismissed from office, suspended from office, transferred to another seat or position against his will only by power of a court decision and only in cases specified in the law.

3. A judge may be retired as a result of illness or loss of strength preventing him from performing his office. The procedure and the manner of appealing to the court shall be laid down by law.

4. The law specifies the age limit upon reaching which judges retire.

Following the takeover of the National Council of Judiciary, the ruling party also established new laws concerning the disciplinary regime for judges. At first, the Disciplinary Chamber was created in the Supreme Court, with total autonomy and 40% higher salaries than other Supreme Court judges, consisting solely of people loyal to the ruling coalition, especially the Minister of Justice.

It was the highest court in disciplinary cases of judges, responsible also for their removal from office. Then, after this body was questioned by the Court of Justice of the European Union and the European Commission, a new body was created, the Chamber of Professional Responsibility. This body was even more politicised, as its members were hand-picked by the President from among candidates drawn of all the Supreme Court judges, with the approval of the prime minister.

As one can easily see, the politicians ensured themselves full control over the election of a body authorised to remove judges from office.

Due to the controversies and the European Commission's decision to withhold the money from the EU there is now a new project to transfer the disciplinary cases of judges to the Supreme Administrative Court. This project has been sent by the President to the Constitutional Tribunal, another body dependent on the ruling coalition. For reasons of personal conflict, the Constitutional Tribunal seized to adjudicate the last couple of months, which means that this law may never be decided or enter into force.

(ii) does the judge have a right of audience on any such motion or otherwise possess a right to be heard against the removal and is there an appeal process if removed;

(iii) what are the grounds for seeking the removal of a sitting judge;

(iv) what is the relationship between violation of the ethics code/principles and removal; and

(v) describe the transparency in the process.

The reasons for disciplinary action that might result in removal from office are listed in Article 107 of the law on common courts. Relevant regulations are also included in other acts concerning other types of courts.

Article 107

§ 1. A judge is disciplinary liable for official (disciplinary) misconduct, including:

1) an obvious and blatant violation of the law;

1a) refusal to administer justice;

2) actions or omissions that may prevent or significantly impede the functioning of a judicial authority;

3) actions questioning the existence of a judge's service relationship, the effectiveness of the judge's appointment, or the legitimacy of a constitutional body of the Republic of Poland;

4) public activity incompatible with the principles of independence of the courts and judges;

5) violation of the dignity of the office.

§ 2. A judge is also disciplinary liable for his/her conduct prior to taking up the position, if, by doing so, he/she failed to fulfill the duties of the state office he held at that time or turned out to be unworthy of the office of judge.

§ 3. It is not a disciplinary offence:

1) the fact that a court decision issued with the participation of a given judge is subject to an error in the interpretation and application of national or European Union law or in the determination of the facts or assessment of evidence;

2) submitting a request to the Court of Justice of the European Union for consideration of the question referred for a preliminary ruling referred to in Art. 267 of the Treaty on the Functioning of the European Union (Journal of Laws of 2022, item 2250);

3) examination of compliance with the requirements of independence and impartiality in the case referred to in Art. 42a § 3 or art. 23a § 4 of the Act of August 21, 1997 - Law on the Military Courts System (Journal of Laws of 2022, item 2250), or art. Art. 26 § 2 of the Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2021, item 1904 and of 2022, items 480, 1259, 2280 and

2600), or examination of compliance with the requirements of independence and impartiality in in the case referred to in Art. 29 § 5 of this Act.

As one can easily see, judicial control of the nomination process of judges is subject to disciplinary responsibility. This is aimed to make it impossible for the judges to question the faulty nominations by the NCJ.

All disciplinary hearings are public. The court of last instance is the Chamber of Professional Responsibility, nominated by the politicians mentioned above.

B. If removed from office, describe the adverse consequences that may affect the removed judge including -

(a) financial (especially pension) consequences;

(b) future employment consequences following removal;

(c) societal consequences including loss of title or civic decorations; and

(d) disciplinary steps that may be taken against the removed judge.

A judge who is removed from office loses the privileges connected with the office, like the higher pension. This does not exclude further disciplinary actions against the person. As for the employment consequences, he or she might be found unworthy to be enrolled on the list of lawyers (advocates, barristers). Naturally the removal from office might result in loss of trust in the person's competence or honesty.