EUROPEAN STANDARD FOR JUDICIAL APPOINTMENTS: SOME DOUBTS

Beata Stępień-Załucka[1]
University of Rzeszów

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ABSTRACT: The National Council of the Judiciary in Poland is an important element of the system of appointing judges to all judicial positions. In 2017, there was a reform of the way the members of the Council are elected in Poland, which has caused some controversy. It follows from the case law of the European Tribunals that the current form of the Council contradicts the European standard of the right to a tribunal established by law - in the context of judges obtaining positions with the participation of this Council. The aim of this article is to present this problem and to take a legal and comparative view of the functioning of judicial councils in other European countries, together with the possible consequences for these countries, using the example of the National Council of the Judicary in Poland.

KEYWORDS: judges, appointment of judges, judicial council, National Council of the Judiciary, Polish law

1. Introduction

The constitutional provisions of individual states tend to be vague as regards the standard for the appointment of judges. They generally provide only for whom, or on whose recommendation, such an appointment is made, without specifying the stages preceding the appointment. These issues should and usually are regulated by statute. In this respect, various national traditions have developed, tried and tested over many years, sometimes modified, thus creating a national *acquis constitutionnel*, a value to be respected inter alia by European Union law. Thus, in some countries, various bodies, shaped in different ways, assist in the selection of judicial candidates. Sometimes, although this is not the rule in all Member States of the European Union, these are permanent bodies known as national judicial councils. Their shape varies, and there is no single standard, just as there is no single standard for the appointment of judges across the European Union. Comparative studies of existing

[1] University of Rzeszów, Poland (beata@kpmz.pl). ORCID: 0000-0003-1802-680X

standards in this area indicate that there are more than twenty such standards in EU countries.[2]

There are no specific solutions in this regard in European Union law either. Both the Treaty on European Union and the Charter of Fundamental Rights, however, are sources of the right to an independent and impartial tribunal, the essence of which is the implementation of the requirement that anyone who invokes or is subject to the application of EU law must have access to an independent tribunal that can provide them with effective protection. This right derives primarily from the content of the second subparagraph of Article 19(1) Treaty on European Union (TEU) and Article 47 of the EU Charter of Fundamental Rights.

The second subparagraph of Article 19(1) TEU imposes an obligation on all Member States to put in place the remedies necessary to ensure effective legal protection in the areas covered by EU law, and Article 47 of the Charter of Fundamental Rights reaffirms the right to an effective remedy and to a fair trial before an independent court where there is an alleged infringement of rights and freedoms guaranteed by EU law. It should be added that Article 4(2) TEU imposes an obligation on the EU to respect the national identities of the Member States, which are "inextricably linked to their fundamental political and constitutional structures".[3]

This regulation must be read in conjunction with the principle of conferred powers in Article 5 TEU, listing the competences of the European Union. The TEU specifies the principle of conferral (principle of conferred powers), in Article 5: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein" (first sentence of paragraph 2 of Article 5 TEU). The second sentence of Article 5(2) TEU makes it clear that competences not conferred on the Union in the Treaties remain with the Member States. The principle of conferral sets the limits of the European Union's competences, and Member States are free to act to the extent that an area has not been delegated to the European Union.

Clearly, the organisation of national judiciaries is not one of the competences conferred on the EU by the Member States. Member States have also retained the exclusive right to shape the procedures and to designate the bodies responsible for enforcing the rights granted to individuals by EU substantive rules.

[2] V. Autheman, S. Elena, *Global Best Practices: Judicial Councils*, IFES Rule of Law White Paper Series, Arlington 2004, passim.
[3] Ch. Rozakis, *The Right to a Fair trial in Civil Cases*, Judicial Studies Institute Journal 2004, No. 2, pp. 98 et seq.

This autonomy of the Member States, which can be described as a procedural autonomy, should be interpreted in the light of the principle of the effectiveness of EU law, which implies the obligation of the Member State to provide an effective judicial route in any case where there is a connection with EU law.[4]

The countries of the European Union are also members of the Council of Europe. From this membership stems the obligation to respect the European Convention on Human Rights. The Convention is not only an inventory of protected human rights, but also an act that provides for complaint procedures ensuring that the actions and omissions of a state party are challenged before an international adjudicating institution, the European Court of Human Rights. Each state of the European Convention has to accept a full complaints mechanism, i.e. the possibility of bringing both inter-state and individual complaints against it.

Also in the European Convention on Human Rights it is difficult to find any specific guidelines as to how judges should be appointed. The only Convention provision that can be applied in this respect is the very general provision of Article 6(1) of the European Convention on Human Rights, which stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, to decide on his civil rights and obligations or on the merits of any criminal charge against him.

Against such a background, it is important to note, both in EU and Council of Europe law, the standard of an independent and impartial court. This European standard seems to be a certain extension of national constitutional law thought, where the independence of courts with impartial and independent judges is generally referred to.

Recently, the jurisprudence of the Court of Justice of the EU, as well as the jurisprudence of the European Court of Human Rights, has developed the above standard by considering, inter alia, precisely how judges are appointed to office in the Member States. In this jurisprudence, views have emerged questioning the way judges are appointed in Poland, which should be subjected to a broader European discussion. This will be the subject of this contribution.

2. Reform of the judiciary in Poland

[4] K. Kowalik-Bańczyk, *Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings*, Yearbook of Antitrust and Regulatory Studies 2012, No. 5(6), pp. 215 ff.

Introducing the issue, it should be recalled that the background to the above-mentioned rulings are the legislative changes that took place in Poland in December 2017, which concerned the way the composition of the National Council of the Judiciary was formulated[5] from the beginning of 2018 (the Act of 8 December 2017).[6] Indeed, under Polish law, it is the National Council of the Judiciary that is the constitutional body that conducts public competitions for judicial positions. It is at the request of the National Council of the Judiciary that judges in Poland are appointed by the President of the Republic (Article 179 of the Polish Constitution).[7]

In Poland, the National Council of the Judiciary is composed of representatives of the executive, the legislative and the judiciary. The latter (the judiciary part) consists, among others, of 15 judges of various courts, who until the amendments were elected by the judges themselves. After the legislative changes, the 15 judges are now elected by the Sejm, the body of the legislature, the lower house of parliament.[8] In this regard, it should be noted that the Polish Constitution indicates the entity competent to elect all members of the National Council of the Judiciary except those who are judges. In this area, the provision of Article 187(1)(2) of the Polish Constitution only provides that the National Council of the Judiciary shall also consist of fifteen members elected from among judges of the Supreme Court, common courts, administrative courts and military courts. On the other hand, according to Article 187(4) of the Constitution of the Republic of Poland, the system, scope of activities and working procedures of the National Council of the Judiciary, as well as the manner of election of its members, are determined by statute.[9] It is in the wording of these two

[5] I have already written about the initial assessment of the changes, see: B. Stępień-Załucka, *National Council of the Judiciary in Poland. A Few Comments on the Controversial Reform and Its Future*, [in] *Future Law*, eds. C. Santos Botelho, F. da Silva Veiga, Porto 2018, pp. 571 et seq. I pointed out, among other things, that due to many controversies only time will show to what extent the changes made in Poland will bring benefits, and to what extent they will cause damage to the system and society. And although the reform and the way in which it was introduced were very controversial, the changes were found to be in line with the Polish Constitution by the Polish Constitutional Tribunal, which must be important for their further perception, as I will write below.

[6] Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, Journal of Laws 2018, item 3.

[7] A. Rakowska-Trela, *Krajowa Rada Sądownictwa po wejściu w życie nowelizacji z 8.12. 2017 r., - organ nadal konstytucyjny czy pozakonstytucyjny?* [in:] *Konstytucja. Praworządność. Władza sądownicza. Aktualne problemy trzeciej władzy w Polsce*, ed. Ł. Bojarski, K. Gajewski, J. Kremer, G. Ott, W. Żurek, Warsaw 2019, pp. 116-119.

[8] The reform is described, for example, in M. Valle Camacho, *El derecho a un tribunal establecido por ley y el procedimiento de nombramiento judicial: nuevos desarrollos a través de la jurisprudencia del TEDH y del TJUE. Su aplicación al caso de Polonia*, Cuadernos Europeos de Deust 2023, No. 68, pp. 117-147.

[9] P. Tuleja, *Konstytucyjny status Krajowej Rady Sądownictwa* [in:] *Krajowa Rada Sądownictwa. XX-lecie działalności*, ed P. Tuleja,Warsaw 2010, pp. 61-90

provisions that the competence of a body other than judges to elect judges-members of the National Council of the Judiciary is seen.[10]

According to the recently emerging jurisprudence of the European Courts, the composition of the National Council of the Judiciary as of 2018 is flawed in Poland, precisely because of the change in the way the judicial part of the National Council of the Judiciary was elected. This is important because with the participation of the National Council of the Judiciary shaped in this way, about 1/3 of all judges were appointed in Poland.[11]

In the assessment of the reforms made in Poland to the way judges are appointed, a significant echo and international resonance was the resolution of the Polish Supreme Court of 23 January 2020,[12] which stated, inter alia, that the composition of the court in a given case is contrary to the provisions of the law when the composition of the court includes a person appointed to the office of a judge at the request of the National Council of the Judiciary formed according to the procedure established by the provisions of the law of 8 December 2017. However, this resolution was, inter alia, the subject of a ruling by the Polish Constitutional Tribunal, the body which in Poland decides on the constitutionality of the law.[13] The Constitutional Tribunal ruled on 20 April 2020 that the resolution of the Supreme Court is incompatible with the Polish Constitution, which essentially means that it has been eliminated from the Polish legal order (despite the votes to the contrary).[14]

As an aside, it is worth mentioning that the Polish Constitutional Tribunal has previously found the change in the law regarding the manner in which members of the National Council of the Judiciary are appointed in Poland to be in line with the Polish Constitution, although, for example, many voices have been raised in the Polish doctrine indicating the controversial nature of the changes.[15] In the judgment of the Constitutional

[10] See, however: H. Izdebski, *Article 187*, [in:] *Komentarz do Konstytucji RP. Art. 186, 187,* Warsaw 2020, p. 139.
[11] Resolution of the Supreme Court of 23 January 2020, BSA I-4110-1/20.
[12] BSA I-4110-1/20.
[13] See, e.g., the Supreme Court's resolution of 5 April 2022, I PZP 1/22, according to which the Constitutional Court's judgment of 20 April 2020 could not and did not have a direct effect on the Supreme Court's resolution of 23 January 2020. On the other hand, in another decision, the Supreme Court stated that as a result of the Constitutional Tribunal's ruling of 20 April 2020, the Supreme Court's resolution of 23 January 2020 is not formally binding on the judges of the Supreme Court, while the thoughts contained therein may be used in adjudicatory practice within the limits of the normal ways of interpreting the law (Supreme Court decision of 3 November 2021, IV KO 86/21). Undoubtedly, therefore, there is a lack of a unified position to this extent, which only adds to the existing chaos.
[14] U 2/20.
[15] See, e.g., J. Majewski, *Strukturalne uzależnienie obecnej Krajowej Rady Sądownictwa od władzy politycznej i wynikająca z tego wadliwość procedury powołań na urząd sędziego a wymóg niezależności i bezstronności sądu oraz instytucja wyłączenia iudex suspectus w postępowaniu karnym (art. 41 KPK). Uwagi wybrane*, [w:] *Bezstronność sędziego w sprawach karnych w świetle zarzutu wadliwości jego powołania*, ed. P. Wiliński, R. Zawłocki, Warsaw 2022, p. 74.

Tribunal of 25 March 2019, K 12/18, the election of the judges of the members of the Council by the parliamentary chamber was found to be an acceptable way of shaping the composition of the National Council of the Judiciary.[16] This judgment, by virtue of Article 190(1) of the Polish Constitution, has a universally binding character and the value of finality in Poland. The universally binding force of the Constitutional Tribunal's judgments - according to the hitherto prevailing view - obliges all other organs of public authority, including judicial authorities (such as the Polish Supreme Court), to respect and apply these judgments. In this respect, there is no legal means of challenging the substantive ruling of the Constitutional Tribunal.

It needs to be added at this point that the jurisprudence of the Polish Constitutional Tribunal is treated in some circles as irrelevant, or even non-existent, due to the expressed dissatisfaction with the composition of the Constitutional Tribunal or the manner in which this body operates, as could be seen, inter alia, in the rulings of the European tribunals concerning the reform of the judiciary in Poland. However, there is no verification procedure in the current regulations, both Polish and European, as to the defectiveness of the composition of the Polish Constitutional Tribunal, and consequently the defectiveness of its rulings. According to the hitherto prevailing view, only the Constitutional Tribunal would have the power to resolve the doubts concerning it. Until the Constitutional Tribunal rules to the contrary, the presumption of constitutionality of the Constitutional Tribunal's activities applies. Pursuant to Article 190 of the Constitution of the Republic of Poland, only the Constitutional Tribunal is entitled to exercise hierarchical control of the compliance of legal regulations with the constitutional standard in a final manner and with universally binding force of its decisions. In this respect, the competences of the Constitutional Tribunal may not be taken over by any other organ of the judiciary.[17]

With the above in mind, the evaluation of the reforms made - from the perspective of the rulings of the European courts - appears to be an interesting area of research. Undoubtedly, a certain conflict of values can be seen here, noticeable between the national constitutional order and the rulings of the Constitutional Tribunal, the only body authorised, according to the law in force, to examine the constitutionality of law in a given state, and the European order and the jurisdiction of the European courts based on this order.

3. Selected views of the European Courts on judicial reform in Poland

[16] K 12/18.

[17] Such a view was expressed, inter alia, by D. Zawistowski, *Niezależność sądów i niezawisłość sędziów z perspektywy prawa Unii Europejskiej*, Ruch Prawniczy Ekonomiczny i Socjologiczny 2016, No. 2, p. 9.

In order to answer the question of the legitimacy of the views of the European Tribunals, it is necessary to look at the basic reasoning contained in the judgments of the European Tribunals on the reform of the judiciary in Poland.

As far as the European Court of Human Rights is concerned, it must be recalled at this point that from 7 May 2021, when the first judgment on the judicial reform in Poland was issued, until the end of 2023, the Court issued eleven judgments on various aspects of the reform, in which it found a violation of Article 6 § 1 of the European Convention on Human Rights on various grounds. In the judgment of 7 May 2021, Xero Flor v. Poland it was found, inter alia, a violation of the right to a tribunal established by law due to the participation in the proceedings before the Constitutional Tribunal of a judge whose election was affected by serious irregularities violating the essence of this right. [1819]In the judgment of 29 June 2021, Broda and Bojara v. Poland, the violation allegedly consisted in the lack of access to a court in order to challenge the decision of the Minister of Justice to prematurely terminate the term of office of the president and vice-president of the court. In the judgment of 22 July 2021, Reczkowicz v. Poland, the functioning of one of the chambers of the Supreme Court (the Disciplinary Chamber) was challenged because of the way it was filled by judges appointed with the participation of the reformed National Council of the Judiciary.[20] In the judgment of 8 November 2021, Dolińska-Ficek and Ozimek v. Poland, a similar view was expressed with regard to another of the chambers of the Supreme Court (the Extraordinary Control and Public Affairs Chamber).[21] In the 3 February 2022 Advance Pharma v Poland judgment, a violation was derived from the fact that the judges of the Civil Chamber of the Supreme Court appointed on the recommendation of the reformed National Council of the Judiciary lacked the characteristics of an 'independent and impartial tribunal established by law'.[22] In the 15 March 2022 Grzęda v Poland judgment, a violation was derived from the lack of access to a court to challenge the premature termination of office of a member of the old National Council of the Judiciary.[23] A similar violation was found in the judgment of 16 June 2022 Żurek v. Poland.[24] In Juszczyszyn v Poland, the 6 October 2022 judgment again challenged the functioning of one of the chambers of the Supreme Court (the Disciplinary Chamber) on the grounds that it was filled by judges appointed with

[18] Application no. 4907/18.
[19] Application no. 26691/18 and 27367/18.
[20] Application no. 43477/19.
[21] Application no. 49868/19 and 57511/19.
[22] Application no. 1469/20.
[23] Application no. 43572/18.
[24] Application no. 39650/18.

the participation of the reformed National Council of the Judiciary.[25] A breach of the same standard was found in the judgment of 6 July 2023 Tuleya v. Poland.[26] Meanwhile, in the Pająk v. Poland case, the judgment of 24 October 2023 found a violation related to the lack of access to a court to challenge the decisions of the Minister of Justice refusing to allow the applicants to continue serving as judges beyond the reduced retirement age.[27] In turn, the Wałęsa v. Poland judgment of 23 November 2023 challenged the mechanism of the extraordinary complaint, an extraordinary remedy available against final judgments and introduced into Polish law as part of the judicial reform, as well as, the appointment of judges to one of the chambers of the Supreme Court (the Chamber of Extraordinary Control and Public Affairs), stating that the judges of this chamber were appointed in violation of the law.[28]

In the rulings of the European Court of Human Rights, in addition to the various aspects of the reform of the judiciary in Poland that have been recognised by the Court and sometimes challenged, the Court has also considered as an integral part of its findings that the violation of the applicants' rights had its origin in the changes in Polish legislation that deprived the Polish judiciary (judges) of the right to elect judges-members of the National Council of the Judiciary. This was intended to allow the executive and legislative authorities (and therefore the political power) to interfere directly or indirectly in the procedure for the appointment of judges, thereby systematically undermining the legitimacy of a court composed of judges so appointed. The European Court of Human Rights therefore interpreted the provisions of the Polish Constitution and the Act on the National Council of the Judiciary, emphasising that the current system of shaping the composition of the National Council of the Judiciary breaches the existing European standard whereby only judges should elect other judges as members of the body participating in the procedure for selecting candidates for the office of judge. It adopts the construction that judges appointed in a specific manner under national law do not fulfil in gremio the standard of an independent and autonomous tribunal established by law within the meaning of Article 6 § 1 of the European Convention on Human Rights. The current procedure for the appointment of judges in Poland, essentially to all courts, is therefore flawed according to the European Court of Human Rights. As one may think, according to the European Court of Human Rights, only the election of judges-members of the National Judicial Council by other judges

[25] Application no. 35599/20.
[26] Application no. 21181/19 and 51751/20.
[27] Application no. 25226/18.
[28] Application no. 50849/21.

would comply with the European standard under Article 6 § 1 of the European Convention on Human Rights.

Similar conclusions result from reading the case law of the Court of Justice of the European Union. For example, in the judgment of 15 July 2021. (C-791/19), the CJEU took the view that only a judicial council, whose members do not come from an election by parliament but are elected by the judges themselves, provides guarantees of the independence of the judges it appoints. Interestingly, the Court did not illustrate its concerns with any specific action of the current National Council of the Judiciary in Poland or the behaviour of its members, assuming, as it were, a priori the defectiveness of the legislative changes introduced in Poland. Similar conclusions also follow from other CJEU rulings.

In this context, one more thing is puzzling, which may be attempted to be described as the paradox of the change of political power. If one were to share the view that political power allows excessive interference in the procedure for appointing judges, it would seem that a change of political power in elections (which, after the most recent parliamentary elections, is taking place in Poland) results in judges who are dependent on that power suddenly becoming judges who are independent of the current power (since they were supposed to be dependent on the previous power they were sympathising with).

The positions of the two European Tribunals are therefore - in the view of many - controversial, aimed at reversing the statutory changes made in Poland. The idea is thus to restore a state in which the judges-members of the National Council of the Judiciary would be elected by other judges. Only then would the standard of an independent European court - according to the European tribunals - be met. Is this position justified?

4. Ways of appointing judicial councils in European countries

Looking at the views of the European Court of Human Rights and the Court of Justice of the European Union, at least a few things are puzzling. The views expressed in the aforementioned rulings are interesting insofar as the current model of the National Council of the Judiciary operating in Poland was inspired by, inter alia, the Spanish model. In the positions of the Polish government before European Tribunals in the cases indicated, such an argument appeared, but no broader conclusions were drawn from it. However, it seems that it may be of significant importance in the future, especially in the context of the efficient functioning of the judiciary of individual European countries.

At this point, it is therefore necessary to recall the assumptions of the Spanish model for the appointment of judges. In Spain, as is well known, there is a general judicial council

- the Consejo General del Poder Judicial. It is composed of representatives of the various authorities, including the judiciary (Article 122(2) of the Spanish Constitution). The member judges of the Council, of which there are twelve, are elected by a vote in Parliament. Six judges are elected by the lower house (Congress of Deputies) and six by the Senate. The rules for the election of judges are determined by law (Article 122(2), second sentence, of the Spanish Constitution). The Spanish Constitution therefore clearly indicates the scope of the regulation of the organic law to develop the constitutional provisions concerning it.

As regards the election of the judges-members of the Judicial Council, the principles under which these elections take place are not established in the Basic Law. This is because the legislator has decided that they will be set out in the Organic Law on the Judicial Power, which gives the legislator considerable freedom in shaping these principles. The detailed rules for the selection of the composition of the General Council are therefore determined by sub-constitutional acts of a statutory nature. [29]With regard to the selection of judges, this is done by the Organic Law on Judicial Power . [30]Originally, the judges had a greater influence on the formation of the Council's composition, but after the 1985 amendments, the judicial circles were basically removed from influence on the creation of the Council, which consequently led to the Council's composition basically depending only on the parlment.[31] The most recent method of electing judges and other lawyers to the General Council was set out in 2013.[32] Candidates for the Council apply themselves, but such an application should be supported by at least 25 judges in active status or by a legally recognised association of judges. The selection of judges, as indicated above, is done by Parliament. This system is sometimes criticised, precisely because of the way in which the members of the Council are selected, but this does not mean that the appointment of judges with the participation of the Council thus formed is questioned.[33]

When looking at the Spanish solutions, one cannot avoid comparing that system with the current Polish system. In Poland, judges to the Council are currently elected by one of the chambers of parliament, from among judges proposed with the support of other judges (25 signatures) or with the support of citizens (2000 signatures). Of the candidates put

[29] Ley Orgánica 1/1980, de 10 de enero, del Consejo General del Poder Judicial, BOE-A-1980-720.
[30] Ley Orgánica 6/1985, de 1 de julio, de Poder Judical, BOE-A-1985-12666.
[31] F.M. García Costa, *Consideraciones sobre el sistema de elección de los vocales del Consejo General del Poder Judicial*, Anales de Derecho 2008, No. 26, p. 443.
[32] Ley Orgánica 4/2013, de 28 de junio, de reforma del Consejo General del Poder Judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, BOE-A-2013-7061.
[33] G. Rosado Iglesias, *La constitucionalización del Gobierno Judicialcuarenta años de Consejo General del Poder Judicial, régimen actual y cuestiones pendi, entes*, Revista de derecho político 2018, No. 101, p. 366 ff.

forward, it is the parliamentary clubs that indicate the persons they intend to support, with a maximum of nine candidates per club. If the total number of candidates indicated by the parliamentary clubs is less than fifteen, the Presidium of the Sejm indicates the remaining candidates (from among the candidates proposed according to the procedure) - Article 11d of the Act on the National Council of the Judiciary. Thus, far-reaching analogies to the Spanish system can be seen here, enriched somewhat by a certain democratic element (the possibility for citizens to propose a candidate).

The German example may also be interesting in the above context.[34] As is well known, there is no permanent judicial council in Germany. Judges are appointed by collegial bodies (*Richterwahlausschuss*) consisting entirely or predominantly of representatives of other authorities (legislative and executive), which depends on the type of court and the level of the judiciary. These so-called ad hoc commissions for the election of professional judges have their basis in Article 95(2) of the German Constitution and the Law on the Election of Judges (*Richterwahlgesetz*). [3536]The Federal Law on the Judicial Profession (*Deutsches Richtergesetz*) is also the legal instrument that regulates in detail how judges function in the Federal Republic of Germany.

By way of example, candidates for federal judges are proposed by the Federal Minister of Justice (*Bundesjustizminister*) or *the Richterwahlausschuss*. *The Richterwahlausschuss* decides on the candidate in a secret ballot by a simple majority of the votes cast. If the Federal Minister of Justice agrees with the choice, he or she requests the Federal President (*Bundespräsident*) to appoint the candidate as judge. The president, together with the federal chancellor (Bundeskanzler) or the Federal Minister of Justice appoints the judge. At the state level, on the other hand, the situation varies. The German Constitution leaves the Länder legislations considerable leeway in shaping the detailed regulations for the selection of judges of ordinary courts (Article 98 (3) to (5) of the German Constitution). [37]It can be pointed out here, inter alia, that in five Länder the selection and appointment of Land judges takes place exclusively within the respective Ministries of Justice without the involvement of the Richterwahlausschuss.

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[34] J. Riedel*, Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany,* [in:] *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands and Spain*, ed. *G. Di Federico*, Bologna 2005, p. 95.

[35] Richterwahlgesetz in der im Bundesgesetzblatt Teil III, Gliederungsnummer 301-2, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 133 der Verordnung vom 31. August 2015 (BGBl. I S. 1474).

[36] Deutsches Richtergesetz in der Fassung der Bekanntmachung vom 19. April 1972 (BGBl. I S. 713), das zuletzt durch Artikel 4 des Gesetzes vom 25. Juni 2021 (BGBl. I S. 2154).

[37] H. F. Zacher, *Versorgung der Beamten, Richter un Soldaten,* [in:] *Darstellung der Alterssicherungssysteme und der Besteuerung von Alterseinkommen*, Bonn 1983, p. 127 ff.

In general, this model for the selection of judges is also criticised in the local doctrine, inter alia due to the lack of transparency or the fact that the selection is based not only on the criteria of the candidate's expertise, but also on his or her political orientation. This system is supposed to reduce the chances of 'politically neutral' judges, which calls for, among other things, greater transparency in such elections.[38]

In this regard, as regards the functioning of the judicial councils in Spain and Germany - in terms of their composition - it should be noted that this concept is based on the model of a democratic chain of legitimacy of such bodies, understood in such a way that all acts of exercise of state power can be attributed to the will of the citizens. The chain of legitimacy is intended to ensure that public power (including the judicial councils) can be attributed to the people, as it comes from the people (Article 1(2) of the Spanish Constitution, Article 20(2) of the German Constitution). The mandate derived from the people is supposed to determine the legitimacy of the exercise of state power.[39] According to this concept, bodies elected by other means, unless explicitly regulated differently in the Constitution, should derive their legitimacy indirectly, i.e., e.g., through nominations coming from the citizens in the aforementioned nomination chain (e.g., parliament elected by the citizens, composition of the body concerned elected by the parliament). The absence or substantial deficit of a democratic mandate, on the other hand, is supposed to prejudge the unconstitutionality of the relevant arrangements.

Similar views as to the democratic legitimacy of the National Council of the Judiciary in Poland appear in the local doctrine, which is supposed to justify, inter alia, the correctness of the legislative changes made.[40] In such a light, the rulings of the European courts seem to disregard the domestic constitutional order and its traditions. Indeed, one would look in vain for such arguments in the justifications of the cases presented above. However, according to Article 4(2) of the Treaty on European Union, the European Union shall respect the equality of Member States before the Treaties as well as their national identities, inextricably linked to their fundamental political and constitutional structures, which shall be of importance at least in the context of the judicial activities of the Court of Justice of the European Union.

[38] F. Wittereck, *Die Verwaltung der Dritten Gewalt*, Tübingen 2006, pp. 268-271.
[39] E.-W. Böckenförde, *Demokratie als Verfassungsprinzip*, [in:] *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band II*, eds. J. Isensee, P. Kirchhof, Heidelberg 2004, pp. 429 et seq.; A. Voβkuhle, G. Sydow, *Die demokratische Legitimation des Richters*, Juristenzeitung 2002, No. 14, pp. 673 ff.
[40] Such a concept was confirmed, for example, by the Polish Supreme Court in its decision of 3 July 2024, III CB 26/24.

5. Conclusion

With the above in mind, the views of the European Tribunals are surprising to say the least. They imply that also the procedure of appointing judges in a given country is covered by the right to a fair trial under the European rules, and that a group of judges before they undertook adjudicatory actions and took judicial office may not meet the standards of an independent tribunal. If, therefore, the European standard for the selection of judges has been breached in Poland, it seems that in the not too distant future analogous doubts will be raised as to the applicable standard for the selection of judges in other European countries, including, precisely, Spain or Germany. Indeed, the election of members of judicial councils, or the absence of a council and the election of judges by active politicians, appear to be similarly burdensome in these countries as in the Polish case, according to the views of the courts.

In fact, the rulings of the two European Courts indirectly undermine the independence of judges in all EU Member States where either the election of the members of the judicial council is carried out by the parliament (Spain) or where judicial councils do not exist at all (such as Germany, but also Austria, the Czech Republic or the Scandinavian countries). Following the Polish example, where as a result of such a defect resulting from European case-law, it is envisaged, for example, that it is possible to consider the irregularities in the election of members of the National Council of the Judiciary as tantamount in its effects to a finding of a lack of authority to exercise constitutional and statutory powers, which may then mean, inter alia, a lack of authority to elect judges of particular types of courts, which may also result in the fact that since the judges were also elected in a defective manner, any actions taken by them will also be defective. This, in turn, if such a view is accepted and an appropriate solution sanctioning it is implemented, would seem to be dangerous, also for the right to a fair trial, which stems from Article 6(1) of the European Convention on Human Rights and Article 19(1)(2) TEU in conjunction with Article 47 of the EU Charter of Fundamental Rights.[41] Perhaps the above has already been noted by the CJEU itself. Indeed, in its judgment of 9 January 2024, C-181/21 and C-269/21 in cases where judicial appointments were challenged, it indicated that it did not appear that the referring court was competent under national law to assess the legality, in the light of, inter alia, EU law, of the composition of another court and to challenge, if necessary, the order of that court. Perhaps this heralds a change in the approach to the problem indicated here.

[41] L. F. Müller, *Richterliche Unabhängigkeit und Unparteilichkeit nach Art. 6 EMRK - Anforderungen der Europäischen Menschenrechtskonvention und spezifische Probleme in den östlichen Europaratsstaaten*, Berlin 2015, p. 10 ff.

Thus, the above, despite the seriousness of the problem, seems to be a rather controversial step by the European Tribunals, de facto casting a pall over the administration of justice of individual European states. So while Poland is facing a discussion on what to do next with the National Council of the Judiciary, which may decide to return to the previous way of electing members of the National Council of the Judiciary (which had its advantages and disadvantages), this discussion should not be devoid of elements from other countries, just as other countries should become increasingly sensitive to what is being questioned and proposed in Poland.

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