5 Disciplinary liability of judges
The Polish case

Piotr Mikuli and Maciej Pach

5.1 Introduction

This chapter focuses on those normative solutions in the Polish law that relate to the procedures applied to hold judges accountable under the concept of disciplinary liability. First of all, it discusses the measures practised in Poland after several legal modifications that the Law and Justice Party (PiS) introduced during the years 2015–2020. It is argued that the new measures concerning judges' disciplinary liability fail to achieve greater judicial transparency and are actually inconsistent with the national constitution and European Union (EU) and international standards. Under the guise of formulating more just rules for individual judicial accountability, Polish authorities aim to subjugate the entire judicial system, which must be perceived in light of the systematic breach of the rule of law (Sadurski 2019).

Referring to the introduction to this volume, it must be emphasised that the concept of accountability may be perceived very broadly (in relation to the judiciary, see Shetreet 2013; Tushnet 2013; Piana 2010; Yusulf 2010). Disciplinary responsibility is one of the various mechanisms to keep the judiciary accountable. Obviously, the notion of accountability when referring to the judicial power also comprises several mechanisms, not only relating to judges as such (internal and external assessment [evaluation] and periodic reporting by the judiciary) but also to functions of institutions beyond the scope of the dispensation of justice (e.g., courts reporting on financial issues). In this context, E. Meyer and T. Bustamante denote judicial accountability as 'the set of mechanisms aimed at making judges and courts personally or institutionally responsible for behaviours and decisions contrary to constitutional or legal standards' (Meyer and Bustamante 2020).

The titular disciplinary liability, in turn, means the use of certain measures to hold judges accountable for unlawful acts (that are not common offences) or to judicial ethics that are not subject to appeal in judiciary due course. At the same time, enforcing accountability may result in certain sanctions and penalties, including removal from office.

Regardless of which system of government is adopted in a contemporary democratic state ruled by law, in both parliamentary and presidential regimes, the separation of the judiciary from the legislative and the executive powers is

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necessary to implement the rule of law. Today's democratic states have developed a number of safeguards to guarantee both the judiciary's independence and the high level of competence of those who have to exercise judicial power. Such guarantees are stipulated not only by the provisions of the constitution and of judicial procedures but also by the political elite and society's legal and political culture as a whole. In this context, both the Venice Commission's opinions and the jurisprudence of international courts show the adoption of two different standards in terms of the legal requirements for judicial appointments and precisely the issue of judges' responsibility. Generally, in this approach, regulations that are formally insufficient to ensure an objective assessment of the functioning of political power and those concerning the influence of political power on the formation of the judiciary's personal substrate are accepted in the so-called countries of old democracies. It is so because of the extra-legal and political standards that sanction the judiciary's separation. In contrast, in the so-called countries of young democracies, importance is attached to several legal safeguards for this separation due to the inadequate legal culture that has to be developed over generations. Of course, this approach is understandable to a certain extent, but it has many disadvantages. Apart from the very criterion of the division into stabilised/old and new democracies, the problem is that in Western countries that attach importance to the standards of the rule of law, a significant increase in populist sentiment can also be observed in recent years. In countries where an erosion of democracy is witnessed, such as in Poland and Hungary, the existing standards protecting the judiciary's independence have been disregarded relatively easily. Therefore, an issue of concern is that in countries with no formal safeguards, it will be so much easier to bring about a pathological politicisation of the judiciary without making a 'jump on the courts'. In this context, the importance of formal safeguards is appreciated, and they can certainly make it significantly more difficult for populist politicians to take over the courts in a hostile manner. Legal solutions that have been in place for many years also contribute to developing appropriate attitudes of respect for the law and a suitable political culture. Regardless of this finding, there is no doubt that to maintain the courts' principles of independence, democracy, and separation of powers, social-political consensus on these fundamental values is important. Without this, any legal and formal solutions may fall apart like a house of cards due to a populist revolution.

The disciplinary liability of judges is one of those institutions that can be used exceptionally easily to undermine the essence of the judiciary's independence and to provoke repressions, the 'chilling effect' violating the right to a fair trial.

However, there is not the slightest doubt that the rules for holding judges liable to disciplinary action, as well as the question of waiving judicial immunity, must be extremely precise and structured in such a way as to eliminate, as far as possible, any irregularities and pathologies that may arise in practice (see Kosař 2016). Therefore, many models of judges' accountability can be imagined, including the broad aspect of the notion of disciplinary liability as such. However, the basic premise of these mechanisms is to strive for objectivity in the assessment of a judge's disciplinary misconduct, as well as to ensure impartiality in the

procedures (procedural fairness) and to safeguard, as much as possible, against the discretionary treatment of a judge's misconduct so that the institution of disciplinary responsibility does not develop into a mechanism that tramples on judicial independence. In the latter context, it is necessary to create such a definition of the tort and disciplinary misconduct, which cannot interfere with the judgement sphere under any circumstances. Of course, the latter may be assessed directly by a higher court in the event of an appeal/revocation by the parties, or indirectly when the assessment system for the promotion of judges takes account of the number of judgements, handed down by the candidate concerned, that were amended or overturned by higher courts.

5.2 Models of disciplinary liability of judges and the Polish solutions

It is challenging to make a simple classification of the models of disciplinary responsibility because various legal solutions in this respect may overlap with other types of personal responsibility of judges (e.g., involving complaints lodged by the public or the parties to the proceedings) and may also be strictly connected to separate procedures aimed at the judges' removal from office (see Kosař and Spáč 2018). It should also be emphasised that the understanding and treatment of the institution of disciplinary responsibility may vary. For example, in the Polish tradition, disciplinary responsibility is explained not only by defining the material scope of this responsibility (as done at the outset of this chapter) but also by referring to individuals entitled to assess a person's guilt in committing a disciplinary tort. The point is that these individuals must be engaged in the same profession as the guilty person. In this way, the disciplinary accountability is internal: a certain 'court of equals'. In the case of public trust professions, the internal disciplinary responsibility is the rule (the responsibility of teachers, professors, officials, attorneys), with the possibility of challenging the final decision in court. In the case of judges' disciplinary responsibility, the problem is that from beginning to end, the disciplinary delicacy in this regard should be decided by judges, without external control, which may be subject to some criticism. Of course, the disadvantages of such a solution can be countered here by ensuring the judiciary's necessary independence.

Referring to different models of holding judges liable for disciplinary action, in general terms, it may be pointed out that the bodies competent to decide in such cases may comprise certain types of disciplinary courts, often created as a composition of the ordinary courts (e.g., in the Federal Republic of Germany and in Austria). Another solution is to entrust these tasks to the high councils of the judiciary or their internal bodies. The model based on the judicial council concept seems to be quite attractive, especially in the council's diverse membership. In such a system, it is possible to imagine creating a mechanism where lay members (i.e., people who do not come directly from the judicial community alone) can be involved in handing down the guilty verdict on disciplinary responsibility. It is also worth noting that the judges' responsibility may also comprise various

procedures regarding complaints against courts. In this regard, a particular role may be played by special offices linked to judicial authorities (e.g., in England and Wales) or ombudsmen (in Sweden and Finland).

5.3 Scope of disciplinary liability of judges and disciplinary penalties in Poland after the changes provided under the PiS administration

As stated above, the principles of independence of courts and judges create an indispensable standard of each democratic state ruled by law. The 1997 Polish Constitution expresses both in Article 173 and Article 178, para. 1, and includes numerous provisions guaranteeing respect thereof. However, it does not mean that judges remain unpunished in the exercise of their office. To ensure the correct functioning of the judiciary and an appropriate social image of judges, the Act of 27 July 2001–Law on Common Courts Organisation (Journal of Laws of 2020, item 365, as amended; hereinafter LCCO), since its very beginning, included provisions enforcing criminal responsibility (by regulating the procedure of immunity waiving) and disciplinary liability for misconduct in office. According to the LCCO:

> A judge is liable to disciplinary actions for misconduct, including an obvious and gross violation of legal provisions and impairment of the authority of the office (disciplinary misconduct).
>
> (Art. 107, § 1)

> A judge is also liable to disciplinary actions for their conduct before the accession to the post if, due to such conduct, they failed to fulfil their respective duties at the state office held at that time or appeared to be unworthy of holding a judicial post.
>
> (Art. 107, § 2)

In the literature, disciplinary misconduct is also conceptualised by a notion of a disciplinary tort, defined as follows: 'A disciplinary tort is an illegal act for which fault can be attributed to a perpetrator, of more than a negligible social harmfulness' (Laskowski 2019, p. 168). It is worth stressing that the above-quoted general provisions of the LCCO have not been amended in the course of almost two decades. It seems justified to notice that an excessively detailed legal definition of disciplinary misconduct may improperly correspond to disciplinary liability aims. Instead, general, unclear provisions could raise judges' fears that disciplinary proceedings can be initiated against them, and such fears could weaken their independence in adjudicating. However, a sufficient means to counteract this threat was provided by the case law of the Supreme Court (SC), interpreting the statutory wordings (e.g., the notion of 'an obvious and gross violation of legal provisions') uniformly and strictly (see Sawiński 2013; LEX, thesis no. 25 and the SC judgement of 29 October 2003, SNO 48/03). Knowing this case law,

judges could have predicted what kinds of actions may be qualified as grounds for disciplinary liability.

The initial wording of Article 107 of the LCCO had been in force from 1 October 2001 to 14 February 2020; § 1 was amended only by the Act of 20 December 2019 amending the Act–Law on the Common Courts[1] Organisation, the Act on the Supreme Court, and certain other acts (Journal of Laws of 2020, item 190). Currently, this provision is much more detailed, stating:

> A judge is liable to disciplinary actions for disciplinary misconducts, including 1) an apparent and gross violation of legal provisions, 2) actions or abandonments that can disable or relevantly obstruct the functioning of a judiciary organ/body, 3) actions that question the office status of a judge, the effectiveness of the appointment of a judge or the legitimacy of the constitutional organ of the Republic of Poland, 4) public activities incompatible with the principles of independence of the courts and judges, 5) impairment of the authority of the office.

Points 1 and 5 repeat the previous statutory regulation. Point 4 is identical to Article 178, para. 3 of the Polish Constitution, which forbids judges from performing public activities incompatible with the principles of independence of courts and judges. Nevertheless, taking into account the uninterrupted smear campaign against the judiciary, led by PiS since 2015, points 3 and 4 of the amended § 1 raise crucial doubts. One of the decisive stages of this campaign was changing the system of electing the members of the National Council of Judiciary (NCJ).

The Act of 8 December 2017 amending the Act on the National Council of Judiciary and certain other acts (Journal of Laws of 2018, item 3) abolished the model established in 1990, according to which the judicial self-government elected 15 judge-members of the NCJ[2] (Śledzińska-Simon 2018). Currently, they are elected by the Sejm (first chamber of the parliament). This kind of solution must be assessed as incompatible with Article 187, para. 1 of the Polish Constitution, which in this provision limits the Sejm's appointment function to the election of four deputies of the NCJ, and inconsistent with Article 186 para. 1, which states that the NCJ 'shall safeguard the independence of courts and judges' (see Mikuli 2017). Although Article 187, para. 1, point 2 literally does not regulate who elects judges of the NCJ, Article 186, para. 1 must be taken into consideration in its interpretation. If the politicians directly nominate the majority of the NCJ members, the NCJ's function of safeguarding the judiciary's

1 Common courts refer to courts of general jurisdiction and comprise district courts (*sądy rejonowe*), provincial courts (*sądy okręgowe*), and appellate courts (*sądy apelacyjne*). These courts decide (among other things) cases concerning criminal, civil, family, and juvenile law; commercial law; and labour and social security laws—except for cases vested in other special courts.

2 The NCJ comprises 25 members.

independence may easily be questioned. Meanwhile, the NCJ is the only authority with the power to submit to the President of the Republic of Poland a motion aiming at a judge's appointment (Art. 179). The discussed changes of the NCJ model were introduced with a violation of the constitutional four-year term of office of the previous judicial members of the NCJ. For this reason (and many others), the Act amending the Act on the NCJ is perceived as unconstitutional by the majority of scholars. However, in the judgement of 25 March 2019 (file reference: K 12/18), the Constitutional Tribunal did not share this point of view. It must be mentioned that, at this time, it had already been captured by PiS (Koncewicz 2019; Sadurski 2019), and a person who was illegally elected to the tribunal (Justyn Piskorski) was the 'judge-rapporteur' in this case.

The status of judges appointed by the President of the Republic on the motion of the 'new' NCJ was a subject of many preliminary references directed to the Court of Justice of the European Union (see, e.g., the SC's three decisions of 30 August 2018; file references III PO 7/18, III PO 8/18, III PO 9/18). Just after the discussed 2019 amendments to the LCCO were passed and before they entered into force, on the motion of the first president of the SC of that time, a resolution of the Civil, Criminal, and Labour and Social Security Chambers of the Supreme Court of 23 January 2020 (file reference: BSA I-4110–1/20) was adopted. It aimed to solve the issue raised on the grounds of the interpretation of the provisions of the Code of Civil Procedure and the Code of Criminal Procedure concerning the unlawful bench composition. According to this resolution:

> A court formation is unduly appointed within the meaning of Article 439(1)(2) of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Article 379(4) of the Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of the Supreme Court on the application of the National Council for the Judiciary formed following the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts (Journal of Laws of 2018, item 3).

This resolution was later quashed by the Constitutional Tribunal (see the judgement of 20 April 2020, file reference: U 2/20), although the majority of academia argued that the tribunal acted beyond its competence, as it cannot assess the constitutionality of the SC's resolutions. It is also worth noting that the intellectual justification for this judgement, which remains at an extremely low level, was based on a caricatured reading of both the principles of the Polish Constitution and the EU law, which may be perceived as a further degradation of the Polish system of constitutional review.

The Polish judges' long-lasting resistance against the so-called reform of the judiciary, which in fact means unconstitutional legislative changes, violating the EU law at the same time, resulted in an expansion of the disciplinary liability conditions mentioned in Article 107, § 1 of the LCCO. Such clauses as 'actions or abandonments that can disable or relevantly obstruct the functioning of a

judiciary organ/body' and 'actions that question the office status of a judge, the effectiveness of the appointment of a judge or the legitimacy of the constitutional organ of the Republic of Poland' were added to the statutory catalogue. It would seem that these regulations were supposed to create a chilling effect on the judges to discourage them from taking advantage of legal procedures to verify the status of judges appointed on the motion of the 'new' NCJ (Laskowski 2019, pp. 178–180). For instance, currently, a preliminary reference to the Court of Justice of the European Union (CJEU), suggesting some legal drawbacks of an act of appointment of a judge, can be treated as 'an action that can relevantly obstruct the functioning of a judiciary organ' (e.g., because of the length of time between the preliminary reference and the preliminary ruling of the CJEU) or as 'an action that questions the effectiveness of the appointment of a judge' and trigger disciplinary liability or at least, an investigation to be conducted by the disciplinary commissioner. The disciplinary commissioner for common court judges and two deputy disciplinary commissioners for common court judges, appointed by the minister of justice, are now equipped with a specific statutory basis for taking steps of that kind. Moreover, according to the mentioned Act of 20 December 2019 that amended the LCCO, a judgement of a disciplinary court stating an act of commission of a disciplinary tort in one of the two new forms obliges the court to punish the judge with the most severe penalties, that is, a transfer to another place of service or dismissal from the office of a judge.

Furthermore, the evolution of the LCCO provisions pertaining to the disciplinary penalties in the time of the PiS administration should be assessed in the aggregate context of political power activities towards the judiciary after 2015 and the critical reaction of the judicial self-government. For more than 15 years, the statutory catalogue of disciplinary penalties has encompassed the following:

- an admonition,
- a reprimand,
- deprivation from the function held,
- a transfer to another place of service,
- a dismissal from the office of a judge.

(Art. 109, § 1 of the LCCO)

The Act of 30 November 2016 amending the Act–Law on the Common Courts Organisation and certain other acts (Journal of Laws of 2016, item 2103) added a new sort of penalty: 'lowering the basic salary of a judge by five to twenty per cent for a period from six months up to two years' (new Art. 109, § 1, Point 2a of the LCCO). The Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2018, item 5; hereinafter the 2017 Act on the SC) increased the upper limit of the allowed reduction to 50%. Another change was provided by the mentioned Act of 20 December 2019 amending the LCCO. A new penalty appeared in the LCCO: a financial penalty in the amount of one month's income increased by judicial income extras. Both of these new penalties can be adjudicated for all kinds of disciplinary torts, in principle, except for the two new categories of torts

linked with questioning the judicial nominations. It is said to be 'in principle' because for the new kinds of disciplinary torts, these penalties can also come into play but only in less grave cases (the new § 1a in Art. 109 of the LCCO).

In light of the current legal status, after the changes provided under the PiS administration, the catalogue of disciplinary torts and the disciplinary penalties concerning the SC judges are almost identical as in the case of judges of common courts (see Art. 72, § 1 and Art. 75, § 1 of the 2017 Act on the SC). The only and minor difference is that there is no such penalty as a transfer to another seat of service in the SC judges' case. Furthermore, for 'actions or abandonments that can disable or relevantly obstruct the functioning of a judiciary organ/body', 'actions questioning the status of a judge, the effectiveness of the appointment of a judge or the legitimacy of the constitutional organ of the Republic of Poland', or 'public activities incompatible with the principles of independence of the courts and judges', the only penalty that can be imposed on an SC judge is dismissal from office. In contrast, an alternative penalty in the form of a transfer to another place of service is imposed on common court judges. An exception to this rule is made for less grave cases, which allows the disciplinary court to adjudicate the reduction of income, financial penalty, or dismissal from the function held.

Due to the lack of different regulations on the matter of disciplinary torts and disciplinary penalties in the Act of 25 July 2002–Law on the Administrative Courts Organisation (Journal of Law of 2019, item 2167, as amended; hereinafter LACO), the provisions regarding the SC and the common courts shall also apply to the Supreme Administrative Court (SAC) judges and to the Voivodship Administrative Court (VAC)[3] judges, as appropriate (Art. 49, § 1 and Art. 29, § 1 of the LACO). Therefore, the above remarks pertain to both the VAC judges and the SAC judges.

The discussed Act of 20 December 2019 that amended the LCCO and the Act on the SC established disciplinary torts referring to military judges—the same as referring to common court judges—concerning questioning judges' status (see Art. 37, § 2 of the Act of 21 August 1997–the Law on the Military Courts Organisation [Journal of Laws of 2019, item 2216, as amended]; hereinafter LMCO). Similarly, new disciplinary penalties for military judges, added after 2015, are identical (see Art. 39, § 1, Points 2a and 2b of the LMCO), with a minor difference—allowing the reduction in a judge's basic salary by 5% to 20%, not 50%.

To sum up, the changes in the provisions that regulate the subject of disciplinary liability and disciplinary penalties are illustrations of coercive legislation against judges (Kardas 2020). If this analysis is limited to the new provisions' wording, perhaps it would not entitle the authors to make such alarming remarks. However, a proper interpretation of these provisions must be put in the context of the current situation of the Polish judiciary, which, after 2015, involves permanent attacks on judges from the side of the legislative and the executive

3 Administrative courts in Poland comprise 16 VACs and one nationwide SAC.

branches. Piotr Kardas rightly argues that disciplinary proceedings against judges 'have become an important aspect of the conflict about the rule of law and the primacy of law over politics' (Kardas 2020, p. 152). The new mechanisms must be perceived as part of a package of legal changes to the judiciary; the system was created to ensure that judges would be subservient to the political will of the authorities (Gajda-Roszczynialska and Markiewicz 2020). It must be noted that in recent years, the Disciplinary Commissioner for Common Court Judges and two Deputy Disciplinary Commissioners initiated investigations, in many cases linked to the activities of judges in judicial associations and even worse, sometimes also concerning decisions made by judges during the courts' proceedings (Mikuli 2019). Gajda-Roszczynialska and Markiewicz (2020) are right in stating that although disciplinary proceedings are by no means the only forms of repression that affect judges, they may create an instrument for breaking the rule of law in Poland.

5.4 Current jurisdiction of disciplinary courts and of disciplinary commissioners

The crucial element of the 'reform' of disciplinary proceedings introduced by the PiS parliamentary majority was the establishment of a new chamber in the SC, namely the Disciplinary Chamber (DC). In the overwhelming opinion of academia, the new chamber is perceived as a bogus court, as it has a special systemic and independent status within the SC,[4] which is not envisaged by the constitution; moreover, it is fully composed of judges appointed by the politically captured NCJ (Zoll and Wortham 2019, p. 895). For these and many other reasons, at the end of 2019, the SC adjudicated that the DC was not a court in light of Article 47 of the Charter of Fundamental Rights of the EU, Article 6 of the European Convention on Human Rights and Article 45 of the Polish Constitution (see the SC judgement of 5 December 2019, III PO 7/18). In this judgement, the SC took into account the judgement of 19 November 2019. Replying to preliminary references regarding the independence of judges of its DC,[5] the CJEU ruled that the Polish SC, as the referring court, should assess whether the DC was in fact independent. In its judgement, the CJEU set the criteria for this assessment, also quoting its previous case law (see Krajewski and Ziółkowski 2019). Furthermore, on 8 April 2020, when the European Commission–initiated infringement procedure against Poland was underway (C-791/19), the CJEU ordered an interim measure obliging Poland

4 The chamber is in fact an extraordinary, separate court only formally linked to the rest of the SC. The judges in this chamber are paid a 40% higher salary, and proceedings benches (apart from judges) comprise lay judges elected by the Senate.

5 These refer to the joined cases C-585/18, C-624/18, and C-625/18. See InfoCuria 'Judgement of the Court (Grand Chamber)' (19 November 2019) <http://curia.europa.eu/juris/document/document.jsf?docid=220770&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=611315> [Accessed 20 November 2020].

to immediately suspend the application of the national provisions on the powers of the DC of the SC concerning judicial disciplinary cases.[6]

As far as the jurisdiction in the SC judges' disciplinary cases is concerned, according to Article 73, § 1 of the 2017 Act, in the first instance, the SC adjudicates by a bench composed of two judges of the DC and one lay judge of the SC. In turn, in the second instance, the SC adjudicates by a bench consisting of three judges of the DC and two lay judges of the SC. In light of the previous statutory provisions, in the first instance, the SC adjudicated by a bench comprising three judges of the SC, and in the second instance, by a bench consisting of seven judges of the SC. The new act maintains previously existing regulations regarding the disciplinary commissioner of the SC and his/her deputy. Both are still elected for a four-year term by the board of the SC (Art. 74 of the 2017 Act on the SC). However, compared with the 2002 Act, the new provisions have a different regulation on the issue of the authorities entitled to request the disciplinary commissioner of the SC to initiate an investigation. The competences of the first president of the SC, the board of the SC, and the disciplinary commissioner of the SC's own initiative, remain intact. Nevertheless, currently, the list of entitled authorities is expanded, as it also comprises the president of the DC of the SC, the public prosecutor general, and the national public prosecutor. Considering that the public prosecutor general is at the same time the minister of justice and that the national public prosecutor is the deputy minister, the evolution of the provisions cannot be perceived in other way than permitting the executive's pressure on the judicial power.

After conducting an investigation, the disciplinary commissioner of the SC may either initiate disciplinary proceedings against the SC judge or refuse to do so if there are no grounds for such an action (Art. 76, §§ 2 and 4 of the 2017 Act on the SC). The disciplinary commissioner has to inform the President of the Republic of Poland and all the authorities entitled to request the launch of the investigation about the refusal in initiating disciplinary proceedings. These authorities may appeal to the first instance's disciplinary court (Art. 76, § 4 in fine). They can take advantage of the same competence when the disciplinary commissioner of the SC discontinues the disciplinary proceedings due to the lack of grounds for submitting a case for examination. Once again, it should be emphasised that the disciplinary court of the first instance is currently the DC of the SC, created from scratch under the PiS administration, with judges having strong personal ties with Minister of Justice Zbigniew Ziobro. Moreover, if the disciplinary court quashes the decision of the disciplinary commissioner of the SC, the guidelines provided by this court are binding for the commissioner (Art. 76, § 6).

6 At the time of writing, the CJEU judgement of April 2020 has been obeyed only partially, as the DC still operates in judicial immunity cases. Apart from its role in disciplinary procedures, this organ is also entitled to waive judicial immunity. Discretional waiving of the immunity also plays an important role in persecuting judges who dare to criticise the governmental actions that intimidate the judiciary.

According to Article 110, § 1 of the LCCO, disciplinary cases against judges of common courts shall be heard in two instances. In the first instance, adjudication is generally handled by disciplinary courts at appeal courts by a bench of three judges. In exceptional situations enumerated in the provision, the SC adjudicates by a bench of two judges of the DC and one lay judge of the SC.[7] In the second instance, the jurisdiction belongs to the SC acting as a bench of two judges of the DC and one lay judge of the SC. Thus, the final judgement in disciplinary cases against judges is supposed to be adopted by the chamber of the SC, which was created from scratch under the PiS government and is accused of strong politicisation, shaped entirely on the motion of the 'new' NCJ.

Another sign of the politicisation of disciplinary proceedings against judges can be observed on the grounds of the new Article 110a, § 1 of the LCCO, added by the 2017 Act on the SC. According to this provision, the minister of justice has the competence to entrust the duties of a disciplinary court judge in an appeal court, for a six-year term of office (Art. 110a, § 3), to a common court judge with at least ten years of experience as a judge. Thus, in disciplinary cases in appeal courts, only judges entrusted by a politician (a minister) may handle disciplinary cases. The obligatory consultation with the NCJ has not changed much because, as noted above, the NCJ has been packed with the politicians' nominees. Moreover, the NCJ's opinion does not bind the minister of justice in any way. Another factor that raises doubts from the perspective of the court's independence is that the presidents of disciplinary courts are appointed by the president of the DC of the SC (Art. 110b, § 1).

The crucial new authorities, introduced to the LCCO by the 2017 Act on the SC, are the disciplinary commissioner for common court judges and two deputy disciplinary commissioners for common court judges, appointed by the minister of justice for a four-year term of office (Art. 112, § 3 of the LCCO). They act as prosecutors before disciplinary courts (Kardas 2020, pp. 93–102). Apart from them, prosecutors in disciplinary cases against judges can also serve as deputy disciplinary commissioners at appeal courts and deputy disciplinary commissioners at regional courts (Art. 112, § 1). According to Article 112, § 2:

> In cases of appeal court judges and presidents and vice-presidents of appeal courts and regional courts, the following persons may act as prosecutors before disciplinary courts: the Disciplinary Commissioner for Common Court Judges and Deputy Disciplinary Commissioners for Common Court Judges. In cases of other regional court judges and presidents and vice-presidents of district courts, the person authorised to act as a prosecutor shall be a deputy disciplinary commissioner at an appeal court, and in cases of other district court judges and trainee judges, this shall be a deputy disciplinary commissioner at a regional court.

7 Before the 2017 Act on the SC entered into force, also amending Art. 110 of the LCCO, the jurisdiction in disciplinary cases against judges belonged in the first instance to appeal courts and in the second instance to bench of SC judges.

However, the 'central' commissioners are allowed to 'take over the case conducted by a deputy disciplinary commissioner' operating at a regional court or at an appeal court and to 'hand over the case to that commissioner' (Art. 112a, §§ 1a and 3). A deputy disciplinary commissioner at an appeal court and a deputy disciplinary commissioner at a regional court are appointed by the disciplinary commissioner for common court judges (Art. 112, §§ 6 and 7).

After the Act of 20 December 2019 amending the LCCO entered into force, general assemblies of judges of appeal court areas and court circuits, as appropriate, have been deprived of their powers to submit to the 'central' commissioner candidatures for the office of a deputy commissioner at an appeal court and at a regional court. It proves that the powers of the central commissioner, who is nominated by the minister of justice, have been strengthened at the expense of judicial self-government bodies. Furthermore, the establishment of the institutions of the disciplinary commissioner for common court judges and both deputies already manifests centralisation and politicisation of the disciplinary commissioner function. Although the institution of the central disciplinary commissioner was established earlier, the commissioner was appointed by the NCJ among candidatures submitted by the general assemblies of judges of appeal court areas. In turn, deputies of the central commissioner were elected by judicial self-government representation in appeal court areas and court circuits. Currently, the central commissioner (and his/her deputies) is (are) discretionally appointed by the minister of justice, and in turn, the central commissioner freely nominates deputy disciplinary commissioners at appeal courts and regional courts.

It should be emphasised that the central disciplinary commissioner (currently Justice Piotr Schab), as well as both of his deputies (Justices Michał Lasota and Przemysław Radzik)—owing their nominations to Minister of Justice Ziobro—are extraordinarily diligent in launching disciplinary proceedings against judges who have criticised the controversial changes in the judiciary field. According to the latest report of the Association of Polish Judges (Iustitia), describing the period from 2015 to the end of 2019, the disciplinary commissioners initiated investigations or disciplinary proceedings in cases against 31 judges (see Ko cierzy ski 2020, pp. 11–74). Sometimes, the disciplinary commissioners violated the provisions in their jurisdictions. These occurred when they initiated investigations independently, ignoring the fact that the initial jurisdiction belonged to the deputy disciplinary commissioner at the appeal court or the regional court. The LCCO provisions allow the central disciplinary commissioners to take over a case but only under the condition that the 'local' disciplinary commissioner initiated it, thus not from the beginning. One example of such violations was the case of three judges who referred to the CJEU for a preliminary ruling, citing the so-called judiciary reform's nonconformity with EU law (see Mazur 2019, pp. 46–49).

Another proof of the politicisation of disciplinary proceedings in Poland is provided by Article 112b of the LCCO, introduced by the 2017 Act on SC. It allows the minister of justice to appoint 'the Disciplinary Commissioner of the Minister of Justice to conduct a specific case relating to a judge'. If the minister

of justice decides to do so, actions in the case taken by any other commissioner are excluded (§ 1). Such a disciplinary commissioner ad hoc is appointed from among common court judges or the SC judges; in some cases, it is also possible to appoint a prosecutor for this office (§ 2). The commissioner 'may initiate proceedings upon the request of the Minister of Justice or join pending proceedings' (§ 3). The commissioner's appointment 'shall be equivalent to a request for initiating investigation proceedings or disciplinary proceedings' (§ 4). According to Article 112b, § 5, the minister is entitled to reappoint a commissioner ad hoc even if the previous appointment has expired, since 'a ruling refusing to initiate disciplinary proceedings, discontinuing disciplinary proceedings or closing disciplinary proceedings becomes final'. This provision has not been applied until now, but it can easily be used as a tool to create a chilling effect among judges, as they have to take into account the fact that the minister of justice can even appoint a commissioner ad hoc several times in a row, to resume investigations and disciplinary proceedings against independent judges who contest the unconstitutional 'judiciary reform', for instance. By any means, the LCCO does not limit the will of the minister, whose political interest may often contradict the interest of the independent judiciary.

The 2017 Act on the SC inducted the disciplinary commissioner of the minister of justice in the LMCO with powers similar to those known from the LCCO's analogous offices of disciplinary commissioners, who were introduced ad hoc into the SC. The disposition of Article 76, §§ 8–11 of the 2017 Act on the SC entitles the President of the Republic of Poland or the minister of justice (if the president did not appoint a disciplinary commissioner) to appoint the extraordinary disciplinary commissioner to handle a specific case relating to a judge of the SC. Such an appointment means that the disciplinary commissioner of the SC and deputies are excluded from taking action in this specific case. After the Act of 20 December 2019 amending the LCCO and other acts entered into force, the President of the Republic of Poland is now allowed to appoint an extraordinary disciplinary commissioner also in cases of administrative court judges (the new § 5 in Art. 48 of the LACO). These are blatant expressions of politicisation of disciplinary proceedings against the SC judges and administrative court judges.

In light of Article 114, § 1, sentence 1 of the LCCO, the authorities entitled to request the disciplinary commissioner to initiate an investigation include the minister of justice, the president of the appeal court or the president of the regional court, the board of the appeal court or the board of the regional court, and the NCJ. The commissioners can also act on their own initiative. A statutory condition that must be fulfilled to initiate an investigation is 'establishing the circumstances necessary to state that the criteria of disciplinary misconduct were satisfied'. After the investigation, if there are grounds for disciplinary proceedings, the disciplinary commissioner is entitled to initiate such proceedings and to 'draw up the disciplinary charges in writing' (§ 3). According to § 7, sentence 1, 'When serving charges, the disciplinary commissioner shall request that the President of the Supreme Court heading the Disciplinary Chamber designate a disciplinary court to examine the case at first instance'. If there are no grounds

for disciplinary proceedings, 'the disciplinary commissioner shall issue a decision refusing to initiate proceedings'. However, the minister of justice 'may file an objection within 30 days. Filing an objection shall be equivalent to an obligation to initiate disciplinary proceedings and any instructions of the Minister of Justice regarding further proceedings shall be binding on the disciplinary commissioner' (§ 9). These new powers of the minister were established in the LCCO by the amendment introduced by the 2017 Act on the SC and constitute another example of a potentially coercive regulation against judges who criticise the controversial changes in the judiciary. A government official has an opportunity to oblige the disciplinary commissioner to initiate disciplinary proceedings even if the commissioner does not find it justified.

In the current legal status, the disciplinary jurisdiction for military judges is shaped analogous to that for common court judges. According to Article 39a of the LMCO, in the first instance, disciplinary cases are adjudicated by a bench of three judges at regional military courts. In cases strictly enumerated in the LMCO, the disciplinary jurisdiction belongs to the SC sitting as a bench of two judges of the DC and one lay judge of the SC (and in some cases specific to the SC, as a bench of one judge of the DC). In the second instance, disciplinary cases are adjudicated, in principle, by the SC as a bench of two judges of the DC and one lay judge of the SC (in exceptional cases—the SC by a bench of three judges of the SC).

The 2017 Act on the SC added Article 39b to the LMCO, which stipulates that the minister of justice, having consulted the NCJ, 'shall entrust the duties of a disciplinary court judge at a regional military court to a judge with at least 10 years of experience as a judge' (§ 1). Such a position has a six-year term of office (§ 3). Thus, in this area, a full analogy to the LCCO regulations exists.

The LMCO's regulation on the disciplinary commissioner position is not as complicated as that of the LCCO. The deputies of the disciplinary commissioner, acting at regional military courts, are not established. The only commissioners are the disciplinary commissioner for military court judges and the deputy disciplinary commissioners for military court judges, who are prosecutors before disciplinary courts. The amendment to LMCO introduced by the 2017 Act on the SC also politicised these offices. Currently, the disciplinary commissioner for military court judges and the commissioner's deputy are appointed for a four-year term of office by the minister of justice, after consultation with the minister of national defence and the NCJ (Art. 40, § 2 of the LMCO). According to the previous legal status, they were appointed by the NCJ from among the candidates submitted by the Assembly of Military Court Judges—an organ of judicial self-government.

Until now, disciplinary proceedings in administrative court cases seem to be the most immune to politicisation. The jurisdiction in these cases belongs entirely to the SAC (Art. 48, § 1 of the LACO). In the first instance, the SAC adjudicates by a bench of three judges, and in the second instance by a bench of seven judges. The prosecutors' role is played by the disciplinary commissioner of the SAC and the commissioner's deputy, elected by the board of the SAC for a four-year term of office (Art. 48, § 4). However, it is worth keeping in mind the President of

the Republic of Poland's new powers to appoint the extraordinary disciplinary commissioner, which results in excluding the jurisdiction of the disciplinary commissioners acting within the SAC.

5.5 Final remarks

To sum up the preceding discussion and after a review of the arrangements for disciplinary liability, the following findings are presented:

1 The provisions amending the laws relating to the judiciary, specifically the principles and the scope of judges' disciplinary responsibility, in the intention of politicians, aimed at politicising the courts, undermining the principle of separation of powers. In light of political practice and the PiS politicians' statements, there can be no doubt about the ruling party's intentions in this regard.
2 The legal solutions discussed in this text must be considered against the background of other reforms and changes that involve taking political control over independent institutions and bodies. Thus, the PiS majority's measures must be perceived as symptoms of the law system's decay. The law becomes a tool of political repression. As known, one of the most important phenomena of the current form of authoritarianism is that legal institutions or procedures are not abolished but abused, transformed as bodies/organs ready to rubberstamp decisions already made by those who gained political power (Ginsburg and Moustafa 2008).
3 Any legal solution must be assessed against its operation's general context, including political practice (this is a general statement about any constitutional system). Without this, a pure assessment of textual provisions will lead to wrong conclusions. The assessment of the solutions presented without taking 'law in action' (i.e., political practice) would not be so negative. Entrusting the SC with the power to decide on judges' disciplinary matters would finally fall under the judicial concept, referring to autonomy accountability issues. Some may even argue that it may be undesirable, not because of the threat of politicisation but because all judicial disciplinary matters have been closed within 'the judicial bubble'. Meanwhile, in Poland's case, the creation of the DC of the SC, staffed in violation of the constitution by lawyers connected with the ruling party, was nothing else than establishing an external, political machine of harassment and intimidation.

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