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**Gloss on the Resolution of the Formation of the Combined
Civil Chamber, Criminal Chamber, and Labor Law
and Social Security Chamber of the Supreme Court
of January 23, 2020, Case BSA I-4110-1/20**

I.

The Supreme Court of the Republic of Poland after examining in a formation of combined chambers: the Civil Chamber, the Criminal Chamber, and the Labor Law and Social Security Chamber, a case filed by petition of the First President of the Supreme Court of 15 January 2020 to resolve divergences in the interpretation of law existing in the case-law of the Supreme Court, adopted a Resolution with the following content: “1. A court formation is unduly appointed within the meaning of Art. 439(1)(2) of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Art. 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 application of the National Council for the Judiciary formed according with 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). 2. A court for-

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mation is unduly appointed within the meaning of Art. 439(1)(2) of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Art. 379(4) of the Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of a common court or a military court on application of the National Council for the Judiciary formed according with 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) if the defective appointment causes, under specific circumstances, a breach of the standards of independence within the meaning of Art. 45(1) of the Constitution of the Republic of Poland, Art. 47 of the Charter of Fundamental Rights of the European Union (EU CFR) and Art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). 3. The interpretation of Art. 439(1)(2) of the Code of Criminal Procedure and Art. 379(4) of the Code of Civil Procedure provided in points 1 and 2 hereof shall not apply to judgments given by courts before the date hereof and judgments to be given in proceedings pending at the date hereof under the Code of Criminal Procedure before a given court formation. 4. Point 1 hereof shall apply to judgments issued with the participation of judges of the Disciplinary Chamber established at the Supreme Court under the Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2018, item 5, as amended) irrespective of the date of such judgments”².

A detailed analysis of the content of the Supreme Court’s Resolution and the very extensive justification behind it allows us to state that they primarily lead to the following conclusions:

1. one of the most important constitutional and international law criteria for the independence and impartiality of courts and judges is the fully lawful and free from “particular specific political expectations of candidates for judges”³ procedure for the appointment to this office;
2. the National Council for the Judiciary formed according with the provisions of the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts “is structural-

² http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf (30.04.2020). The Resolution was adopted with 6 separate opinions.

³ Supreme Court’s Resolution justification, p. 27.

ly no longer independent”⁴, mainly because of doubts concerning the unconstitutional political appointment of its members;

3. the procedure of nominating candidates to the office of a judge by the currently functioning National Council for the Judiciary is structurally defective, but in general the Supreme Court’s Resolution has not undermined the status of the candidates nominated to the office of a judge by the currently functioning National Council for the Judiciary – it rather provides a legal basis for the individual to demand that the case be heard by an impartial, independent and competent court;
4. there always is (without time and subject restrictions) an improper court formation within the meaning of the Art. 439(1)(2) of the Code of Criminal Procedure or non-compliance of the composition of the court with legal provisions within the meaning of Art. 379(4) of the Code of Civil Procedure in relation to every person appointed to the office of a judge of the Supreme Court at the request of the currently functioning National Council for the Judiciary – this rule applies to all judgments issued with the participation of judges of the Disciplinary Chamber established in the Supreme Court pursuant to the Act of December 8, 2017 on the Supreme Court, irrespective of the date of these judgments;
5. in relation to a person appointed to the office of a judge in a common or military court at the request of the currently functioning National Council for the Judiciary, improper court formation within the meaning of the Art. 439(1)(2) of the Code of Criminal Procedure or contradiction of the composition of the court with legal provisions within the meaning of the Art. 379(4) of the Code of Civil Procedure occurs when a defect in the appointment process leads, in specific circumstances, to a violation of the constitutional, EU and ECHR standards of independence and impartiality of the court;
6. the Resolution differentiates the effects in criminal and civil matters – it does not apply to judgments issued by courts pursuant to the provisions of the Code of Criminal Procedure before adoption of the Resolution, i.e. before January 23, 2020, and to judgments that will be issued

⁴ Supreme Court’s Resolution justification, p. 50.

on this day in proceedings before a given court, but it is fully applicable to judgments issued by courts pursuant to the provisions of the Code of Civil Procedure before the date of its adoption and to judgments which will be issued in proceedings pending on that day before a given court;

7. the Resolution of the Supreme Court does not refer to the *iudex in habilis* formula, but to improper court formation within the meaning of the Art. 439(1)(2) of the Code of Criminal Procedure and to the conflict between the composition of the court and the provisions of law within the meaning of the Art. 379(4) of the Code of Civil Procedure.

It should be further noted that the Supreme Court's Resolution does not specify the mode of application in specific criminal or civil proceedings of the interpretation of the Art. 439(1)(2) of the Code of Criminal Procedure and the Art. 379(4) of the Code of Civil Procedure. The interpretation of these provisions formulated in the Resolution undoubtedly may be directly used in appeal remedies, but also alternatively in proceedings before court conducted pursuant to the provisions of the criminal and civil procedures, as regards substantiating the motions for excluding a judge (*iudex suspectus*). At the same time, the legal grounds indicated in the pleadings should be the relevant regulations of laws combined with the Art. 45(1) of the Constitution, from Art. 6 ECHR and Art. 47 EU CFR. It should also be noted that from the perspective of a participant in court proceedings, the Supreme Court's Resolution certainly does not constitute an obstacle (temporary or material) to attempting to determine in each specific case the circumstances of the contradiction between the composition of the court and the principles of independence and impartiality of courts within the meaning of the Art. 45(1) of the Constitution, Art. 6(1) of ECHR and Art. 47 of EU CFR.

It is also worth noting that the phrase "in specific circumstances" contained in para. 3. of the Resolution refers to the process of appointing a given person to the office of judge, and not to the circumstances of the case itself. This means that to establish a violation of the standard of independence and impartiality, it should be sufficient to show that the procedure for appointing a given person violates constitutional, international and EU regulations, i.e. to demonstrate that a given person has been appointed as a judge in a defective manner as described in the Supreme Court Resolution.

II.

The Supreme Court's Resolution is of fundamental importance for the Polish legal system and can be analyzed both from the perspective of criminal and civil procedures, but also, or maybe even above all, from the perspective of its impact on the interpretation in Poland of the constitutional and European regulations, which guarantee the right to court (right to fair trial)⁵. This perspective has been actually adopted in this synthetic and entirely approbative gloss. The constitutional effects of the Supreme Court Resolution for the Polish legal system should be primarily analyzed from the perspective of legally correct shaping of the right to court in the Polish legal order, because in the substantive layer, the Supreme Court Resolution concerns mainly the problem of the proper formation of a court within the meaning of the Art. 45(1) of the Constitution of the Republic of Poland of April 2, 1997, the Art. 6 of ECHR and the Art. 47 of EU CFR. Pursuant to the standards arising from these provisions, the court has to be an independent and impartial court. The scholarly opinion claims in this context that "the exercise of the right to court requires the court to have the characteristics as set out in the Constitution. Failure to meet these features means that even if the act names a body of the state as a court, it will not be a court within the meaning of the Art. 45(1) of the Constitution"⁶. There is also no doubt, as it was stated in the Resolution, that the violation of the regulations specifying the features of the court, also in relation to the constitutional condition of the "competent court", is the situation of shaping the composition of the court and granting the status of a judge to individuals contrary to the constitutional procedure.

In view of the presented observations, it should be noted that the participant in any judicial proceedings, but also his representative (defense counsel) should, in the context of the circumstances of a particular case and in order to minimize the risk of its settlement by a "court" which is not an independent and impartial court within the meaning of the Art. 45(1) of the Constitution, the Art. 6(1) of ECHR and the Art. 47 of EU CFR, consider the

⁵ O. Hałub-Kowalczyk, M. Jabłoński, M. Radajewski, *Identyfikacja treści prawa do sądu – wybrane zagadnienia*, Wrocław 2019.

⁶ P. Tuleja, *Art. 45 Prawo do sądu*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, WKP (Lex) 2019.

legitimacy of taking appropriate procedural steps aimed at shaping the composition of the court according with these provisions. Each participant should also be aware of the possible negative effects of adjudicating by a court that is non-compliant with these regulations, including the risk of the judgement being set aside in the future.

The direct legal basis for the Supreme Court Resolution is Art. 83 § 1 in connection with the Art. 86 § 1 of the Act of December 8, 2017 on the Supreme Court (ASC), but also the Art. 183 para. 1 of the Constitution. The Resolution is an expression of judicial oversight which, pursuant to this constitutional provision, the Supreme Court exercises over the activity of common and military courts in the area of adjudication. This supervision is limited to “adjudication”, and therefore concerns “consideration of a case” (Art. 45(1) of the Constitution) and “exercising the administration of justice” (Art. 175(1) of the Constitution). Based on the Art. 87 § 1 of ASC, the Resolution has the force of a legal principle, from which it is possible to depart only on the basis of the Art. 88 § 2 of ASC on the re-consideration of the matters covered by it by means of the Resolution of the merged chambers of the Supreme Court. The Resolution is not formally binding on common and military courts, but it affects their case-law by the authority of the Supreme Court and in connection with the instance supervision of the Supreme Court. What is important, the Art. 183(1) of the Constitution also provides for “prohibiting the transfer of powers to other judicial bodies (administrative courts, common courts, special courts or the Constitutional Court) in this respect, leading to the forbidden marginalization of the role of the Supreme Court. This ban, in a double-qualified way, extends to other state organs operating in the sphere of executive power (including those related to the administration of justice, such as the Minister of Justice, the Prosecutor General) or the legislative authority”⁷.

⁷ P. Wiliński, P. Karlik, *Komentarz do art. 183 Konstytucji*, [in:] *Konstytucja RP. Tom II. Komentarz do art. 87–243*, eds. M. Safjan, L. Bosek, Warsaw 2016. In this context, the decision of the Constitutional Tribunal of 28 January 2020 (Kpt 1/20), which was issued as a result of a request of the Marshal of the Sejm to resolve also a constitutionally questionable dispute in jurisdiction, in which the decision attempted, inter alia, to suspend the Resolution of the Supreme Court. Similarly, the ‘judgment’ of the Constitutional Tribunal of 20 April 2020 (U 2/20 – with three separate opinions), in which it was stated that the Resolution of the Supreme Court (sic!) is incompatible with Art. 179, Art. 144 (3)(17), Art. 183(1), Art. 45(1), Art. 8(1), Art. 7 and Art. 2 of the Constitution, Art. 2 and Art. 4(3) of the Treaty on European

III.

As known, the Supreme Court's Resolution is a consequence of the judgment of CJEU of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18. Due to divergences in the jurisprudence of the Supreme Court following the judgment of the CJEU (see cases III PO 7/18, II PO 8/18, III PO 9/18 and cases III PO 7 / 18, I NOZP 3/19, II DSI 17/18, III KO154 / 18, III KZP 4/19) the Supreme Court adopted the Resolution discussed herein, which in general is the implementation of the obligation of the Polish state under Art. 260(1) of the Treaty on the Functioning of the European Union. The Resolution of the Supreme Court should therefore be read in close connection with the judgment of the CJEU, mainly for the crucial aspects of the judgment of the CJEU that refer to the National Council for the Judiciary and the Disciplinary Chamber of the Supreme Court. Importantly, in para. 161 of the CJEU judgment, it was emphasized that the interpretative guidelines contained in the judgment referring to the proper formation of an independent and impartial court within the meaning of EU law, do not only concern cases in which questions were referred for a preliminary ruling, but that "each national court (...), as an authority of a Member State, has the responsibility to refrain from applying any provision of national law contrary to a directly effective provision of EU law in the context of a dispute before that court".

In particular, in para. 143–151 of the CJEU judgment, these indications and circumstances were listed in a more specific way and it was *inter alia*: 1) "the fact that the new composition of the National Council for the Judiciary

Union and Art. 6(1) of ECHR. The Constitutional Tribunal rulings clearly have no constitutional basis, if only because they applied directly to the Supreme Court Resolution (and not to its legal basis), and which is an act of applying the law and has no direct normative value. However, this issue requires detailed separate discussion, which is beyond the scope of this study. In addition, due to the fact that the composition of the Constitutional Tribunal, as in previous decisions regarding new statutory regulations regarding the National Council for the Judiciary (K 12/18 and K 5/17), was shaped contrary to the binding judgments of the Constitutional Tribunal of December 3, 15 in case K 34/153 and of March 9, 16 in case K 47/154, the 'rulings' of the Constitutional Tribunal do not have a legalistic impact on the way of understanding the Resolution of the Supreme Court. Generally, it should be stated that the issue of improper staffing of the court and con-compliance of the composition of the court with legal provisions cannot be determined in a particular case by a decision of the Constitutional Tribunal, because the assessment in this respect does not belong to its competence.

was created by shortening the four-year term of office of earlier members in this body”; 2) “the fact that although 15 members of the National Council for the Judiciary elected from amongst the judges were previously selected by the judicial community, they are currently designated by the legislative authority from among candidates who can be nominated by a group of 2,000 citizens or 25 judges, which causes such reform leads to an increase in the number of members of the National Council of the Judiciary by giving political power or elected by them to 23 out of 25 members that this body has”; 3) “the occurrence of any irregularities which could have been affected by the process of appointing some members of the National Council for the Judiciary in the new composition – irregularities which the referring court mentions and which the court will be required to verify, if necessary”; 4) “take into account the manner in which the said body performs its constitutional task of safeguarding the independence of the courts and the independence of judges and exercises its individual competences, and in particular whether it does so in a way that may cast doubt on its independence from the legislative and executive power”; 5) “whether the manner in which the Act on the National Council for the Judiciary specifies in its Art. 44 section 1 and 1a, the scope of the appeal that may be lodged against a Resolution of the National Council for the Judiciary covering decisions on the application for appointment to the office of a judge of that court, enables effective judicial review of such Resolutions, at least to the extent that it is possible to establish that there has been no exceeding of powers or abuse of power, infringement of the law or making a manifest error of assessment”. The indications of the CJEU, together with Resolution of the Supreme Court, can and should be the basis for the assessment of specific cases related to the proper formation of the court, not only through the prism of EU law, but also within the framework of constitutional guarantees, since these are basically convergent regulations⁸.

⁸ It should also be emphasized that the Resolution of the Supreme Court is indirectly linked to the judgment of the European Court of Human Rights (ECtHR) of 12 March 2019 in the case *Guðmundur Andri Ástráðsson v Iceland* (complaint No. 26374/18). In this case ECtHR stund a violation of the right to court (Art. 6(1) of the ECHR), in case of adjudication in a court by a person appointed to adjudicate contrary to the provisions of national law. On February 5, 2020, a hearing of the Grand Chamber of the ECtHR in this case took place, but the judgment has not been announced yet (29.04.2020). The judgment of the Grand Chamber of the ECtHR will be very important for shaping the Strasbourg standard in this matter and may

IV.

The Resolution of the Supreme Court applies to common and military court judges and the Supreme Court. It does not apply to persons appointed to the office of an administrative court judge at the request of the currently functioning National Council for the Judiciary. It is because judicial supervision over administrative courts is exercised by Supreme Administrative Court pursuant to the Art. 184 of the Constitution. However, there is a legal possibility of an auxiliary reference to the Supreme Court's Resolution (as well as, above all, to the judgment of the CJEU and potentially the judgments of the ECtHR in the case of Guðmundur Andri Ástráðsson), to indicate a possible contradiction between the composition of the administrative court and the provisions of the Constitution, the EU CFR and the ECHR, under the Art. 183 § 2 point 4 of the Act of 30 August 2002 – Law on proceedings before administrative courts (as part of the *iudex suspectus* institution, or under an appeal to the Supreme Administrative Court). In the current jurisprudence of the Supreme Administrative Court and regional administrative courts, this matter is not entirely unambiguous⁹.

Therefore, it cannot be ruled out that pursuant to the Art. 36 § 1 of the Act of 25 July 2002 – Law on the structure of administrative courts, the President of the Supreme Administrative Court will request the Supreme Administra-

therefore have potentially great practical significance for matters related to the appointment of a given person to the office of judge at the request of the National Council for the Judiciary shaped in contradiction with the constitutional provisions of the National Council for the Judiciary.

⁹ Judgment of the Supreme Administrative Court in case I OSK 1917/18 and the judgments of the Supreme Administrative Court of 6 December 2019 in cases I GSK 1505 / 18, I GSK 1480/18, I GSK 1610/18, I GSK 1454/18, I GSK 1511/18, I GSK 1646/18 and November 29, 2019, reference number I GSK 173/17, I GSK 174/17, I GSK 175/17, I GSK 188/17, I GSK 189/17, I GSK 190/17, I GSK 192/17, I GSK 191/17, I GSK 193/17, I GSK 194 / 17, I GSK 195/17, I GSK 255/17, I GSK 256/17, I GSK 257/17, I GSK 258/17, I GSK 259/17, I GSK 552/19, provisions of the Provincial Administrative Court in Opole from November 19, 2019, reference number: II SA / Op 309/19, II SA / Op 342/19, decision of the Provincial Administrative Court in Opole of November 12, 2019, reference number II SA / Op 235/19; judgment of the Provincial Administrative Court in Opole from November 19, 2019, II SA / Op 321/19; final judgments of the Provincial Administrative Court in Warsaw from December 23, 2019, reference number: V SA / Wa 1203/19, V SA / Wa 1204/19, V SA / Wa 1205/19).

tive Court to adopt a Resolution explaining the legal provisions which application caused divergences in administrative court rulings. There is no doubt that the constitutional and international requirements for the composition of an impartial and independent court under the Art. 45(1) of the Constitution, the Art. 6 of ECHR and the Art. 47 of EU CFR, also refer to administrative courts, i.e. to regional administrative courts and to the Supreme Administrative Court.

V.

The following conclusions can be drawn regarding the effects of the Resolution of the Supreme Court for the constitutional right to court (right to fair trial):

a) in order to minimize the risk of a case being resolved by a “court” which is not independent and impartial within the meaning of the Art. 45(1) of the Constitution, the Art. 6(1) of ECHR and the Art. 47 of EU CFR, each participant in court proceedings has the right to consider the appropriateness of taking procedural steps (mainly in the scope of the institution *iudex suspectus* and pleas in appeal) aimed at shaping the composition of the court according with the interpretation expressed in the Resolution of the Supreme Court;

b) it should be stated that the phrase “in specific circumstances” may cause the most interpretation doubts in a particular case regarding the content of the Supreme Court Resolution, but it should be also emphasized that the courts should not impose the burden of proof on the parties to court proceedings in such a way that the latter will be obliged to provide documents confirming the defectiveness of the nomination procedures;

c) an indirect reference to the Supreme Court Resolution (and to the judgement of the CJEU) in the scope of demonstrating a possible contradiction of the composition of the administrative court with legal provisions (*iudex suspectus* or cassation complaint to the Supreme Administrative Court) is also not excluded;

d) the Supreme Court’s Resolution does not constitute an obstacle (temporary or objective) to attempt to further determine in each specific case the circumstances of the contradiction between the composition of each Polish court, including the Supreme Court and the Supreme Administrative Court,

with the principles of independence and impartiality of courts within the meaning of the Art. 45(1) of the Constitution, the Art. 6(1) of ECHR and the Art. 47 of EU CFR, including in particular in proceedings before the European Court of Human Rights in the context of violation of the Art. 6(1) of ECHR;

e) the issue of improper court formation in a specific case within the meaning of the Art. 439(1)(2) of the Code of Criminal Procedure and within the meaning of the Art. 379(4) of the Code of Civil Procedure, as well as within the meaning of the Art. 183 § 2 item 4 of the Law on proceedings before administrative courts, has not been prejudged by the Constitutional Tribunal in the ‘ruling’ of 20 April 2020, as the assessment in this respect does not belong to the constitutional competence of this body – this applies even more to the situation in which the Constitutional Tribunal’s panel consisted of persons not authorized to adjudicate within the meaning of the Constitutional Tribunal’s judgments of December 3, 2015 in case K 34/15 and of March 9, 2016 in case K 47/15.

Finally, it should be also noted that regardless of the further actions of the political authority toward the judiciary, which since 2015 have resulted in a constantly deepening constitutional crisis in Poland, the Resolution of the Supreme Court has created an important legal basis for attempting to guarantee the real constitutional right to court. Therefore, its assessment must be fully positive.

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