

dr Katarzyna Gajda-Roszczyńska¹

A test of six conditions of the EU standard of the notion of “court” and the Polish administration of justice – deliberations on the basis of the judgment of Court of Justice dated 27.2. 2018 in the case of C-64 /16 *Associação Sindical dos Juizes Portugueses*.

Preface

Judicial independence play an important role in international acts and² documentation of international organizations³. So far the issue of the independence of the judiciary in the aspect of abstract standards appeared very often in judgments of the European Court of Human Rights in which the cases concerning the sovereignty of the judiciary and independence of the courts take a very crucial position⁴, and the Court of Justice dealt with this matter accidentally when analyzing the questions referred for a preliminary ruling. The decision of the Court of Justice dated 27.2.2018 on C-64 /16 *Associação Sindical dos Juizes Portugueses*⁵ changed the status quo and is of landmark nature as it finds that there exists a general European standard of the notion of “court” and the Court of Justice has a treaty competence for general evaluation of how the justice is administered in the Member States⁶.

The main arguments of the judgment

In case of the judgement of the Court of Justice dated 27.2.2018 concerning the case of C-64/16 *Associação Sindical dos Juizes Portugueses* the Court of Justice was faced with

¹ Author is Ass. Proffesor at the Chair of Civil Procedure of the University of Silesia in Katowice and a judge in the District Court for Krakow-Krowodrza in Krakow. Member of “Iustitia”. Member of the Editorial Board of the „Polski Proces Cywilny” (Polish Civil Procedure) law review. Lecturer at the ARS Center at the Faculty of Law and Administration of the Jagiellonian University in Krakow and at the Regional Bar Council in Krakow. Member of the Comission of the Scientific Association of Civil Procedural Law Academics. She participates in numerous national and international scientific projects. Her scientific interests include examination proceedings (in particular: participants of the proceedings, the subject matter of the proceedings, evidence, especially illegal evidence and the abuse of procedural law), European civil procedure, alternative dispute resolution (in particular mediation in civil matters) as well as the judiciary system and the organization of courts. She is the author of over 50 publications.

² Thus, e.g. Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ETOC), Journal of Laws of 1993, No. 61, item 184, art. 47 of the EU Charter of Fundamental Rights (CFR), Official Journal of EU C 303 of 2007, p. 1.

³ See e.g. the Basic Rules of Judicial Independence – Resolution of the General Assembly of UN 40/32, November–December 1985, Guidelines No. R (94) 12 of the Committee of Ministers of the Council of Europe concerning the independence, efficiency and role of the courts dated 13.10.1994, the European Charter on the Statute for Judges dated 18.7.1998, conclusions of the Consultative Council of European Judges (CCJE), ENCJ standards, CEPEJ standards, EAJ standards or MEDEL standards.

⁴ See inter alia the case of C-453/00 *Commission v. Ireland*; judgements of ECHR dated 19.4.2007 in the case of *Vilho Eskelinen et al. v. Finland*, complaint No. 63235/00; dated 5.2.2009r.; the case of *Ojuić v. Croatia*, complaint No. 22, 30/05; dated 26.7.2011; the case of *Juričić v. Croatia*, complaint No. 58222/09; dated 19.9.2012; the case of *Ohneberg v Austria*, complaint No. 1078/08.

⁵ Compare the discussion concerning this decision: *M. Krajewski*, *Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma*, European Papers. Journal of the Law and Integration, No. 1/2018, See: https://europeanpapers.eu/en/system/files/pdf_version/EP_EF_2018_I_023_Michal_Krajewski_0.pdf, p. 395 et seq.; *J. Barcik*, Czy etos trzeciej władzy narusza jej więzi z Państwem Polskim?, Monitor Konstytucyjny, see: <https://monitorkonstytucyjny.eu/archiwa/3461>; *M. Taborowski*, Przełomowy wyrok: Trybunał Sprawiedliwości UE uznaje, że ma prawo oceniać stan wymiaru sprawiedliwości w państwach UE, see: <https://archiwumosiatsynskiego.pl/wpis-w-debacie/przełomowy-wyrok-trybunał-sprawiedliwosci-ue-uznaje-ze-prawo-oceniac-stan-wymiaru-sprawiedliwosci-panstwach-ue/>

⁶ See *M. Taborowski*, *ibidem*.

fundamental questions: is there a general universal EU standard of the notion of “court” in European Union within the frames of the existence of the principle of the rule of law and, if so, what circumstances shall be taken into account when analyzing whether a given body has the status of a European “court”. In both cases the answer of the Court of Justice to such questions was positive. The Court of Justice indicated that under art. 2 TEU EU is based on such values as the **rule of law**, which are common to the Member States, in the society based inter alia upon **justice**. In such a case it should be noted that common trust between the Member States and, in particular, between their courts, is based on a crucial assumption under which the Member States **share numerous common values**, which form the grounds for the existence of EU, and which are defined in art. 2 TEU⁷. EU is the **Union of law**, in which individuals have the right to challenge in front of the court the legality of each decision or any other national act concerning the application of EU act to them⁸. Article 19 TEU, in which the value of the rule of law, affirmed in Art. 2 TEU was precisely defined, delegates the task of exercising judicial control in EU legal order not only to the Court of Justice but also to national courts⁹. Thus those courts perform common tasks in cooperation with the Court of Justice, which aim at obeying the law with respect to its interpretation and application of treaties¹⁰. As a result, **the Member States are obliged** – inter alia in accordance with the principle of loyal cooperation expressed in Art. 49(3)(1) TEU – **to ensure the application and respect for the EU law in their territories**¹¹. On that basis and under the provision of Art. 19(1)(2) TEU Member States shall provide necessary measures to ensure that the right of individuals to have effective legal protection in the areas covered by EU law is respected. Consequently, **member states are obliged to establish a system of measures and procedures ensuring the effective judicial review in such areas**¹². The Court of Justice confirmed that the principle of effective legal protection of the rights derived by individuals from EU law, to which the second paragraph of Art. 19(1) TEU refers, constitutes a general principle of EU law resulting from the constitutional traditions shared by Member States,

⁷ See similar opinion 2/13 (accession of EU to ECHR) dated 18.12.2014, EU:C:2014:2454, p. 168, (, item 30 of the judgement of the Court of Justice dated 27.2.2018 concerning the case C-64/16.

⁸ As in: point 31 of the judgement of the Court of Justice dated 27.2.2018 concerning the case C-64/16. See similarly the judgement dated 3.10.2013, *Inuit Tapiriit Kanatami et al. v. Parliament and Council*, C-583/11 P, EU:C:2013:625, item 91, 94 and the case law quoted there.

⁹ As in: point 32 of the judgement of the Court of Justice dated 27.2.2018 concerning the case C-64/16. See similarly the opinion 1/09 (Creation of a unified patent litigation system) dated 8.3.2011, EU:C:2011:123, item 66; judgements: dated 3.10.2013, *Inuit Tapiriit Kanatami et al. v. Parliament and Council*, C-583/11 P, EU:C:2013:625, item 90; and also dated 28.4.2015, *T & L Sugars and Sidul Açúcares v. Commission*, C-456/13 P, EU:C:2015:284, item 45.

¹⁰ As in: point 33 of the judgement of the Court of Justice dated 27.2.2018 concerning the case C-64/16. See similarly the opinion 1/09 (Creation of a unified patent litigation system) dated 8.3.2011, EU:C:2011:123, item 69; and also the judgement dated 3.10.2013, *Inuit Tapiriit Kanatami et al. v. Parliament and Council*, C-583/11 P, EU:C:2013:625, item 99.

¹¹ See similar opinion 1/09 (Creation of a unified patent litigation system) dated 8.3.2011, EU:C:2011:123, p. 68.

¹² As in: point 34 of the judgement of the Court of Justice dated 27.2.2018 concerning the case C-64/16. See similarly the judgement dated 3.10.2013, *Inuit Tapiriit Kanatami et al. v. Parliament and Council*, C-583/11 P, EU:C:2013:625, Point 100, 101 and the case law quoted there.

expressed in Art. 6 and 13 European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4.11.1950 and currently confirmed in Art. 47 thereof¹³. The existence of **judicial review aiming at respect for the law of EU is an intrinsic feature of the rule of law**¹⁴. Each Member State should make sure that the **bodies included – as a “court” as defined in EU law – in the system of appeal measures in the areas covered by EU law will meet the requirements of effective legal protection**. What is more, the Court of Justice forming the definition of a “court” rooted in the national administration of justice, constituting also the constituent of the state in an European aspect – quoting the established jurisdiction¹⁵ – confirmed the previously applied general criteria which should be taken into account when performing the general evaluation if a given body has the status of a “court”¹⁶:

- a) firstly – the statutory legal basis of the functioning of the body,
- b) secondly – its permanent character,
- c) thirdly – the obligatory nature of its jurisdiction,
- d) fourthly – the contradictory nature of proceedings,
- e) fifthly – the application of the provisions of law by the body,
- f) sixthly and the most crucially – its independence¹⁷.

The third important element contained in the decision is clarification of the criterion of sovereignty as an integral element of administering justice which is necessary not only at the level of EU, with respect to EU judges and Advocates-General of the Court of Justice, which is provided for by the third paragraph of Art. 19(2) TEU, but also at the level of Member States with respect to national courts¹⁸. Apart from indicating the criterion of independence as sine qua non condition to assume that a given body is a “court”, the Court of Justice did not refrain from defining the notion of “independence” in the context of general standard of the notion of a “court”. In the opinion of the Court of Justice the independence of national courts has a crucial significance, in particular for proper functioning of the court cooperation system. The notion of independence means inter alia that a given body performs its judiciary tasks fully autonomously, not being subject to any chains of command or any other entity and not

¹³ See similar judgements: dated 13.3.2007, Unibet, C-432/05, EU:C:2007:163, point 37; dated 22.12.2010, DEB, C-279/09, EU:C:2010:811, point 29–33.

¹⁴ As in: (Point 34 of the judgement of the Court of Justice dated 27.2.2018 concerning the case C-64/16. See similarly the judgement dated 28.3.2017, Rosneft, C-72/15, EU:C:2017:236, item 73 and the case law quoted there.

¹⁵ See judgements: dated 16.2.2017, Margarit Panicello, C-503/15, EU:C:2017:126, point 27, dated 17.6.2014, Torresi, C-58/13 and C-59/13, EU:C:2014:2088, point 17; and also dated 6.10.2015, Consorci Sanitari del Maresme, C-203/14, EU:C:2015:664, point 17, the judgement dated 24.5.2016, the judgement of MT Højgaard and Züblin, C-396/14, EU:C:2016:347, point 23, Miles et al., C-196/09, EU:C:2011:388, point 37 and Belov, C-394/11, EU:C:2013:48, Point 38.

¹⁶ Referring to the second paragraph of Article 47 of the Charter of Fundamental Rights.

¹⁷ As in: Point 38 of the judgement of the Court of Justice dated 27.2.2018 concerning the case C-64/16 *Associação Sindical dos Juizes Portugueses*.

¹⁸ *Ibidem*, Point 42.

receiving any orders or guidelines from any source and that it is thus protected against the intervention and external pressure which would threaten the independence of judgement of its members and affect its decisions¹⁹. Contrary to some arguments quoted in public discourse²⁰, the Court of Justice clearly found that EU has an explicit treaty competence in the form of the second paragraph of Art. 19(1) TEU in relation to Art. 2 TEU to evaluate the regulation and functioning of the administration of justice in EU Member States, in particular, to evaluate whether a given body in the light of the applicable regulations is a court as defined by the European law, verifying simultaneously the hitherto used meaning of the principle of procedural and organizational (institutional) autonomy. The CJ made a correct assumption that national judges are European judges in all cases where they potentially are entitled to apply European law, so **it is possible and necessary to create an abstract notion of a court at the European level, which should contribute to the amalgamation of the rule of law at the European level with national courts.**

In quest for the notion of a European “court” – background for the test of six conditions

Admissibility of quest for a general notion of European court cannot disregard such principles as: the rule of law, procedural and organizational (institutional) autonomy of Member States or the right to valid remedy connected with the system of legal protection.

1. The rule of law and the standard of the notion of a “court”

The analyzed decision constitutes a breakthrough both at the system-wide and procedural level and introduces a new quality in the discussion on the rule of law. Claiming that EU is the Union of law but it is also based on justice and common values, the Court of Justice directly supports not only the rule of law in a narrower, normative sense as a principle of legality, understood as the principle of operation of public institutions under which such institutions may act only within the limits of the competences attributed to them by legal norms. Referring to the common European values it also recognizes that the body shall act in accordance with a broader axiological system and the aims of a given society (in particular, meet the legal requirements). Taking into account the above it should be assumed that the system of power – for example of European Union – is not only based on law but subordinate

¹⁹ *Ibidem* (see similar judgements: dated 19.9.2006, Wilson, C 506/04, EU:C:2006:587, point 51; and also dated 16.2.2017, Margarit Panicello, C 503/15, EU:C:2017:126, point 37 and the case law quoted there).

²⁰ The statement of the Vice-Minister of Foreign Affairs *K Szymański* dated 2.9.2017 was completely different in this scope, see: <https://www.pap.pl> – he claimed that the transformations do not relate to the rule of law directly, but only to its interpretation.

to law. The Union constitutes not only a legal system defined in the legal sense, but also a legal system in which law-abiding national courts as European courts protect common values and citizens' rights. They should also guarantee the observance of the European values. There is now freedom without the Law.

2. Granting legal protection and the right to valid remedy and the standard of the notion of “court”

What is crucial is the fact that the analyzed decision above all directly connects the necessity to find a general model of administration of justice with the issue of granting legal protection to citizens and the right to valid remedy in the context of the mutual trust principle. Wide and context-oriented view of the notion of a court with respect to the legislative and executive power (or in other words – political power)²¹, is momentous and necessary to ensure proper access to justice. In the context of the analyzed issue it is necessary to discuss and define the scope of the right of recourse to court in the context of judiciary power to administer justice. The right of recourse to court is expressed in international law acts, in particular in Art. 6(1) ECHR, or Art. 14(1) of the International Covenant on Civil and Political Rights dated 16.12.1966²². And at the European level the right to a fair trial and to valid remedy must be analyzed with respect to the notion of access to justice. The substance and the limits of the notion of *access to justice* are defined by: the principle of effective legal and court protection, derived from the principle of effectiveness of EU law, preserving at the same time in a more and more disputable scope the principle of procedural and organizational (institutional) autonomy of the Member States²³. In literature the notion of *access to justice* takes various meanings, in particular it means the subjective right of an individual to take legal action and be awarded a judgement before an independent panel of judges, the possibility of solving the dispute with ADR methods or also the possibility of using court assistance²⁴. Just in this context the CJ deemed that there is a necessity of creating a general test aimed at defining whether a body is a court or not within the European meaning so as to ensure proper *access to justice* before national courts. In CJ's case law it is underlined that ensuring proper *access to justice* forms one of the preliminary conditions for guaranteeing the effectiveness of functioning of the European legal order. Effectiveness of the EC law forms

²¹ As in: Point 42 of the judgement of the Court of Justice dated 27.2.2018 concerning the case C-64/16 *Associação Sindical dos Juizes Portugueses*.

²² Journal of Laws of 1977, No. 38, item 167.

²³ See *N. Póltorak* [in:] *Karta Praw Podstawowych*, p. 1175 et seq.

²⁴ See *K. Gajda*, *Alternatywne metody rozwiązywania sporów*, pp. 26–29; *K. Gajda-Roszczyńska*, *Sprawy o ochronę indywidualnych interesów konsumentów w postępowaniu cywilnym*, Warsaw 2012.

the grounds for the concept broadening the notion of *access to justice* to include also the national level²⁵. The notion of *access to justice* was further clarified through establishment in Art. 47 CFR of *the right to valid remedy and to a fair trial*²⁶. The regulation contained in Art. 47 of EU Charter of Fundamental Rights provides for among all the principle of effective protection²⁷. What is innovative about the analyzed decision is the translation of this concept onto the scope of the second paragraph of Art. 19(1) TEU.

What is intrinsically connected with the notion of *access to justice* is the right to valid remedy which was derived from CJ's case law from the provisions of European Convention of Human and Citizen Rights, and also was earlier incorporated in particular acts of EU law. Analogously, the right to valid remedy, apart from being incorporated in Art. 47 CFR, is respected in EU law through its accession to the provisions of ECHR and as a basic law – the general principle of EU law. The CJ underlined on numerous occasions that *the right to valid remedy* is a fundamental right and is protected inter alia under Art. 6, but mostly under Art. 13 ECHR²⁸. The right to a fair trial resulting in particular from Art. 6(1) ECHR, forms a fundamental right which EU regards as the general principle under Art. 6(2) TEU²⁹. It forms the general principle of EU law which is inspired by the fundamental rights³⁰. It was also stressed out that this right as a general principle of EU law forms a part of the original EU law and binds directly the Member States. It should be as a result respected in all kind of litigation by all adjudicative authorities³¹. The right to valid remedy is a EU law notion which does not have a direct legal definition. It should be noted that Art. 47 par. 1 and 2 CFR guarantee respectively the right to “valid remedy”, so not only procedural measures (Subs. 1) and the

²⁵ See instead of many: see the judgement of CJEU dated 16.12.1976 concerning the case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, p. 1989; the judgement of CJEU dated 16.12.1976 concerning the case 45/76 *Comet BV v. Produktschap voor Sier-gewassen*, p. 2043; the judgement of CJEU dated 10.7.1997 concerning the case C-261/95 *Palmisani v. Istituto Nazionale della Previdenza Sociale*, p. I-4025; the judgement of CJEU dated 13.3.2007 concerning the case C-432/05 *Unibet (London) Ltd, Unibet (International) Ltd v. Justitie- kanslern*, p. I-2271.

²⁶ See *E. Storskrubb, J. Ziller, Access to Justice in European Comparative Law* [in:] *Access to Justice*, pp. 184–187.

²⁷ See *N. Póltorak* [in:] *Karta Praw Podstawowych*, p. 1175 et seq.; compare also the judgement of CJEU dated 22.12.2010 concerning the case C-279/09 *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, pp. I-13849, point 30, 31; the order of CJ dated 1.3.2011 concerning the case C-457/09 *Claude Chartry v. Belgium*, pp. I-819, point 25; and also the judgement of CJ dated 28.7.2011 concerning the case C-69/10 *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, point 49 (As in: *K. Gajda-Roszczyńska, Komentarz do art. 2 KPC* [in:] *Komentarz do postępowania cywilnego, v. I*, edited by *A. Góra-Błaszczkowska*, Warszawa 2015, p. 24 et seq.

²⁸ See the judgement of CJEU dated 15.5.1986 concerning the case 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* (1986), p. 1651; the judgement of CJEU dated 29.10.1980 in joined cases 209–215/78 and 218/78 *Heintz van Landewyck SARL et al. v. the Commission of the European Communities* (1980), p. 3125; the judgement of CJEU of 15.10.1987 concerning the case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens et al.* (1987), p. 4097; dated 9.2.2006 in joined cases C-23/04–C-25/04 *Sfakianakis AVEE v. Elliniko Dimosio*, (2006), p. I-1265, point 28; judgement of CFI dated 15.1.2003 in joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International, Inc et al. v. the Commission of the European Communities* (2003), p. II-1, point 121.

²⁹ The judgement of CJEU: dated 26.6.2007 concerning the case C-305/05 *Ordre des barreaux francophones et germanophone et al v. Conseil des ministres* (2007), p. I-5305, point 29 and dated 1.7.2008 in joined cases C-341/06 P i C-342/06 *Chronopost SA and La Poste v. Union française de l'express (UFEX) et al* (2008), p. I-4777, point 44.

³⁰ See the judgement of CJEU dated 17.12.1998 concerning the case C-185/95 *Baustahlgewebe GmbH v. Commission of the European Communities* (1998), p. I-8417.

³¹ See the judgement of CJEU dated 13.2.1979 concerning the case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* (1979), p. 461; the judgement of CJEU dated 17.12.1998 concerning the case C-185/95 *Baustahlgewebe GmbH v. Commission of the European Communities* (1998), p. I-8417.

right to a fair trial, hereinafter called right of access to justice. This notion is broader than Art. 6 and 13 ECHR. This notion should be interpreted taking into account the principles of EU law, whereby it should have in the whole EU autonomous and consolidated interpretation³². This consolidation of interpretation is an axiological stimuli to adopt by CJEU in the said decision a uniform standard of a national court before which this law is implemented in EU, and furthermore, to adopt general criteria to estimate whether such a body is a European court. It is also because the right to valid remedy before the court in the scope defined by EU law concerns the courts of Members States as European courts³³. In the said decision CJEU confirms that the provision of Art. 47 CFR has to be interpreted in conjunction with the second paragraph of Art. 19(1) TEU which defines inter alia the obligation of Member States to establish “measures” necessary for effective legal protection and, while creating a general standard, its evaluation should be entrusted to CJEU. Here it should be noted that traditionally it was assumed that Art. 47 of Charter of Fundamental Rights enables solely the review connected with the question referred for a preliminary ruling. Innovative approach and combination of this with the second paragraph of Art. 19(1) TEU enable in turn a new interpretation of the principle of organizational autonomy and creation of a general and abstract model³⁴. Legal protection granted by European countries should be effective, and all the interference of the legislative or executive authority, making this law ineffective, should be impermissible. As it was adopted by CJEU, the right to valid remedy was connected directly with the second paragraph of Art. 19(1) TEU³⁵.

Searching for axiological determinants of the quest for general criteria defining the notion of a “court” and the limits of this notion in the Polish national legal system we must quote the right of recourse to court. The right of recourse to court is a constitutional right expressed in S. 45(1) of the Constitution of the Republic of Poland under which “every individual has the right to a fair and open trial without undue delay by an independent, impartial and sovereign court”. The right of recourse to court, named also “right to legal protection”, “right to justice”, “right to take legal action”, “right to a fair trial”, “right to litigate”, “right to defense before the court”, “right to lodge a complaint” is a self-contained subjective right of every individual granting him the right to lodge a claim for hearing the

³² Compare e.g. the judgement of CJEU: dated 14.1.1982 concerning the case 64/81 *Nicolaus Corman & Fils SA v. Hauptzollamt Gronau*, (1982), p. 13, point 8; dated 6.3.2008 concerning the case C-98/07 *Nordania Finans A/S ir BG Factoring A/S v. Skatteministeriet* (2008), p. I-1281, point 17; dated 1.3.2012 concerning the case C-166/11 *Ángel Lorenzo González Alonso v. Nationale Nederlanden Vida Cia. de Seguros y Reaseguros, S.A.E.* (2012).

³³ As in: *K. Gajda-Roszczyńska*, Komentarz do art. 2 KPC [in:] *Komentarz do postępowania cywilnego...*, *op. cit.*, pp. 24–26.

³⁴ In reference to the second paragraph of Art. 19(1) TEU as the abstract grounds for the decision: *M. Krajewski*, *op. cit.*, p. 400 et seq.

³⁵ *Ibidem*.

case by the court and being granted legal protection³⁶. The right of recourse to court is not only an instrument enabling the exercise of other constitutional rights and freedoms, but exists independently and is protected irrespective of the breach of other subjective rights³⁷. The content of the right of recourse to court resulting from S. 45 of Poland's Constitution was refined in S. 77(2), S.78, S. 176(1), S. 177, S. 178 of Poland's Constitution³⁸. The right of recourse to court consists of three basic elements: right of access to court (in the meaning of taking legal action), the right to shape court procedure in a way respecting the principles of procedural justice and the right to court judgment, i.e. to be granted a binding decision settling the case by the court in due time³⁹. So that those rights could be implemented in the national system, a body must meet relevant requirements to be a court. The right of recourse to court in the constitutional meaning incorporates the right to have the justice administered by a court. The indispensable condition for the implementation of the right of recourse to court includes the possibility of seeking redress before the court as the public body administering justice. From the content of S. 10, 173 and 175 of Poland's Constitution the principle of administration of justice by court is derived, under which the administration of justice was reserved solely for the competence of national courts⁴⁰. Currently a view dominates which treats the administration of justice as a subjective-objective category. In practice it means inter alia settling civil cases by an independent judge in an independent court⁴¹. Courts and judges administering justice should act on the basis of legislation, be independent, sovereign, impartial and guarantee a fair trial⁴². From the axiological perspective European goals and values and Polish constitutional patterns are the same.

3. Principles of procedural and organizational autonomy and the general standard of a “court” as the body administering justice

³⁶ As in: *K. Gajda-Roszczyńska*, Komentarz do art. 2 KPC [in:] Komentarz do postępowania cywilnego..., *op. cit.*, p. 26 and quoted by her *E. Wańkowski*, Skarga, powództwo i prawo, p. 263 et seq.; *H. Mądrzak*, Prawo do sądu jako gwarancja ochrony praw człowieka (studium na tle polskiego prawa konstytucyjnego, prawa cywilnego materialnego i procesowego) [in:] Podstawowe prawa jednostki, p. 187 et seq.

³⁷ As in: *K. Gajda-Roszczyńska*, Komentarz do art. 2 KPC [in:] Komentarz do postępowania cywilnego..., *op. cit.*, s. 26 quoting *A. Wróbel*, Głosa do trzech wyroków Trybunału Konstytucyjnego, „Przegląd Sądowy” No. 1/2000, p. 208.

³⁸ As in: *Z. Czeszejko-Sochacki*, Prawo do sądu, p. 91 et seq.; see also *K. Flaga-Gieruszyńska*, Dostęp do sądu a postulat humanizacji procesu cywilnego [in:] *Aurea praxis, aurea theoria*, v. II, p. 2783 et seq.

³⁹ As in: *K. Gajda-Roszczyńska*, Komentarz do art. 2 KPC [in:] Komentarz do postępowania cywilnego..., *op. cit.*, p. 26 and quoted judgements of CJ dated: 9.1.2006, SK 55/04, OTK-A No. 1/2006, item 1; dated 28.2.2006, P 13/05, OTK-A No. 2/2006, item 20; dated 7.3.2006, SK 11/05, OTK-A No. 3/2006, item 27; of 14.3.2006, SK 4/05, OTK-A No. 3/2006, item 29; of 8.5.2006, SK 32/05, OTK-A No. 5/2006, item 54; dated 10.7.2007, K 37/04, OTK-A No. 7/2006, item 79; dated 24.7.2006, SK 8/06, OTK-A No. 7/2006, item 84; dated 1.9.2006, SK 14/05, OTK-A No. 8/2006, item 97; dated 12.9.2006, SK 21/05, OTK-A No. 8/2006, item 103; dated 4.12.2006, P 35/05, OTK-A No. 11/2006, item 167; See also *P. Pogonowski*, Realizacja prawa do sądu, p. 7–16; *H. Pietrkowski*, Prawo do sądu, p. 3 et seq.; *idem*, Prawo do rzetelnego procesu, p. 37; *A. Zieliński*, Prawo do sądu, p. 20.

⁴⁰ This principle was also applied to People's Republic of Poland's Constitution — see *R. Więckowski*, Dopuszczalność drogi sądowej, p. 11; *S. Włodyka*, Ustrój organów ochrony prawnej, p. 46–53; *idem*, Konstytucyjna zasada; *Z. Resich*, Pojęcie wymiaru sprawiedliwości, p. 305 et seq.; currently see *T. Ereciński*, *J. Gudowski*, *J. Iwulski*, Komentarz do prawa o ustroju sądów powszechnych, p. 15–16; *S. Włodyka*, Organizacja sądownictwa, p. 7–12; *K. Lubiński*, Pojęcie i zakres, p. 3 et seq.; *K. Piasecki*, Organizacja wymiaru sprawiedliwości, p. 6 et seq.; *M. Zubik*, Sprawowanie wymiaru sprawiedliwości, p. 7–8.

⁴¹ See *J. Ignaczewski*, Wymiar sprawiedliwości, p. 1 et seq.

⁴² See *P. Pogonowski*, Realizacja prawa do sądu, p. 7.

In quest for a general standard of a “European court” we cannot disregard the discussion on the scope of understanding the notion of the principle of procedural and organizational (institutional) autonomy and the institutional balance and mutual trust connected therewith. The analyzed decision undoubtedly affects their understanding.

The procedural law and the court law connected therewith are unquestionably attributed to the public law, so, as a principle, its application is dominated by national legislation and national interpretation. This assumption formed the basis for procedural and organizational autonomy principle⁴³. The doctrine of Rewe/Comet⁴⁴ based on this traditionally assumed that procedural and organizational (institutional) autonomy of Member States involves the situation where in lack of EU norms it is the task of the national legal system to appoint courts competent for adjudication and define the procedural conditions regulating the complaints and aiming at the protection of rights derived by the citizens of Member States directly from the effective EU law⁴⁵. In lack of EU law, the implementation of the legal norms adopted by the European legal system is entrusted, as a principle, to the judiciary of the Member States with the application of procedures established in particular states as long as particular Member States are obliged to guarantee effective standards of protection existing in EU law⁴⁶. The doctrine pointed out that procedural and organizational autonomy is in fact a certain legal construction, prerogative or in other words a symbol of national sovereignty⁴⁷. The limits of assumed competence were delineated by the principle of primacy, principle of equivalence and of effectiveness⁴⁸. Those principles applied to all the regulations concerning procedural instruments for pursuing your rights, in particular pursuing claims in court in civil actions⁴⁹. Procedural autonomy was limited by: the principle of effectiveness, principle of non-discrimination, or principle of equivalence. Regulation of

⁴³ B. Hess, The State of the Civil Justice Union [in:] EU Civil Justice. Current issues and future outlook, edited by B. Hess, M. Bergström, E. Storsrubb, Swedish Studies in European Law, vol. 7, Oxford, Portland, Oregon 2016, p. 1.

⁴⁴ Formulated on the basis of the decision 33/76 Rewe – ZetralfinaneG et Rewe – Zentral AG v. Landwirtschaftskammr fur das Saarland (1976) ECR 1989.

⁴⁵ T.T. Koncewicz, „Sędziowie krajowi jako wspólnotowi. Teoretyczne podstawy dyskusji” [in:] Acta Universitatis Wratislaviensis, Przegląd prawa i administracji, edited by K. Wójtowicz, Wrocław 2003, pp. 123–160.

⁴⁶ See instead of many others: C.N. Kakouris, Do the Member States Possess Judicial Procedural Autonomy?, C.M.L.Rev., 1997, p. 1389 et seq.; G. Rodriguez Iglesias, Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrecht, Europäische Grundrechtzeitung, 1997, p. 298 et seq.; A. Wróbel, Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej, „Ruch Prawniczy Ekonomiczny i Socjologiczny” No. 1/2005, p.39 and M. Domagalska, Zasada autonomii proceduralnej państw członkowskich i jej ograniczenia wynikające z zasady efektywności [in:] Stosowanie prawa Unii Europejskiej przez sądy, vol. II, Zasady – orzecznictwo – piśmiennictwo, edited by M. Szwarc-Kuczer, K. Kowalik-Bańczyk, Warszawa 2007, p. 326 et seq.; T.T. Koncewicz, op. cit., s. 123–160; A. Nylund, B. Krans, The European Union and national civil procedure – a rocky road or a smooth proces? [in:] The European Union and National Civil Procedure, Intersentia, Cambridge 2016, p. 1.

⁴⁷ See C.N. Kakouris..., op. cit., p. 1389 et seq.; M. Bobek, Why There is No Principle of ‘Procedural Autonomy’ of the Member States [in:] B. de Witte, H.-W. Micklitz (eds), The European Court of Justice and the Autonomy of the Member States, Cambridge: Intersentia, 2012, pp. 305–323; A. Wróbel, Autonomia proceduralna państw członkowskich..., op. cit., p.39; M. Domagalska, Zasada autonomii proceduralnej państw członkowskich..., op. cit., p. 327.

⁴⁸ See M. Dougan, National Remedies Before the Court of Justice..., op. cit., p. 4 et seq.

⁴⁹ See M. Szpunar, Prawo wspólnotowe przed organami krajowymi, „Rejent” No. 3–4/2004, pp. 219–220; S. Biernat, Zasada efektywności prawa wspólnotowego w orzecznictwie CJEU [in:] Studia z prawa Unii Europejskiej, edited by S. Biernat, Kraków 2000, p. 67.

pursuing claims based on EU law by national provisions concerning the procedure had to meet two conditions: first, under *principle of effectiveness*⁵⁰ the procedural conditions regulated by the national law cannot make pursuing claims *excessively difficult*⁵¹ or *virtually impossible* and, second, while pursuing claims resulting from EU law *less favourable* provisions than those in case of comparable claims based on the national law cannot apply⁵². The literature currently suggests that the principle of procedural autonomy in the area of procedures is undergoing modification as we witness the so-called europeanization of procedures which is based on three pillars: the first pillar includes standards indicated by the European Convention for the Protection of Human Rights and Fundamental Freedoms and Charter of Fundamental Rights, in particular Art. 47 of the Charter, the second pillar is based on secondary law regulations referring to crossroads of procedural law and private international law, especially cross - border proceedings and judicial cooperation, and the third “invisible” pillar consist of the growing number of issues that are not regulated in coherent way Partly it emanates from case law from the European Court limiting procedural autonomy to promote equivalent and efficient application of EU law, e.g. in case of directives⁵³. What is more, in civil procedure even today CJEU, overcoming the rule of procedural autonomy, created already some minimal standards with respect to national procedures⁵⁴.

For these reasons only, the traditionally used approach under which the principle of organizational autonomy was not directly limited by the case law of the Court Of Justice, which did not interfere in a general way into the organization of the administration of justice, and, in particular, into the organization of the judiciary or instances⁵⁵, could not continue. For some time the literature authors also have been pointing to a problem of varied standard of the notion of a court and the necessity of guaranteeing certain standards of justice administration bodies in EU⁵⁶. The previous contribution and influence of CJUE on the shape of the national justice administration systems included in Art. 267 TFEU is indisputable⁵⁷. In this context introduction of more and more deviations from the principle of procedural autonomy, e.g. in

⁵⁰ The definition used by CJEU in the judgement C-261/95 dated 1.6.1997 Rosalba Palmisani and Istituto Nazionale della Previdenza Sociale (INPS) on the interpretation of Article 5 of EC Treaty.

⁵¹ Compare the judgement 199/82 dated 9.11.1983, *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* (ECR p. 3595).

⁵² B. Hess, The State of the Civil Justice Union [in:] *op. cit.*, p. 2. *Europäisches Zivilprozessrecht: ein Lehrbuch*, Hüthig Jehle Rehm 2010, p. 18, 20.

⁵³ B. Krans, EU Law nad National Civil Procedure Law: An Invisible Pillar, *European Review of Private Law*, pp. 23–567. See also E. Storskrubb, *Civil procedure and EU law: a policy area uncovered*, Oxford University Press 2008; V. Harsagi and M. Kengyel (eds) *Der Einuss des Europäischen Zivilverfahrensrechts auf die nationalen Rechtsordnungen*, Nomos 2009; B. Hess, *Europäisches Zivilprozessrecht...*, *op. cit.*, B. Hess, M Bergström and Eva Storskrubb (eds), *Swedish Studies in European Law*, vol. 7, Oxford, Portland, Oregon 2016.

⁵⁴ B. Hess, The State of the Civil Justice Union [in:] *op. cit.*, pp. 15–16.

⁵⁵ As in: S. Biernat „Zasada efektywności prawa wspólnotowego w orzecznictwie CJEU” [in:] *Studia z prawa Unii Europejskiej*, edited by S. Biernat, Kraków 2000, p. 51; C. Mik, „Sądy polskie wobec perspektywy przystąpienia Rzeczpospolitej Polskiej do Unii Europejskiej”, *Przegląd Prawa Europejskiego* No. 1/ 1997, p. 20.

⁵⁶ B. Hess, The State of the Civil Justice Union [in:] *op. cit.*, pp. 10–13.

⁵⁷ *Ibidem*, K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2014, § 3.05.

the area of cooperation of judiciary in civil matters, due to strict connection of the principle of procedural autonomy with the principle of organizational (institutional) autonomy, the correlation of the said factors must have caused limitation in the principle of organizational autonomy in a general sense. Today it seems necessary to establish certain standards in the scope of determining the notion of a “court” and their verification in order to establish the real standard and scope of judicial power. Overcoming the principle of organizational autonomy, CJUE in its decision due to the said values abandoned the opinion that whether a given body has the nature of a court within the meaning of the said provision is exclusively a matter of the internal inter-Community legal order⁵⁸. In CJUE's opinion it is possible and advisable to create a general model of a European court at the European level as a guarantor of common European values and pursuing their rights by the Europeans and also to guarantee mutual trust between the Member States. The Court of Justice assumed, aiming at new opening of the principle of organizational autonomy of the Member States, that it is a set of obligations concerning the access to justice, fair procedures and court independence⁵⁹, rather than, as it was previously, a prerogative of the State. The said approach completely changed the perspective. Creating such a general model CJUE deviated from the view that in order to determine whether a national body which was entrusted under the statute to perform functions of various character should be deemed “a court” within the meaning of Art. 267 TFEU, it is necessary to examine particular character of the functions performed by it in a given legal context in which it addresses CJUE and that national courts may address CJUE exclusively in case of a dispute heard by such courts and if they are obliged to take a stance on the proceedings aimed at typical court settlement⁶⁰. CJUE thus formed the basis for the control of minimum standards with respect to the national systems of administration of justice.

Test of six conditions

The analysis of the decision in the context of the said conditions indicates that CJUE noticed that even though it is courts and tribunals that exercise judicial power, the same

⁵⁸ See also judgements dated 17.9.1997 concerning the case C-54/96 Dorsch Consult, Rec. s. I-4961, point 23; dated 31.5.2005 concerning the case C-53/03 Syfait et al., ECR I-4609, point 29; dated 14.6.2007 concerning the case C-246/05 Häupl, p. I-4673, point 16 and also dated 22.12.2010 concerning the case C-118/09 Koller, ECR I-13627, point 22; judgments in Case 61/65 Vaassen (née Göbbels), ECR 261; Case 14/86 *Pretoire di Salò v. Persons unknown*, ECR 2545, par. 7; Case 109/88 Danfoss, ECR 3199, par. 7 and 8; Case C-393/92 Almelo and Others, ECR I-1477; and Case C-111/94 Job Centre, ECR I-3361, par 9.

⁵⁹ Compare *D.U. Galetta*, Procedural Autonomy of EU Member States: Paradise Lost? A Study on the ‘Functionalised Procedural Competence’ of EU Member States, Heidelberg 2010; *E. Cannizzaro*, Sui rapporti fra sistemi processuali nazionali e diritto dell’Unione europea [in:] *Il Diritto dell’Unione Europea*, 2008, pp. 447–468; *N. Pótorak*, European Union Rights in National Courts, Alphen aan den Rijn 2015; *A. Wallerman*, Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States’ Self-Imposed Limits on National Procedural Autonomy, in *Common Market Law Review*, 2016, pp. 339–360.

⁶⁰ See instead of many others: the judgement *Belov*, EU:C:2013:48, point 39, 41.

bodies could not do it without judges⁶¹. An independent court is a court structurally, organizationally and functionally separate from other public authorities, and an independent court is a court in which sovereign judges adjudicate⁶². The criteria adopted by CJUE indicate also a broad and multifaceted approach to the problem. An examination checking whether a national court meets the standards adopted by the European order involves verification whether it is a court in the systemic meaning (criterion of statutory legal basis for the functioning of the body, criterion of permanent character of the body and criterion of obligatory character of its jurisdiction)⁶³ as well as in the procedural aspect (criterion of the contradictory nature of proceedings and application of legal provisions while adjudicating)⁶⁴. Adoption by CJUE of the sixth criterion of “independent court”⁶⁵ confirms the acceptance of the concept that the existence of law-abiding European courts is directly related to the sovereignty of judges, being one of the institutional measures at the European level safeguarding access to justice and the right to a valid remedy before an impartial and objective court, and as a consequence, cooperation of courts in civil cases and development of integration. The notion of sovereignty of judges must, on the one hand, fulfill the European standards and, on the other hand, take into account a specific status of a judge provided for by the national legislation.

The model of a national court applying or able to apply European law was determined by CJUE on the basis of a test of six conditions which, with respect to particular notions, are supported by the established case law of CJUE.

TEST OF SIX CONDITIONS OF A EUROPEAN COURT

1. The statutory legal basis of the functioning of the body

The criterion of the statutory legal basis for the functioning of the body assumes that the body will function on the basis of valid and applicable provisions of the law.

2. Permanent character of the body

⁶¹ A. Dąbrowski, Ustrojowa pozycja sędziego, „Krajowa rada Sądownictwa” No. 1/2014, p. 8.

⁶² See A. Gajewska, Kilka uwag o niezawisłości sędziowskiej [in:] Trzecia władza. Sądy i Trybunały w Polsce. Materiały Jubileuszowego L. Zjazdu Katedr i Zakładów Prawa Konstytucyjnego, Gdynia 24–26.4.2008, edited by A. Szmyt, Gdańsk 2008, p. 318.

⁶³ S. Włodyka, Ustrój organów ochrony prawnej, Warszawa 1968, p. 25; J. Waszczyński, Ustrój organów ochrony prawnej, Łódź 1974, p. 38.

⁶⁴ S. Włodyka, *op. cit.*, p. 30. Compare also the resolution of the Supreme Court dated 17.11.2009, III CZP 86/09 (Journal of SC of 2009, No 11, item 7), in which it was found that the notion of “court” exists in principle in three meanings: institutional one, jurisdictional body and as a judge performing a given administrative function in court.

⁶⁵ Compare in terms of sovereignty: J. Mokry, Osobowość sędziego a niezawisłość sędziowska [in:] Studia z prawa postępowania cywilnego, edited by M. Jędrzejewska, T. Ereciński, Warszawa 1985, p. 217.

The body cannot have a temporary character⁶⁶, but it should be permanent. The permanent character of the body guarantees its independence.

3. Obligatory character of body's jurisdiction

The obligatory character of the proceedings means in fact that the jurisdiction of the body does not depend on the consent of the parties and its judgements are binding on them⁶⁷. What is to be determined is whether referral to such a body is necessary to settle the dispute and whether the decision obtained is binding on the parties.

4. The contradictory nature of proceedings before the body

The contradictory nature of proceedings assumes that the body settles disputes between the parties. To evaluate the character of the body it is necessary to verify the contradictory elements. In accordance with the case law of the CJ, the requirement of the proceedings *inter partes* does not form an absolute criterion for regarding the body as a court as defined in Art. 267 TFEU⁶⁸.

5. The application of the provisions of law by the body

Settling the disputes the body should apply the commonly applicable provisions of the law as well as the internal law acts in the scope provided for by the national legal system⁶⁹. In accordance with this principle the body should not only act lawfully but also within the limits of the law issuing decisions on the basis of the applicable law. Of course, apart from *lex, ius* is not excluded (*fairness, observe the rules of Community law*)⁷⁰.

6. Independence of the body

The notion of judiciary independence includes on the basis of established case law two aspects: external and internal⁷¹.

The internal aspect of independence involves impartiality and concerns keeping the same distance to the parties to the dispute and their interests with respect to its subject-matter⁷². This element means that the adjudicating body must be totally objective and

⁶⁶ See K. Wójtowicz, Wpływ procesu integracji europejskiej na krajowe organy sądowe, „Toruńskie Studia Polsko-Włoskie – Studi Polacco-Italiani Di Toruń”, Toruń 2013, vol. IX, p. 129.

⁶⁷ See with respect to those criteria the judgment dated 6.10.2015, Consorci Sanitari del Maresme, C-203/14, EU:C:2015:664, point 23, the order Merck Canada, C-555/13, EU:C:2014:92, point 18 and the case law quoted there and also the judgement Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, C-377/13, EU:C:2014:1754, point 28. Similarly the judgement of 17.10.1989 concerning the case 109/88 Danfoss, Rec., p. 3199, point 7–9.

⁶⁸ See judgments dated 17.9.1997, Dorsch Consult, C 54/96, EU:C:1997:413, point 31; dated 16.12.2008 r., Cartesio, C 210/06, EU:C:2008:723, point 63 and point 1 of the operative part and dated 31.1.2013, HID and BA, C 175/11, EU:C:2013:45, point 88.

⁶⁹ See judgements dated 17.9.1997 Dorsch Consult, C 54/96, EU:C:1997:413, point 33.

⁷⁰ The judgement dated 27.4.1994 *Commune d'Almelo et al. v. NV Energiebedrijf Ijsselmij*, Case C-393/92, ECLI:EU:C:1994:17, point 23.

⁷¹ As in: judgements dated 16.2.2017, Margarit Panicello, C-503/15, EU:C:2017:126, point 71; dated 19.9.2006, Wilson, C 506/04, EU:C:2006:587, point 50.

⁷² See judgements dated 16.2.2017, Margarit Panicello, C-503/15, EU:C:2017:126, point 72; dated 19.9.2006, Wilson, C-506/04, EU:C:2006:587, point 52 and dated 22.12.2010, RTL Belgium, C-517/09, EU:C:2010:821, point 40; similarly judgement dated 6.6.2000, Abrahamsson i Anderson, C-407/98, EU:C:2000:367, points 34–37 and the order dated 14.5.2008, Pilato, C-109/07, EU:C:2008:274, point 24.

have no interest in a specific settlement of the dispute except for strict application of laws⁷³.

The external aspect of independence assumes the protection of the adjudicating body against the external interference and pressure which could threaten the independence of judgment exercised by its members with respect to the heard disputes⁷⁴. In this context it is necessary to verify if a given court performs its functions totally independently, without being subject to any chains of command or subordinate to anybody and does not obtain any orders or guidelines from any source⁷⁵, which protects it against any interference and external pressure which could threaten the independence of judgement of its members⁷⁶. Both direct or indirect pressure is unacceptable.

This type of guarantee of independence requires also the existence of the rules, in particular concerning the composition of the body, appointment, term of office and reasons for exclusion on demand or for statutory reasons and dismissal of its members which allows the parties to the proceedings to dispense any doubts concerning the independence of such a body from external factors and its neutrality with respect to conflicting interests⁷⁷. Simultaneously, it is clearly underlined that the necessary independence from this kind of external factors requires certain personal guarantees for the judges, e.g. their irremovability⁷⁸.

A test of six conditions versus the Polish legal order

The changes taking place recently in the Polish legal order in the period from 2015–2018 raise a question whether we can still talk about the judicial power and what are the conditions for its exercise. This purposefully must lead to a conclusion aiming at transformation of an abstract text into a specific examination of the Polish situation. This

⁷³ As in: the judgement dated 19.9.2006, *Wilson*, C-506/04, EU:C:2006:587, point 52; similarly the judgement dated 6.6.2000, *Abrahamsson i Anderson*, C-407/98, EU:C:2000:367, point 32.

⁷⁴ See judgements dated 16.2.2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, point 74; dated 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, point 50 and 51 dated 22.12.2010, *RTL Belgium*, C-517/09, EU:C:2010:821, point 39; and the order dated 14.5.2008, *Pilato*, C-109/07, EU:C:2008:274, point 23; similarly the judgement dated 6.6.2000, *Abrahamsson and Anderson*, C-407/98, EU:C:2000:367, point 34. See similarly the judgements dated 4.2.1999 concerning the case C-103/97 *Köllensperger and Atzwanger*, Rec. pp. I-551, point 21, and dated 6.6.2000 concerning the case C-407/98 *Abrahamsson and Anderson*, Rec. pp. I-5539, point 36; see also similarly the judgement of ECHR dated 28.6.1984 concerning the case *Campbell and Fell v. the UK*, series A No. 80, § 78.

⁷⁵ See the judgement: *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, point 22.

⁷⁶ Judgements: *Wilson*, C-506/04, EU:C:2006:587, point 51; *TDC*, C-222/13, EU:2014:2265, point 30.

⁷⁷ See judgements dated 16.2.2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, point 74; the order dated 14.5.2008, *Pilato*, C-109/07, EU:C:2008:274, point 24 and the case law quoted there; judgement dated 31.1.2013, *HID and BA*, C-175/11, EU:C:2013:45, point 97.

⁷⁸ See the judgement: *Wilson*, C-506/04, EU:C:2006:587, point 51; *TDC*, C-222/13, EU:2014:2265, point 30. Similarly the judgement dated 22.10.1998 concerning joint cases C-9/97 i C-118/97 *Jokela and Pitkäranta*, Rec. pp. I-6267, point 20. For this issue see also the judgements concerning the case *Dorsch Consult*, point 36; *Köllensperger and Atzwanger*, point 20–23, and *De Coster*, point 18–21; see also similarly the judgement of ECHR dated 26.10.1984 concerning the case *De Cubber v. Belgium*, series A No. 86, § 24.

context provokes a direct question: do Polish courts meet the abstract test of six conditions of *Associação Sindical dos Juizes Portugueses*. Deliberations should begin with constitutional regulations which so far have not been changed. Under S. 1 of Poland's constitution, the Republic of Poland is the common good of all the citizens. It constitutes a democratic state of law implementing the principles of social justice (S. 2 of the Constitution of Poland). Under S.4 of the Constitution of the Republic of Poland it is the nation which holds the superior authority. The nation exercises its power through its representatives or directly. Under S. 10 of Poland's constitution, the political system of Poland is based on division and balance of executive, legislative and judicial power and Courts and Tribunals constitute a separate and independent authority (S. 173 of Poland's constitution). National Council of the Judiciary safeguards the independence of courts and sovereignty of judges (S. 186 of Poland's constitution). Political power (legislative and executive one) shall act on the basis of law and within its limits (S. 7 of Poland's constitution) and such limits are defined inter alia in S. 235(4) of Poland's constitution which provides for that Constitution may be changed by the Sejm with a resolution adopted with at least majority of 2/3 votes in the presence of at least half of the statutory number of MPs and the Senate with absolute majority of votes in the presence of at least half of the statutory number of senators. Pursuant to S. 10 of Poland's constitution judicial power is exercised by courts and tribunals. Judicial power is exercised by independent (S. 173 and 186 of Poland's constitution) and sovereign courts (S. 45(1) of Poland's constitution). The status of judges as those personally holding judicial power is defined inter alia in S. 178–181 of Poland's constitution as well as in the provisions of the Act on the System of Courts of Common Jurisdiction dated 27.7.2001⁷⁹ (S. 55 et seq.). The issue of independence of the judiciary and sovereignty of judges as well as contradictory character of the proceedings generates conflicts, especially with respect to the said test of six conditions, in the context of deep changes in the Polish justice administration system which started in 2015. This reorganization was initiated by legal acts adopted by the Sejm of the 8th term, i.e. the Act on the Amendment to System of Courts of Common Jurisdiction and certain other acts, dated 12.6.2017⁸⁰, the Act dated 8.12.2017 on the Amendment to the Act on National Council of the Judiciary⁸¹, and also the Act dated 8.12.2017 on Supreme Court⁸² and other amendments thereto. This includes also earlier changes in the Constitutional Tribunal which gave a practical possibility to change the administration of justice without the

⁷⁹ Consolidated text Journal of Laws of 2018, item 23 as amended; hereinafter called: LSCCJ.

⁸⁰ Journal of Laws of 2017, item 1452.

⁸¹ Journal of Laws of 2018, item 3.

⁸² Journal of Laws of 2018, item 5; hereinafter called: Act on SC.

amendment to the Constitution, which wouldn't be possible in this way without the peculiar deactivation of the constitutional safety valve, which, in the light of the test of six conditions, may be considered with respect to the statutory basis for functioning. Apart from those changes, other changes took place, initiated by the new act Law on Prosecutors which became valid on 4.3.2016 where the position of the Prosecutor General was merged with the Minister of Justice (who still is a MP representing the ruling party), reorganization of prosecutor's offices was made (including replacement of persons holding positions) or a special Internal Affairs Department of the National Prosecutor's Office was created, which affects in criminal and civil cases the condition of contradictoriness. In the context of contradictoriness principle we should also emphasize the changes in criminal proceedings, initiated by the Act dated 11.3.2016 on Amendment to Criminal Procedure Code and Certain Other Acts, limiting the contradictoriness of the proceedings or the changes in criminal proceedings planned in this scope. The number of changes, their depth and way of legislative implementation results in the necessity to evaluate them comprehensively in the test of six conditions.

1. Statutory basis for functioning of the body and application of law

In this aspect we should analyze the first of the test conditions, namely the real and not **ostensible statutory basis for functioning of the body**, in particular in case of doubts concerning the activity of a body which in fact may find the lack of such basis in the form of Constitutional Tribunal which as the only body in Polish legal order has such a competence. The literature shows a new phenomenon of "inability to challenge the compliance of the changes with the Constitution in the proceedings before the Constitutional Tribunal"⁸³. The first legislative changes applied to the Constitutional Tribunal. Legislative changes determined the composition of the CT and those not having legal character referred to real activities. In particular, contrary to s. 190(2) of Poland's constitution, its judgements were not announced. Then the President failed to administer an oath from the duly elected⁸⁴ judges and, as a result, they were not admitted to adjudicating in the Tribunal. The Sejm replaced them with other judges, so-called stand-in judges who said about themselves that they represent the government⁸⁵. Next four judges selected by the Sejm of the previous term of office were in practice eliminated from adjudication. The new President of CT, *Julia*

⁸³ *M. Matczak*, A letter of prof. Marcin Matczak to the judges of General Court of the European Union, see: <https://verfassungsblog.de/10-facts-on-poland-for-the-consideration-of-the-european-court-of-justice/>

⁸⁴ See the judgement of CT dated 3.12.2015, Legalis.

⁸⁵ See the speech of prof. *L. Morawski*, a member of CT at: <https://www.youtube.com/watch?v=3p5egncsjm4>

*Przylębska*⁸⁶ or her newly appointed deputy, *Mariusz Muszyński*, without apparent reasons and grounds changed the composition of the adjudicating panels. What is more, contrary to the rule *nemo iudex in causa sua*, the newly appointed judges adjudicated in their own in cases concerning their appointment. As a consequence, such constitutional bodies as Human Rights Defender, The National Council of the Judiciary and the President of the Supreme Court withdrew their constitutional complaints being of the opinion that in reality CT is not a real constitutional body. Wherefore in the context of evaluation the first question arises: is the first condition met in lack of the controlling body despite the existence of the real basis with a specific name, and if it is doubtful, who should determine it? The criterion of the statutory basis of the functioning of a body assumes that such a body will function under the binding provisions of the law which, firstly, should be compliant with the national constitution and compliant with the European law. In addition, in this context the criterion of application of law becomes doubtful taking into account such situations as refusal to publish judgements and their subsequent publication with a reservation: "The decision issued in breach of the provisions of the Act dated 25.6.2015 on Constitutional Tribunal concerned a normative act which lost its legal effects"⁸⁷, „manual” change of composition⁸⁸, adjudication in your own case or speaking publicly in media about the content of judgements before they were published.

2. Contradictoriness of the proceedings and sovereignty

a) Contradictoriness of the proceedings, sovereignty of judges and independence of courts⁸⁹

With respect to the contradictoriness of the proceedings the main objections are raised by already implemented reform of the criminal proceedings and the planned reform of the civil procedure⁹⁰ in the context of the implemented systemic changes.

In terms of sovereignty, it is necessary to make a preliminary organizational comment. In the Polish legal system both the literature and the case law use the term of “sovereign

⁸⁶ In terms of doubts concerning the correctness of her election.

⁸⁷ See: https://wiadomosci.onet.pl/kraj/opublikowano-zalegle-wyroki-trybunalu-konstytucyjnego/17vxs15?utm_v=2&utm_medium=nitro&utm_campaign=allonet_nitro_new&srcc=ucs&utm_source=wiadomosci_viasg

⁸⁸ See: <https://www.rp.pl/Sedziowie-i-sady/305249947-Fundacja-Batorego-Manipulujac-skladami-TK-Julia-Przylebska-lamie-prawo.html>

⁸⁹ The literature underlines that “the sovereignty of judges cannot exist without the independence of the judiciary. The split of these two may lead to subordination of the judicial power and turning it into a tool abused by the authorities. Each political power wants to have real influence on courts and strives for their subordination. However, what distinguishes a democratic state from a totalitarian state is the balance of powers and the guarantees ensuring not only sovereignty of the judiciary but also independence of courts. Institutional subordination of courts to executive authorities reduces the level of social trust in independence of the judges and, as a consequence, in the administration of justice exercised by the courts”(see *Stanisław Dąbrowski*, Nie ma niezawisłych sędziów bez niezależnych sądów, see: <https://prawo.gazetaprawna.pl/artykuly/730315.prezes-sadu-najwyzszego-nie-ma-niezawislych-sedziow-bez-niezaleznych-sadow.html>)

⁹⁰ Project from 27.6.2018 r., No. UD309.

judge” and “independent court”, whereby, what is important, this differentiation resulted from the interference of the executive power in judicial power. In the Polish literature a scope-limited 19th-century narrow definition of the notion of sovereignty has not been clearly redefined so far, despite the fact that we live in 21st-century. In this period the concept of independence of courts (broader sovereignty of courts) and narrower sovereignty of judges was created. Independence of courts is located in the area of separateness from other powers and should be implemented inter alia in awarding judgements and initially limited thereto (later it was noticed that also in the administrative area), as a consequence, sovereignty of judges appeared only in the adjudication aspect⁹¹. This subject was touched upon when this paradox and the dependence of judicial power on the administrative facilities of the executive power were spotted. The “non-sovereign sovereignty” and “logical absurd” consisting in the fact that “in the sphere of adjudication and decision-making *de iura* the sovereignty is allowed, but outside this sphere, independence from administration ceases even *de iure*”⁹². The words of *I. Kondratowicz* partially apply to this case; he wrote: „Courts as a body of a sovereign nation, in the light of constitution, are fully sovereign, and each of the judges is sovereign only in functioning in judicial position, but in reality they are dependent with respect to the administration and instances on the fully sovereign collectivity (a court) whose members they are”⁹³. The author formulated a thesis that the sovereignty of courts means that „(...) without reservations, so also administratively, and not like individual judges - being sovereign only in administering judgements”⁹⁴. Thus the concept of independence of courts (broader sovereignty of courts) and narrower sovereignty of judges, which is still acceptable, was created. The first one may and should be implemented in the sphere of administering judgements (in the sphere of postulates in administrative one), the second one – only in the adjudication sphere. It was underlined that taking the above into consideration, there should be only one conclusion – the judges are, and in fact they should be, subordinate in the administrative sphere to independent court administration”. It was underlined that as the courts were supposed to be truly independent of the executive power and politics, as S. 2 was adopted about the third independent judicial power, then this power should be exercised by a unit or body which is totally sovereign, and not a minister which is replaced by another one

⁹¹ As in: *B. Wisznicki*, O usprawianie działalności sądów, „Głos Sądownictwa”, 1930, p. 348, *J. Jamontt*: W obronie władzy sądowej, Warszawa 1924, p. 11.

⁹² As in: *J. Jamontt*, Historia i krytyka rozporządzenia o ustroju sądów powszechnych, Warszawa 1928, pp. 6–7.

⁹³ *I. Kondratowicz*, Zawieszenie nieusuwalności sędziów, „Gazeta Sądowa Warszawska” 1929, p. 286. The provision then introducing the division of powers was worded as follows: “The superior authority in the Republic of Poland shall be held by the Nation. The legislative bodies representing the nation include the Sejm and the Senate; in terms of the executive power – the President of the Republic of Poland together with the respective ministers; in terms of the administration of justice – sovereign Courts (Constitution of the Republic of Poland dated 17.3.1921, Journal of Laws, No. 44, item 267).

⁹⁴ *Ibidem*.

every few months and is dependent and politically responsible⁹⁵. These concepts of the interwar period gave rise to a simplified and incomplete in the post-Communist period after 1989 identification of the court independence principle with the sphere of case law and connection of the judge's independence with refraining from interfering into independent interpretation effected by a judge on condition he will use the linguistic interpretation only⁹⁶ and on this basis and of the facts of the case he will administer judgements. This limit – as the present time suggests – was too oversimplified. The constitution of 1997 was supposed to be a sufficient guarantee for the status of the administration of justice⁹⁷. Although formally the system transformation took place through the change of the Constitution in 1997, it was not consistently continued, there was no constructive discussion and practice, in particular in terms of axiology of transformation⁹⁸, or systemic inter-relations between the powers⁹⁹. Consequently, heading towards 19th-century positivist concept that the judge only is the “mouth of legislation”, the 20th-century discussion was skipped concerning the role of judicial power, allowing for more and more intervention, in terms of quantity and depth, of the Ministry of Justice into the operation and functioning of the courts. This statement explaining the historic determinants forms the basis for definition what in fact should be incorporated in the definition of the courts’ independence, judicial sovereignty, in particular in the aspect of the status of the judge and the court as the adjudicative body. Contemporary literature underlines the permanent relation of those two elements, it shows that “sovereignty of judges cannot exist without the independence of courts. The split of these two may lead to subordination of the judicial power and turning it into a tool abused by the authorities. Each political power wants to have real influence on courts and strives for their subordination. However, what distinguishes a democratic state from a totalitarian state is the balance of powers and the guarantees ensuring not only sovereignty of the judiciary but also independence of courts. Institutional subordination of courts to executive authorities reduces the level of social trust in independence of the judges and, as a consequence, in the administration of justice exercised by the courts”¹⁰⁰.

⁹⁵ J. Jamontt, *Historia i krytyka...*, *op.cit.*, p. 8.

⁹⁶ T. Stawecki, *Niezależność zawodów prawniczych i rządu prawa w społeczeństwie [in:] Niezależność sądownictwa i zawodów prawniczych jako fundamenty państwa. Wyzwania współczesności*, edited by: T. Wardyński, M. Niziołek, Warszawa 2009, p. 58.

⁹⁷ A. Machnikowska, *O niezawisłości sędziów i niezależności sądów w trudnych czasach. Wymiar sprawiedliwości w pułapce sprawności*, Warszawa 2018, p. 236 et seq.

⁹⁸ See P. Dutkiewicz, *Problem aksjologicznych podstaw prawa we współczesnej polskiej filozofii i teorii prawa*, Kraków 1996.

⁹⁹ See Z. Ziemiński, „Lex” a „Ius” w okresie przemian, „Państwo i Prawo” No. 6/1991, p. 3 et seq.

¹⁰⁰ See S. Dąbrowski, *Nie ma niezawisłych sędziów bez niezależnych sądów*, see: <http://prawo.gazetaprawna.pl/artykuly/730315.prezes-sadu-najwyzszego-nie-ma-niezawislych-sedziow-bez-niezaleznych-sadow.html>

In the 21st-century what is the sovereignty and independence of courts is defined by the authority to judge¹⁰¹ whose essence is disputed by positivists or postmodernists. In the theory of law there are numerous discussions devoted to discursive mechanisms of solving conflicts, and within the frames of these mechanisms there is the authority to judge attributed to a given judge. Irrespective of the assumed mode of solving disputes and conflicts, the sovereignty in this context is a value not subject to any limitations or gradation whose existence is defined by the formula “yes-yes, no-no”. In the descriptive aspect the positive side includes “dependence of the judge”¹⁰². It is assumed that under the constitution it is dependence on the constitution and statutes, but also on the type of used interpretation and also on the basic values of the legal order and the administration of justice, so undoubtedly it does not include any subordination in this aspect to any chain of command or subordination to anybody or receiving any orders or guidelines from any source. We cannot agree at all, taking into consideration of current concepts of “the judicial power”, that independence relates exclusively to administering judgements, and it has a broader aspect. This stance is supported by the case law of European courts. The notion of sovereignty which forms the integral part of judging among others requires the adjudicative body to be a third party in relation to the body which issued the challenged decision¹⁰³.

The principle of judge's sovereignty results in the Polish legal system directly from S. 178(1) of the Constitution and is regarded by the representatives of the doctrine as one of the fundamental elements of the Polish administration of justice¹⁰⁴. Constitutionlists indicate that the sovereignty of the judiciary together with other principles define the status of the judge affecting the position of the judicial power in the national system¹⁰⁵. It is the essence of a democratic legal state, *sin qua non* condition of implementation of the principle of power separation and one of the basic conditions for using by an individual the rights of recourse to court¹⁰⁶. In the Polish legal system two issues are crucially important when defining the sovereignty. Firstly, the definition of legal limits of holding the position of a judge, subordination of the judge only to statutes and Constitution are taken into account. Constitution and statutes define the scope of judge's sovereignty and indicate the limits that cannot be shifted. With respect to statutes it should be noted that this assumption is made

¹⁰¹ See *B. Wojciechowski*, *Dyskrecjonalność sędziowska. Studium teoretycznoprawne*, Toruń 2004.

¹⁰² *A. Rakowska-Trela*, *Independence, discretion and arbitrariness the limits of administering justice*, Gdańsk 2017, edited by *A. Machnikowska*, p. 43 et seq.

¹⁰³ See the judgement dated 19.9.2006, *Wilson*, C 506/04, EU:C:2006:587, point 49; see similarly in particular the judgements dated 30.3.1993 concerning the case C-24/92 *Corbiau*, Rec. pp. I-1277, point 15; dated 30.5.2002 concerning the case C-516/99 *Schmid*, Rec. pp. I-4573, point 36.

¹⁰⁴ See *M. Serwaniec* [in:] *Z. Witkowski*, *Prawo konstytucyjne*, edited by *A. Bień-Kacala*, Toruń 2015, p. 461; *L. Garlicki*, *Polskie prawo konstytucyjne*, 2015, p. 335; *A. Szyszka* [in:] *Konstytucyjny system władz publicznych*, edited by *P. Chmielnicki*, p. 236 et seq.

¹⁰⁵ *Konstytucja RP. Vol. II. Komentarz do art. 87–243*, edited by *M. Saffjan*, *L. Bosek*, Warszawa 2016.

¹⁰⁶ *Ibidem*.

taking into account that the legislator is reasonable. Secondly, the position of a judge should be free from any external pressure, in particular any guidelines or direct or indirect orders¹⁰⁷. Here we distinguish between its subjective and objective aspect¹⁰⁸. The subjective aspect of sovereignty underlines its strictly personal character connected with the person of the judge as it relates to intrinsic emotions and experience of the judge who must have unlimited sensation of freedom from any pressure¹⁰⁹. The objective aspect of sovereignty concentrates on the external reception of sovereignty and means that the judge should be perceived in society as a person fully free from any influence in the scope of administration of justice¹¹⁰. In CJ's case law it is assumed that the sovereignty of judges includes five basic elements:

- impartiality with respect to the parties to the proceedings;
- independence from non-court bodies;
- independence of the judge from authorities and other court bodies;
- independence from the influence of political factors, especially political parties;
- independence of the judge¹¹¹.

In turn the independence of courts, treated as a constituent feature of the judicial power, is undoubtedly one of the most crucial guarantees of the subjective rights of an individual¹¹² and an ingredient of the rule of law. Traditionally the independence of the judiciary was perceived through its relation to other powers, especially the executive and legislative powers¹¹³. However, the process of marginalization of the doctrinal approach to the independence of the courts, observed in Poland (but also in other countries) for years, together with technocratic limitation of its scope led to a new attitude to the issue of systemic and political positioning of courts¹¹⁴. It is indicated that the classic triple division of powers is undergoing serious modifications, not to mention the fact that it is becoming a legal fiction¹¹⁵, replaced with monism of the executive and legislative powers, jointly defined as “political power”. It means that the stress has to be shifted in philosophy and legal theory from a traditional model of relation between the judicial power and the other power under the

¹⁰⁷ *Ibidem*.

¹⁰⁸ *L. Garlicki*, Article 178 [in:] *L. Garlicki*, *Konstytucja*, vol. 4, p. 9.

¹⁰⁹ The judgement of CJ dated 24.10.2007, SK 7/06.

¹¹⁰ The judgement of CJ dated 20.7.2004, SK 19/02.

¹¹¹ As *inter alia* in the judgment of CJ dated: 24.6.1999., K 3/98, 14.4.1999, K 8/99, the judgement of CJ dated 9.3.2016, SK 47/15.

¹¹² See *T. Ereciński, J. Gudowski, J. Iwulski*, *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa*, Warszawa 2009, p. 223, *W. Sanetra*, *Sądy powszechne i Sąd Najwyższy jako władza sądownicza* [in:] *Trzecia władza. Sądy i trybunały w Polsce*, edited by *A. Szmyt*, Gdańsk 2008, p. 97 et seq.

¹¹³ See instead of many others: *K. Markiewicz*, *Nadzór Ministra Sprawiedliwości nad sądami i sędziami – de lege lata i de lege ferenda* [in:] *Aurea praxis aurea theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, Vol. 2, edited by: *J. Gudowski, K. Weitz*, Warszawa 2011, p. 2918 et seq.

¹¹⁴ *A. Machnikowska*, *op. cit.*, p. 38.

¹¹⁵ See *R. Malajny*, *Zasada podziału władz a system rządów parlamentarnych*, PiP No. 12/ 2009, p. 16.

Montesquieu's principle of the triple division of power to a model of the rule of law in the context of the guarantee of protection of rights and freedoms of individuals. Pursuant to this concept the degree of protection of independence of courts should be directly connected with the implementation of the right of citizens to independent and sovereign court, which simultaneously legitimizes the legal order¹¹⁶. The independence of courts guarantees the implementation of rights and freedoms of citizens in conflicts with political power¹¹⁷. Marginalization of the judicial power may happen only to the detriment of citizens. This modified concept seems to be supported by the case law of ECHR¹¹⁸. Adoption of this concept excludes the implementation of the traditional concept identifying the principle of independence of courts with inter alia the adjudication sphere, as clearly the provision of valid remedy and legal protection of individuals is connected with broadly defined administration of justice, and not only administration of judgements itself. That is why it should include not only the decision-making process but also all factors which affect this decision-making process and the conditions in which the decision is made. It is also necessary to ensure institutional guarantees of independence of courts so that they, as bodies of Polish state having authority based on S. 4 and 174 of the Constitution (although not established as a result of direct elections), could implement the judicial power.

In practice the independence of courts and sovereignty of judges is directly shaped by: principles of appointing, promoting and delegating judges with particular focus on the legal status of the institutions taking decisions in this scope as well as regulations referring to assistant judges, principles of irremovability of judges and stability of office, principles of judge's liability, principles of administrative internal and external supervision and judicial supervision, regulations and competences of judicial self-government and the principles referring to court administration, in particular with respect to organization of courts and management of courts, principles of allocating cases and assessment of judges' work¹¹⁹. I leave this to be decided by the readers whether all the implemented changes allow for regarding courts as still independent, and guaranteeing the judges sovereignty.

b) Changes of provisions referring to courts of common jurisdiction in years 2015–2018 and the independence of courts and sovereignty of judges and contradictoriness of proceedings

¹¹⁶ See *J. Habermas*, *Between Facts and Norms. Contributions to a Discursive Theory of Law and Democracy*, Cambridge 1996, p. 144.

¹¹⁷ Compare *V.C. Jackson*, *Judicial Independence: Structure, Context, Attitude*, in: *Judicial Independence* [in:] *Transition*, edited by *A. Seibert-Fohr*, Heidelberg, New York, Dordrecht, London 2012, p. 46.

¹¹⁸ See instead of many the judgement of ECHR dated 29.4.1988 the case of *Belilos v. Switzerland*.

¹¹⁹ Compare *A. Machnikowska*, *op. cit.*, p. 55.

Apart from the said legislative changes, the adopted statutes changing the Acts on SC and the National Council of the Judiciary implemented further solutions affecting the independence of courts, in particular the most important ones include the change how members of the National Council of the Judiciary are appointed and the competences of this body, and as a result, changes in the procedure of nominating and appointing judges and dismissing the judges before the end of term of office, with respect to the disciplinary proceedings, extraordinary complaints, new structure in the Supreme Court or implementation of non-professional lay judges to the Supreme Court. After the changes affecting CT, SC and NCJ many actions were taken to further limit an ordinary judge of a court of common jurisdiction. In the context of the recent changes in this aspect it should be only underlined that through the changes in the Act on the Supreme Court made by virtue of the Act dated 10.5.2018 on Amendment to the Act – Law on System of Courts of Common Jurisdiction, Act on the Supreme Court and certain other acts¹²⁰, the new institution of extraordinary complaint was changed through its limitation, which in fact did not result in elimination of its defects. A general rule was introduced saying that the complaint may be lodged if it is necessary for ensuring the compliance with the principle of democratic legal state reflecting the principle of social justice, additionally if the decision breaches the constitutional principles, freedoms and rights of individuals, the decision grossly breaches the law or there is an obvious conflict of findings of the court with the content of the evidentiary material collected in the case. Still the implementation of the extraordinary complaint has not been adjusted to other legislative solutions as it still collides explicitly with the functions of cassation complaint and a minor legislative correction still fails to change it. In Poland for many years there has been a system of challenging final and binding decision in civil matters in the form of: a complaint for declaring a legally binding decision unlawful, cassation complaint and the application for revision of the proceedings and in criminal case: cassation and application for revision. The basis for a complaint includes not only situations when the decision breaches the principles or freedoms and rights of individuals and citizens defined in the Constitution but when the decision grossly breaches the law (mistake as for the law) or there is explicit conflict between the material findings of the court with the evidentiary material collected in the case (improperly established facts of the case). Those criteria are general clauses whose interpretation is supposed to be provided by lay judges. In this context in no way the most important defect was eliminated, namely that the assessment of the criterion of mistake as for the law is not made by professional panel but non-professional one, and one of the members

¹²⁰ Journal of Laws of 2018, item 1045.

of the panel is selected by the Senate both in civil and criminal cases. It is both in civil and criminal cases a deviation from the hitherto used model of the Supreme Court as the court of law and regarding it also as the court of fact. The change in bodies which may lodge a complaint against the Prosecutor General (being at the same time the Minister of Justice) and the Ombudsman fails to remove the defects, but only makes them more serious. It should be underlined that in case of the Prosecutor General (Minister of Justice and a member of the co-ruling party) such a complaint may, due to e.g. social interest or state interest, be lodged against the individual interest of citizens (still there are no limitations in this scope). Citizens do not obtain directly any additional measure protecting their rights, it is another instrument inaccessible to citizens and serving other purposes. Consequences which may affect citizens in fact include limitation of their right of recourse to court through instability of judgments, which forms an element of the right of recourse to court. Also the change consisting in the fact that “If the conditions are met defined in S. 89(1) and the challenged decision led to irreversible legal consequences, in particular if from the day of making the challenged decision final and binding 5 years have elapsed, and also if the repeal of the decision breached international commitments of the Republic of Poland, the Supreme Court shall limit itself to finding that the challenged decision was issued in breach of law and indicating the circumstances due to which such a decision was issued unless the principles or freedoms and rights of individuals and citizens defined in the Constitution provide for the issuance of the decision referred to in S. 91(1)”. The decision of cassation character may still be applied (which should be fully eliminated and not left to be decided on the basis of general criteria). It is not that, as the said legislative solution could suggest, that the institution refers only to the protection of the correct interpretation of the Act and correct interpretation of the law due to public interest and the parties may not have benefits arising therefrom. It may be like this, but not necessarily. There is still a possibility of deprivation of the decision of its final and binding status for the last 20 years and of repealing it. Also with respect to prolongation of adjudication with respect to judges of the Supreme Court the President of the Republic of Poland, before granting consent to continuation of holding the position of the judge of Supreme Court, consults the opinion of the National Council of the Judiciary. National Council of the Judiciary gives its opinion to the President of the Republic of Poland within 30 days from the request of the President of the Republic of Poland for such an opinion. If the opinion is not delivered within the time limit referred to in the second sentence, the National Council of the Judiciary is deemed to have given a positive opinion. Issuing the opinion referred to in § 1a, the National Council of the Judiciary takes into account the interest of the

judiciary or an important social interest, in particular reasonable use of personnel of the Supreme Court or the needs resulting from entrusting the tasks to particular chambers of the Supreme Court”. This does not change the fact of dismissal of judges before the lapse of their term of office.

By virtue of the Act on Amendment to the Act – Law on System of Courts of Common Jurisdiction dated 11.9.2015¹²¹ in the Act dated 27.6.2001 – Law on System of Courts of Common Jurisdiction (Journal of Laws of 2015, item 133, as amended) after S. 177 a new section 177a was added which **enabled the Minister of Justice to join the proceedings in support of the Defendant in any case started by a judge, court director, court referendary or judge assistant for a property claim resulting from his employment relation**. Those provisions constitute limitation of judges’ sovereignty and independence of courts, and additionally participation of the Minister of Justice in support of one of the parties, who in principle exercises widely defined supervision over the judge, challenges the contradictoriness of such a procedure with respect to the test of six conditions. In this context for only organizational reasons it should be mentioned that the Act – Law on Prosecutors dated 28.1.2016¹²² amalgamated the function of the Minister of Justice and Prosecutor General in one person.

By virtue of the next Act on Amendment to the Act – Law on System of Courts of Common Jurisdiction dated 23.3.2017¹²³ **the change of the model of appointing and functioning of court directors was made**. The changes involve inter alia the changes: of the way of appointing directors through deviation from the requirement of holding a competition and appointing directors by the Minister of Justice (with the exclusion of any opinion of the judicial circles), in the scope of dismissal of directors – granting full discretion to the Minister of Justice in dismissing directors (the requirements of negative assessment, application of the president of the court or breach of obligations by directors – which was referred to in s. 32b of the Act – Law on System of Courts of Common Jurisdiction – were eliminated from the Act), in the scope of the competences of the judges to assess the work of a court director, in the scope of the competences of the president of the court and director of the court involving the necessity to accept the decision of the president of the court by the director of the court, which due to at least incorrect editing of the provision or due to the lack of knowledge how the courts function on the part of the legislators, creates a risk of intervention in matters concerning the way the work of the judge is performed. Directors are directly liable to the

¹²¹ Journal of Laws of 2015, item 1781.

¹²² Journal of Laws of 2016, item 177.

¹²³ Journal of Laws of 2017, item 803.

Minister of Justice. Additionally, the actions of the president of the court resulting in financial liabilities not included in the financial plan require prior acceptance of a given court director to be valid, except for the rulings concerning the court fees awarded by the court. It should be underlined that in such a situation it is the director who decides about the employment of an assistant and a secretary, rooms for the judges or motivation of employees through awarding prizes or expenses.

The next change took place by virtue of the Act on the National School of Judiciary and Public Prosecution, the Act – Law on System of Courts of Common Jurisdiction and Certain Other Acts dated 11.5.2017¹²⁴ as a result of which the National School of the Judiciary and Public Prosecution became dependent on the Minister of Justice. By virtue of the Act dated 10.7.2015 on Amendment to the Act – Law on System of Courts of Common Jurisdiction and Certain Other Acts¹²⁵ **the institution of assessor** was brought back to life which was removed following the judgement of Constitutional Tribunal dated 24.10.2007 (SK 7/06). The changes contained in the Act further modify the institution of assessor making it dependent on the Ministry of Justice and develop and partially modify this concept¹²⁶.

Another change was introduced by the Act on Amendment to the Act – Law on System of Courts of Common Jurisdiction and Certain Other Acts dated 12.6.2017 (of 2017., item 1452) which **severely widened the supervision competences of the Minister of Justice**, and, what is more, transferred them onto other entities, and also **changed the internal system of courts of common jurisdiction**, e.g. S. 9aa of the said Act. Thus the power of the Minister of Justice was granted to the secretary of State or Undersecretary of State in the Ministry of Justice, somehow contrary to the resolution of the panel of seven judges of the Supreme Court adopted on 17.6.2013 (III CZP 46/13)¹²⁷.

¹²⁴ Journal of Laws of 2017, item 1139.

¹²⁵ Journal of Laws of 2015, item 1224.

¹²⁶ In terms of the model of assessor and his dependence on Minister of Justice compare A. Machnikowska, *op. cit.*, pp. 288–316.

¹²⁷ In this resolution it was clearly stated that: “the Supreme Court, analyzing the transfer of the power by the guardian of the administrative body repeatedly found that competences of a public administration body – granted under a special provision, however not included into the public administration sphere – cannot be transferred to another person. In particular, in the resolution dated 5.4.2007, I PZP 3/07 (OSNP No. 21–22/2007, item 308) it was found that the transfer by the Minister of Justice to another person (secretary and undersecretary of the state) of competences to appoint and dismiss assessors is inadmissible, being of the opinion that appointing and dismissing assessors involves the exercise of *sensu stricto* judicial power so it exceeds the sphere of public administration and cannot be transferred to another person. The resolution refers to the commonly known, established, clear stance approved in the literature, held by the Supreme Court in this scope for many years and demonstrated in its decisions concerning competences awarded to various public administrative bodies under special provisions including the actions not belonging to the administrative sphere (compare inter alia resolution dated 27.9.1991, III CZP 61/91; OSNCP No. 4/1992, item 49, dated 22.12.1980, III CZP 38/80; OSNCP No. 7/1981, item 121, dated 10.10.1979, III CZP 65/79, OSNCP No. 3/1980, item 46 and dated 9.2.1974, III CZP 64/73, OSNCP No. 7–8/1974, item 121 and the judgement dated 19.3.1982, III CRN 35/82, unpubl.). For these reasons it should be stated that the power referred to in S. 75 § 3 in relation to S. 75 § 2 (1) of LSCCJ of transferring a judge to another place of work is held only by the Minister of Justice, so it cannot be transferred to another person, including secretary or undersecretary of state. This conflicts also with the principle of equivalence between the representatives of both executive and judicial power. It is clear that the position of a judge whose status derives directly from the Constitution and decision of Poland’s President based on the resolution of the constitutional body, namely the National Council of the Judiciary is regarded as higher than the secretary or undersecretary of state - officials not included in the Council of Ministers and not belonging to government administration. They form an element of a political (managerial) structure, as helpers of the minister assisting in managing the ministry; they are the closest co-workers of the minister and the highest officials of the ministry but they cannot be attributed a function of state bodies as they perform their tasks on

Secondly, in S. 11 in § 3 LSCCJ the third sentence was deleted. The change of the provision eliminating the possibility of the binding objection of the committee to the candidate for the chairman of the division weakens the collective body of the judicial self-government, and at the same time strengthens the position of the president derived from the nomination and dependent directly on the Minister of Justice. This is connected with s. 18(2) of the transitional provisions which requires the presidents of courts to review within six months the functional positions of the chairmen of divisions, vice-chairmen of divisions, heads of sections and also visitors in the courts subordinate to them and in this period makes it possible to dismiss the chairman of the division, vice-chairman of the division, head of sections and visitor. In fact it allows for review of the functional positions by new presidents¹²⁸.

Thirdly, the way of allocating actions was changed and in fact the possibility of transferring the judge to another division was facilitated under S. 22a § 4a–4c LSCCJ.

Fourthly, the way of appointing the presidents defined in S. 23–25 LSCCJ was changed through the transfer of all the power to appoint the presidents of courts of all instances and deprivation of bodies of judicial self-government of all the power in this scope. The minister of Justice may also dismiss the presidents (modified S. 27 LSCCJ). A new condition was added as a basis for dismissal of the president: “especially low effectiveness of work in the scope of the administrative supervision or organization of work in court or courts of lower instance”, which constitutes a subjective condition. The role of the National Council of the Judiciary in its current shape is doubtful. Additionally under S.18(1) of the introductory provisions a competence of the Minister of Justice – almost fully arbitrary – was provided for in the scope of dismissing the presidents of courts within 6 months. It should be noted that even in the legal standing applicable before 1989 the Minister of Justice had before dismissing the president of court consult a representative body in the form of a court committee and the practice of dismissing presidents of courts on the basis of the said practices

behalf of and by authority of the minister. For these reasons **the decision concerning directly the status of a judge and territorial scope of the judicial power - deeply penetrating the principle of power division (S. 10(1) of the Constitution) – may not be transferred to another person by the Minister of Justice. Taking it, the Minister of Justice bears personal liability, both legal and systemic, which he cannot eliminate or transfer to another person.** It was said also that: “the position of a judge whose status derives directly from the Constitution and decision of Poland’s President based on the resolution of the constitutional body, namely the National Council of the Judiciary, is regarded as higher than the secretary or undersecretary of state – officials not included in the Council of Ministers and not belonging to government administration. They form an element of a political (managerial) structure of the ministry (...)”.

¹²⁸ On the basis of these provisions the new president of the Regional Court appointed under S. 27 of the said Act dismissed *Beata Donhoffner-Grodzicka*, the chairwoman of the criminal division of the District Court Kraków-Śródmieście in which the criminal action was pending concerning a doctor under private accusation by inter alia the Minister of Justice *Zbigniew Ziobro*, and also in July she stood in the first row of protesters against the changes imposed by the government controlled by Law and Justice party. Compare the way this practice functions: <https://krakow.wyborcza.pl/krakow/7,44425,23258434,prezes-krakowskiego-sadu-odwolala-przewodniczaca-wydzialu-karnego.html>

and appointing new presidents by the political power in the period from August 2017 to February 2018 raises common reservations as breaching the independence of courts¹²⁹.

Fifthly, the changes in the assessment of the annual information on courts' operation and the presidents' rewarding and punishment system (s. 37 g, S.37ga, S.37h LSCCJ) internal regulations of courts functioning (S.41 LSCCJ), the principles of granting access to the case files (S.53 c LSCCJ.) were made, which extended the competences of the Ministry of Justice.

Sixthly, the provisions on visitation, e.g. S. 37d LSCCJ were changed: the mode of electing visitors through the transfer of competence to make binding decisions in this matter from the committee (judiciary body derived from election) to the Minister of Justice being at the same time Prosecutor General. Ministry of Justice has full control over the selection of visitors and thus may indirectly, through the selection of the people evaluating and shaping adjudication practices in courts, influence the way of adjudication.

Seventhly, the position of training managers was liquidated (S.29§1(1) and S.31§1(1) LSCCJ) fully transferring this competence to the National School of Judiciary and Public Prosecution. It means that at present the way of training judges is fully controlled by the institution managed by a person selected by the Ministry of Justice.

Eighthly, random allocation of cases was introduced (S.47a LSCCJ). Random allocation of cases should not in principle be criticized but it should be indicated that it is at present unverifiable. The Ministry consistently fails to reveal the source code of the system – neither at the request of non-governmental organizations or at the request of MPs¹³⁰. So it is impossible to say how this system functions and how the cases are allocated. The said system is fully controlled by the Minister of Justice who as a General Prosecutor may potentially be a party to any civil and criminal proceedings.

Ninthly, the accelerated system of promotion was introduced (S. 64 LSCCJ) through a possibility of being promoted directly from the district court to appellate court, with the condition of having adequate length of service.

Tenthly, an obligation was introduced for the judge to inform the president of the court about his participation in a training or attending any other form of professional development courses, if he stays more than one day out of town where the court he works in is located (art.82a§5 LSCCJ).

¹²⁹ See the report of the Helsinki Foundation for Human Rights, *Od kadr się zaczyna. Zmiana prezesów i wiceprezesów sądów powszechnych w okresie od sierpnia 2017 r. do lutego 2018 r.* See more: <http://www.hfhr.pl/wp-content/uploads/2018/04/HFPC-Od-kadr-sie-zaczyna.pdf>

¹³⁰ On 29.1.2018 the complaint of ePaństwo Foundation was lodged against the Minister of Justice in the Province Administrative Court. The Minister thinks that the source code of the system is not public information. The foundation wants it to be revealed. The dispute will be settled by the court. See: <https://www.tvn24.pl>

Eleventhly, the scope of property declaration was extended in the scope of their publication and a new form was introduced. Declarations of judges are available online.

Twelfthly, the change of S. 69 § 1 of the Act – Law on System of Courts of Common Jurisdiction adopted on 12.6.2017 (Journal of Laws of 2017, item 1452) in combination with the amendment to the Act dated 16.11.2016 on Amending the Act on Retirement and Disability Pension from Social Insurance Fund and Certain Other Acts (of 2017, item 38), which became effective on 1.10.2017, led to automatic retirement of women-judges at the age of 60. This amendment was repealed, which does not change the fact that some women were forced to retire at the age of 60 in lack of the decision on prolongation. The practical application of this provision was that the Minister refused to let the women continue adjudicating¹³¹.

By virtue of the Act on Amendment of the Act on the National Council of the Judiciary and Certain Other Acts dated 8.12.2017¹³² **the provisions applying to the National Council of the Judiciary were changed**, modifying the way it is elected and competences. Under S. 3 of this Act in the Act dated 27.6.2001 – Law on System of Courts of Common Jurisdiction¹³³ in S. 106i § 8 was worded as follows: „§ 8. If the National Council of the Judiciary within two months from the day the list and application referred to in § 7 are presented fails to lodge an objection, assessor shall act as a judge for the period of 4 years from the lapse of a two-month period, and in case the objection is lodged, from the day the resolution containing the objection is repealed”.

The last change which became effective on 3.4.2018 is described in the Act on the Supreme Court dated 8.12.2017 (Journal of Laws of 2018, item 5) in S. 108 of this Act and refers in particular to **new disciplinary proceedings**. A new model of disciplinary proceedings with respect to judges but also other legal professions assumes the subordination of the disciplinary proceedings to the Minister of Justice and significant modification of the procedure model and substantive solutions.

A new model of disciplinary proceedings provides for the possibility of carrying out the disciplinary proceedings despite excused absence of the accused judge or his defence counsel, which in fact eliminates the possibility of presenting any arguments by the judge in his defence. It grossly breaches the basic rules of fair trial, including the constitutional principle to defend, namely under S. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the reasonable request of the accused judge

¹³¹ Compare: <http://prawo.gazetaprawna.pl/artykuly/1098291.nieprzedluzanie-sedziom-okresu-orzekania.html>

¹³² Dz.U of 2018, item 3.

¹³³ Journal of Laws of 2016, item 2062, as amended.

who cannot take part in the disciplinary proceedings due to sickness, the president of the disciplinary court or the disciplinary court appoints ex officio defence counsel for him. At the same time the actions connected with appointment of the defence counsel and starting the defence by him do not suspend the proceedings. In the new model of the disciplinary proceedings numerous procedural regulations were introduced which are less favorable for the judge than those existing in the normal criminal case. Such doubtful solutions include inter alia: introduction of limitation: through limiting the judge's right to defend by giving him 14 days for lodging evidentiary motions on pain of disregarding them, non-application of the rule *ne peius*¹³⁴ with respect to the judges in the disciplinary proceedings (see S. 454 of the Code of Criminal Procedure) (which means that the appellate disciplinary court may sentence the accused judge who was deemed innocent in the first instance or with respect to whom the action in the first instance was discontinued or conditionally discontinued), regulations allowing for continuation of procedural steps in the disciplinary proceedings in case the judge or his defence counsel failed to appear and there is no evidence that they were notified about it. Peculiar procedural solution should also be noted, in particular introduction of 24-hour summary procedure to hear applications for permission to hold the judge criminally liable or temporarily detain the judge who was caught red-handed while committing some crimes and introduction of the immediate enforceability of the resolution in this matter. What should be fiercely criticised is the solution under which failure of the defence counsel to appear in the session concerning the case for lifting the immunity does not stop the application from being recognized. Such a regulation contradicts judge's right to defend, breaches the principle of contradictoriness in the disciplinary proceedings, and directly threatens the sovereignty. Also the adjudicative panels in the Supreme Court in the disciplinary proceedings were extended to include lay judges elected by the higher chamber of parliament – the Senate. It means that the lay judges deciding on the disciplinary liability of the judges, including their disqualification from this profession, will be elected by active politicians. A lay judge does not need to have legal education but completion of secondary education is sufficient. The amendment significantly extends the power of the Minister of Justice who also has been the General Prosecutor since 2015. Above all since 3.4.2018 the Minister of Justice has been empowered to select the disciplinary ombudsman of the judges of courts of common jurisdiction and his two deputies at his own discretion. The Minister of Justice being at the same time the General Prosecutor gained specific procedural competences as he may appeal against the order on discontinuance of the proceedings to the disciplinary

¹³⁴ See art. 454 CCP.

court in cases in which he made an application for initiation of the disciplinary proceedings and also he may lodge an objection to the order of the disciplinary ombudsman on the refusal to initiate the disciplinary proceedings and to any other order on the discontinuance of the proceedings. This may be doubtful from the point of view of equal rights of the parties and also may affect the sovereignty of the judges. The amendment grants the Minister of Justice arbitrary rights to nominate the judges for sitting in the disciplinary court, which is also connected with increased salary.

The changes implemented by this S. 108 Act on the Supreme Court dated 8 December 2017 (Journal of Laws of 2018, item 5) included the addition to S. 86 LSCCJ of § 3a–3d which introduced a new non-constitutional basis for resigning from the office of a judge.

The same approach is reflected in another obligation (in this way interpreted by the Ministry) imposed on the judges to submit declarations on holding exclusively Polish citizenship. And this declaration may not be limited to stating that the judge/assistant judge has Polish citizenship but must clearly state that he has only one Polish citizenship” – this is how the letter begins which was sent by the Ministry of Justice to the presidents of appellate courts. It is connected with the new regulation under which a judge holding another citizenship than Polish will be disqualified from adjudicating unless he renounces it by 4 October this year¹³⁵.

Next by virtue of the Act dated 12.4.2018 on Amendment to the Act – Law on System of Courts, Act on the National Council of the Judiciary and the Act on the Supreme Court the way of appointing and dismissing the presidents of courts was changed and new composition of committees was introduced. Before dismissing the president the opinion of the court committee, namely the body selected by the judicial self-government, has to be consulted. This opinion will not be binding but the minister may appeal against the opinion of the National Council of the Judiciary which is not beneficial for him. NCJ may reject ministerial application with 2/3 of votes, namely 17 votes. With respect to committees, the representation of the biggest group of district court judges was increased as each district court should select one member of the committee and in case of a regional court – two judges. Additionally the president and the first vice-president sit on the committee *ex officio*. However, there are no transitional provisions which would say what to do with the pending terms of office of the previous committees.

¹³⁵ Journal of Laws of 2018, item 5.

Next by virtue of the Act dated 11.5.2018 on Amendment to the Act – Law on System of Courts, the Act on the Supreme Court¹³⁶ and certain other acts changes were made in the Act dated 27.6.2001 – Law on the System of Courts, in the Act dated 8.12.2017¹³⁷ on the Supreme Court and¹³⁸ Act dated 12.5.2011 on the National Council of the Judiciary¹³⁹. In particular under S. 106i § 1 is worded as follows: Assessors shall be appointed by the President of the Republic of Poland for unlimited time, at the request of the National Council of the Judiciary, and the words “Minister of Justice” used in § 2 and 3 in various grammatical cases shall be replaced with the words “President of the Republic of Poland” used in the relevant grammatical cases”, the Assessor shall act as a judge for 4 years from taking the office of assessor.” The changes consists in transferring the competence from the Minister of Justice (with the possibility of objection from the National Council of the Judiciary) to the President who shall nominate assessors at the request of NCJ. The difference in appointing the judges lies in the fact that in case of assessor there is no free competition but there is only a list created on the basis of the results of the exam taken in National School of Judiciary and Public Prosecution.

As a result of the discussion on the legality it has to be underlined that the planned changes in all the areas, especially in the law on the organization of common courts, have illusive character and only serve the purpose of ostensible discussion at the European level.

Summary

The analyzed judgment may open a new era of europeanization of the court law, similarly as it happened within the frames of europeanization of procedures so that the national systems can apply the European law and grant protection to the Europeans. It reflects the discussion over the future of court proceedings and shape of the national systems of judiciary¹⁴⁰, and in a broader aspect, the shape of the judicial power in the 21st century. This decision gives the CJ a tool to set limits of the judicial power through determination of the standards of administration of justice. In this context paraphrasing a metaphor used in the area of europeanization of the civil procedure it may turn out that determination of a general standard of the notion of a “court” reflecting common European values will not be a smooth process but rather a rocky road¹⁴¹. Demarcation of such a path in the Polish situation must

¹³⁶ Journal of Laws of 2018, item 1045.

¹³⁷ Journal of Laws of 2018, item 23 as amended.

¹³⁸ Journal of Laws of 2018, item 5, 650, 771, 847 and 848.

¹³⁹ Journal of Laws of 2018, item 389 and 848.

¹⁴⁰ B. Hess, The State of the Civil Justice Union [in:], *op. cit.*, p. 19.

¹⁴¹ See. A. Nylund, B. Krans, The European Union and national civil procedure – a rocky road or a smooth proces ? [in:] The European Union and National Civil Procedure, Intersentia, Cambridge 2016, p. 1 et seq.

take into consideration the fact that Poland is a post-communist country, which leads to specific threats in the scope of antidemocratic tendencies. However, I must agree with the statement that Poland as one of the post-Communist countries is still undergoing transformation from the post-Communist systems of administration of justice and of procedure into “western ones”¹⁴². An additional hampering factor in Member States consists in the lack of knowledge concerning the European law and awareness of the judges that they are European judges, which now in practice translates into the quality of application of the European law¹⁴³.

The analyzed judgment undoubtedly may constitute a stimulation for defining the role of the European judiciary in the democratic life of the old continent determining its crucial role in the integration process. In this context sooner or later the abstract test will become concrete and the CJUE will have to answer the questions whether in the context of the changes in the period 2015–2018 the courts in Poland are still independent and adjudicating judges are guaranteed to have sovereignty. We may enquire whether and when this adequate moment will take place and what will prompt the test to change from abstract one to concrete one. Today the comprehensive character of changes, their depth and way of application raise question about the nature of the Polish courts as European courts¹⁴⁴. Such doubts should be dispersed immediately before the lack of independent courts and sovereign judges being subordinate to the political power and tacit approval of “replacement of the judicial adjudicating and managing personnel” upon every change of the political power will become an irreversible standard. Judges each day enter the courtroom and administer judgments in the name of the Republic of Poland and through them they implement their judicial power. It is not without any significance for the European order how the judicial power will be exercised, especially if we assume full stability of decisions and their mutual recognition. The case law of the European judiciary – CJUE, ECHR, and in particular national courts applying the European law must meet certain standards – so that getting involved in the integration process, having certain status, they could express the real nature of democracy¹⁴⁵. It requires active operation of the European courts and assessment of the test of six conditions in case of Poland not only in the indicated context but also taking into account such fundamental issues

¹⁴² A. Nylund, B. Krans, Conclusions and outlook [in:] *The European Union and National Civil Procedure*, Intersentia, Cambridge 2016, p. 165.

¹⁴³ *Ibidem*, pp. 165–166.

¹⁴⁴ See Report of the Special Rapporteur on the independence of judges and lawyers *Diego García-Sayán* on his mission to Poland, see: <https://www.iustitia.pl/2249-report-of-the-special-rapporteur-on-the-independence-of-judges-and-lawyers-diego-garcia-sayan-on-his-mission-to-poland>

¹⁴⁵ Compare E. Kuzelewska, D. Kloza, I. Krasnicka, F. Strzyczkowski, European integration, democracy and the courts [in:] *European judicial systems as a challenge for democracy* [in:] *European Integration and Democracy Series*, No. 3/2018, p. VII.

as democratic legitimacy, the principle of subsidiarity, responsibility and predictability, but above all legality, stability of judgments and mutual trust between Member States. This question does not relate only to the Polish system of justice but to the issue what the status of the European justice system stand in ten years time¹⁴⁶.

¹⁴⁶ See *B. Hess*, The State of the Civil Justice Union [in:] *op. cit.*, p. 19.