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Composition of the National Council of the Judiciary in the light of the Constitution of the Republic of Poland of 2 April 1997

Pursuant to Article 187(1) of the Constitution of the Republic of Poland of 2 April 1997,[241] the National Council of the Judiciary is composed of:

1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a person appointed by the President of the Republic of Poland,

2) fifteen members elected from among the judges of the Supreme Court, common courts, administrative courts and military courts,

3) four members elected by the Sejm from among its members (deputies) and two members elected by the Senate from among its members (senators).

At the same time, the Constitution determines that the term of office of the elected members of the National Council of the Judiciary shall be of four years (Article 187(3)).

The organisational structure, the scope of activity and work procedures of the National Council of the Judiciary, as well as the manner of electing its members is specified by statute (Article 187(4)).

Undoubtedly, the National Council of the Judiciary is a central constitutional body[242] of a collective nature (it consists of several members). This is clearly determined by Article 187(1) of the Constitution,[243] which defines the composition of the body. The Council is of mixed character, bringing together the representatives of all three branches of power (the legislative, the executive and the judiciary), but the dominant position is held by the representatives of the judiciary, as 17 out of 25 members of the National Council of the Judiciary are judges (not only the 15 elected members are judges, but the First President of the Supreme Court and the President of the Supreme Administrative Court are naturally judges as well). Given the presence of the

241 Journal of Laws [Dz.U.] 1997, No. 78, item 483 as amended.

242 Judgment of the Polish Constitutional Court of 19 November 2009, Case K 62/07, OTK A 2009, No. 10, item 149.

243 Judgment of the Polish Constitutional Court of 16 April 2008, Case K 40/07, OTK A 2008, No. 3, item 44.

representatives of the legislative and the executive, the National Council of the Judiciary cannot be perceived as a judicial authority.[244] A view that the composition of the National Council of the Judiciary may be described as 'complex' should be accepted.[245]

The literature states that the National Council of the Judiciary may be characterised as administrative/self-governing/political[246] in its nature, but it should be emphasised that its 'most political' component is a group consisting of members elected by the Sejm from among deputies and two members elected by the Senate from among senators.[247] I share the opinion that, given its diverse composition (Article 187(1) of the Constitution), the National Council of the Judiciary is inherently complex and cannot be seen as a judicial authority. A view to the contrary cannot be defended[248] in the light of Article 10(2) of the Constitution, under which the judiciary power is vested in courts and tribunals. There is no reference to the National Council of the Judiciary in the provision in question. This opinion cannot be undermined by the fact that in Chapter VIII of the Constitution, entitled *'Courts and Tribunals'*, there are footnotes relating to the National Council of the Judiciary (see Articles 186 and 187). The activities of the National Council of the Judiciary are related to the judiciary and it is only the National Council of the Judiciary that is entitled to submit to the President of the Republic a request for the appointment to judicial office (Article 179 of the Constitution), but this does not mean that the Council itself is a judicial authority. It is simply a body without which the judiciary in the Polish constitutional reality cannot function properly, and it was for this reason that the provisions on the Council are included in Chapter VIII of the Constitution.

244 L. Garlicki, Polskie prawo konstytucyjne. Zarys wykładu [Polish Constitutional Law. An outline for a lecture], Warsaw 2015, p. 334.

245 P. Winczorek, Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Commentary to the Constitution of the Republic of Poland of 2 April 1997], Warsaw 2000, p. 242.

246 W. Skrzydło, Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary], Zakamycze 1999, p. 199.

247 Ibidem.

248 Among others A. Bałaban, Krajowa Rada Sądownictwa – regulacja konstytucyjna i rola w systemie władzy sądowniczej [National Council of the Judiciary – constitutional regulations and its role within the judiciary system, [In:] Sądy i Trybunały w Konstytucji i w praktyce [Courts and Tribunals in the Constitution and in practice], ed. W. Skrzydły, Warsaw 2005, p. 87.

The National Council of the Judiciary cannot be perceived as a body of judicial self-government[249] because it includes representatives of the legislative and the executive among its members. On the other hand, the composition of the Council is strongly dominated by judges, who can be described as the 'representatives of the judicial community'. Therefore, it cannot be denied that the Council is a public and self-governing representation of the judicial community.[250] This does not undermine the idea that the Council is a constitutional State body. It is a State body indeed, but it is clearly outweighed and dominated by the representatives of the judicial community. This is how the composition was shaped in the Constitution. It should only be said that the members of the Council who represent the judicial community will be not only the representatives of its interests, but they will also represent the State›s interest and with this interest in mind they will safeguard the independence of courts and judges (see Article 186(1) of the Constitution).

A view that the National Council of the Judiciary is a body with a specific term of office, elected for a four-year term,[251] cannot be deemed entirely correct. The term of office applies only to the *'elected members'* of the National Council of the Judiciary, which is implied by Article 187(3) of the Constitution, and not to all of its members. The First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice are members of the Council throughout the duration of their terms, while the person appointed by the President of the Republic of Poland is a member of the Council for an unspecified period of time.[252] The part of Article 187(3) of the Constitution which refers to *'elected members of the National Council of the Judiciary'* should be read together with Article 187, subsections (1), (2) and (3) of the Constitution, as the framers of the Constitution used the term *'elected'* there and this solution refers to fifteen members who are judges, four who are deputies of the Sejm and two who are senators. This is of vital importance. The National Council of the Judiciary is a constitutional body, and while it has not been created with any specific term of office, but the terms of certain offices apply to some of its members. I agree that the National Council

249 Ibidem.

250 A. Wasilewski, Władza sądownicza w Konstytucji RP [Judiciary in the Constitution of the Republic of Poland], "Państwo i Prawo" ["The State and the Law" 1998, No. 7, p. 10.]

251 W. Skrzydło, Konstytucja… [Constitution…], p. 199.

252 I. Wawrzeńczyk, Prezydent Rzeczypospolitej Polskiej a organy władzy sądowniczej – uwagi porządkujące [President of the Republic of Poland and the judiciary bodies – explanatory notes, "Przegląd Prawa Publicznego" ["Review of Public Law"], 2014, No. 11, p. 7 et seq.

of the Judiciary as a collective body is not subject to any term of office, but it is a body that 'functions uninterruptedly' as there is no provision in the Constitution referring to a term of office of the National Council of the Judiciary.[253] It would be contrary to the Constitution to establish in an ordinary statute (*ustawa*) that the term of office of all members of the National Council of the Judiciary lasts four years. This would contradict the explicit wording of Article 187(3) of the Constitution, as it would ignore the reservation that the term of office applies exclusively to *'elected'* members of the National Council of the Judiciary, and not to all of its members.

It is correct to believe that the Constitution does not provide for the option of dismissing an elected member of the National Council of the Judiciary before the expiry of the term of office.[254] There is no provision in the Constitution that could provide grounds for any decision to this effect. The literature emphasises however that, due to the Council›s position as a *sui generis* representation of environments and institutions, this would not interfere with the nature of the body. A dismissal procedure must be clearly regulated by statute and dismissals may only be made by the same entity that had elected a given member, and never by the Council itself.[255] I share this view. As the Constitution does not prohibit the dismissal of the Council's members, and given the specific character of the body and the inclusion of the representatives of the judicial community (Article 187(1)(2) and the Parliament (Article 187(1)(3) in its composition, it is possible to introduce to the statute an ordinary procedure for the dismissal of an elected member of the Council. Under such circumstances, as seen from an individual perspective, a member›s term of office would not be four years. However, it is necessary to make a distinction between the very concept of the term of office and *'the expiry of the mandate'* held by an elected member, which is explained below. As a result, it must be pointed out that in the ordinary statute, it is possible to regulate the expiry date for a mandate of an elected member of the National Council

253 R. Pęk, [In:] R. Pęk, M. Niezgódka – Medek, Krajowa Rada Sądownictwa. Komentarz [National Council of the Judiciary. Comment], LEX 2013, thesis 1 to Article 14.

254 B. Banaszak, Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary] Warszawa 2009, p. 822; L. Garlicki, [In:] Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary], Warsaw 2005, vol. 8 to Article 187; judgment of the Polish Constitutional Court of 18 July 2007, Case K 25/07, OTK A 2007, No. 7, item 80.

255 L. Garlicki, [In:] Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary], Warsaw 2005, thesis 8 to Article 187.

of the Judiciary such a that it falls before the end of the term of office.[256] The Constitutional Court, in its K 25/07 judgment of 18 July 2007, emphasised that the elected members of the Council cannot be dismissed during their four-year term of office (p. 9 of the statement of reasons), but the Court's note mentioned that *'there is no provision providing for their dismissal in the Constitution'*. It should be taken into account, however, that the Constitution does not include any details on the start and end of the term of office of an elected member of the National Council of the Judiciary[257], and it fails to mention *'the expiry of the mandate'* of an elected member of the Council, while such situation is not precluded under the Constitution. If the rational framers of the Constitution had intended to exclude the possibility of terminating the mandates of the Council›s elected members, this would have been done explicitly. In fact, no solution to this effect exists. Indeed, it would be irrational, as it would mean that, for instance, it would be impossible for an elected member to resign, thus amounting to forced membership in the Council. This solution would certainly not be perceived as compliant with the Constitution, as it would breach the requirement of respect for human dignity referred to in Article 30 of the Constitution, to which the right to resign from a public function is related. It is a significant subject matter which cannot be left to practice only, and for this reason it should be regulated in the statute referred to in Article 187(4) of the Constitution. Therefore, it is the ordinary statute that should include a provision defining the commencement of the term of office so that it is possible to specify precisely (by indicating a specific date) when the elected nominee's membership in the Council begins. Article 187(3) of the Constitution does not suggest that it is impossible to have the elected member's mandate *'terminated'*. The same provision states that *'the term of office lasts four years'*. This means that the ordinary statute cannot define the term of office otherwise, i.e. regulate its length, for example shortening (e.g. to 3 years) or extending it (e.g. to 6 years). This would expressly contradict the wording of the cited provision of the Constitution. The term of office has been defined absolutely and rigidly without any margin of discretion in terms of its duration. The very concept of the *'term of office'* should be however distinguished from *'the expiry of the mandate'* of an elected member of the Council. These two distinct legal concepts, as confirmed by the explicit wording of the Constitution that uses, with respect to the elected Council›s members, the

256 See: B. Banaszak, Konstytucja …[Constitution...], p. 822.
257 Ibidem, p. 821.

notion of the '*term of office*' instead of '*mandate*', which means that in view of the prohibition of synonymous interpretation, different notions should not be assigned the same meanings. It should be pointed out that the Constitution is not unfamiliar with the idea of mandate; for instance in Article 103(1) there is a reference to a *'mandate of a deputy'*, separate from the terms of office of the Sejm and the Senate (Article 98)(1) of the Constitution). The Constitution fails to provide a legal definition of the '*term of office*' of the elected members of the National Council of the Judiciary, but only defines its duration. It should go without saying that the '*term of office*' should be understood as a period for which a given person is elected as a member of the Council, i.e. a period in which this person will perform their rights and obligations arising from being elected a member of the Council. In this sense, the '*term of office*' is objective in nature and its duration in a specific case must satisfy the requirement referred to in Article 187(3) of the Constitution. A person is elected for such period, which is fully justified by the wording of the constitutional provision in question. The mandate, in turn, is an authorisation for a Council's member to perform obligations and exercise rights.[258] As long as the Constitution does not use the notion of mandate and does not provide for conditions of its expiry, it should be assumed under Article 187(4) of the Constitution that this is a matter to be regulated by an ordinary statute. This is a matter apparently covered by the *'procedures of work'* of the National Council of the Judiciary. The notion includes also the exercise of the right to act as a member of the Council by a person elected as a member of the Council, including but not limited to the commencement and the end of the legitimacy to perform obligations in the Council as a collective body. Consequently, the ordinary statute may specify cases in which the elected Council member's mandate expires. The mandate begins upon the commencement of the term of office, but it can also expire before the term of office ends. '*The expiry of the mandate*' does not mean denying the very rule of the term of office as referred to in Article 187(3) of the Constitution, because under such circumstances there is no derogation from the term-of-office principle. For any elected member of the Council, the term of office was defined to last four years and they were appointed for this period, but the mandate may expire earlier if the conditions specified in the statute arise. As it is emphasised in the literature, the mandate, as a rule, only

258 M. Niezgódka – Medek, [In:] M. Niezgódka – Medek, R. Pęk, Krajowa Rada Sądownictwa... [National Council od the Judiciary], thesis 4 to Article 14.

expires at the end of the term of office, but it is possible to have it terminated in cases envisaged by the statute.[259]

To sum up, it cannot be said that the Constitution absolutely precludes the idea of terminating the elected member's mandate. There is no prohibition to this effect. In terms of positive obligations, the duration of the term of office is specified, but the conditions under which the mandates of the Council's elected members expire before the end of the term of office are not regulated. From the perspective of Article 187(3) of the Constitution, it must be states that the basic law assumes, as a rule, the four-year term of office for the elected members of the National Council of the Judiciary, but it does not preclude the possibility of defining in an ordinary statute circumstances which may lead to the expiry of the member›s mandate before the end of the term of office. It should therefore be said that '*the term of office*' is specified in an objective manner, determined by the period arising from the Constitution, while '*the expiry of the mandate*' arises from specific statutory conditions. In the current legal *status quo*, an ordinary statute, namely the Act of 12 May 2011 on the National Council of the Judiciary,[260] in its Article 14(1) states that '*the mandate of an elected member of the Council expires prior to the end of the term of office*' and enumerates six circumstances which result in the expiry of a member›s mandate. The same solution existed in the now repealed Act of 27 July 2001 on the National Council of the Judiciary,[261] the difference being that in the previous act, seven reasons for the expiry of the elected member's mandate were named (Article 10(1)). Both legal acts, the Act of 2001, which is no longer in force, and the currently applicable Act of 12 May 2011, use the same notion whereby '*the mandate of an elected member of the Council expires prior to the end of the term of office*'. The difference is that in the Act of 2001, it was specified that the expiry of the mandate would occur prior to the expiry of the '*four-year*' term of office. In both cases, an ordinary statute provides (provided) for the expiry of the Council member's mandate, which means that if any of the conditions mentioned in the statute was satisfied, this resulted in the termination in practice of the Council member's term of office prior to its expiry due to the '*expiry of the mandate*'. From a normative point of view, it was impossible for the Council members whose mandates had expired to continue their terms of office. However, this does not amount to undermining the term-of-office

259 M. Dębska, Ustawa o Krajowej Radzie Sądownictwa. Komentarz [Act on the National Council of the Judiciary. Commentary], Lexis Nexis 2013, comment to Article 14.

260 Consolidated text, Journal of Laws [Dz.U.] 2018, item 389.

261 Consolidated text, Journal of Laws ([Dz.U.] 2010, item 11, as amended.

principle, because the term of office could not simply subsist despite the loss of the mandate. It was the loss of the mandate that determined the end of the possibility of further membership in the Council, despite the person having been elected for the four-year term of office. There was no claim in the literature to the effect that the provision envisaging the expiry of the mandate of an elected member of the Council is unconstitutional.[262]

In its 18 July 2007 judgment in Case K 25/07, the Court did not question the solution whereby an ordinary statute enumerates the conditions of '*the expiry of the mandate*' (s. 12 of the statement of reasons). At the same time it indicated that extraordinary, constitutional and reasoned circumstances of a specific regulation may possibly justify a breach of the principle of the term of office (p. 12 of the statement of reasons to the judgment). The above implies that, firstly, the Court accepted the possibility of regulating the conditions of '*the expiry of the mandate*' by means of an ordinary statute, and it did not absolutely reject the possibility of an earlier termination of the elected Council members' terms of office prior to the end of the four-year term of office. Indeed, in such circumstances the principle of the term of office would be breached. But to accept any reasoning to the contrary would mean that in no case and under no circumstances would it be possible to terminate the term of office of a member of the Council, even in a situation that objectively prevents such members from performing their duties, as well as in the situation of circumstances justifying the termination of the elected members' terms of office, for instance due to a fundamental change in the functioning of the Council, including the shaping of its composition and its mode of work that make it significantly different from any prior applicable solutions. It is implied by the judgment of the Constitutional Court of 18 July 2007 in Case K 25/07 that the mandate of an elected member of the Council may '*expire*', which is a different situation than the shortening of the body›s term of office or '*the expiry of the mandate*' with respect to all elected members of the Council. In the latter case, extraordinary circumstances must arise to justify the breach of the principle of the term of office. The coexistence of the two situations means that '*the expiry of the mandate*' of an individually named member of the Council is nothing extraordinary, but it is essential that the mechanism is linked to spe-

262 See, for example, T. Ereciński, J. Gudowski, J. Iwulski, Komentarz do prawa o ustroju sądów powszechnych i ustawy o Krajowej Radzie Sądownictwa [Commentary on the act on the system of ordinary courts and the act of the National Council of the Judiciary], ed. J. Gudowskiego, Warsaw 2002, ss. 532-535.

cific circumstances set forth in the statute that constitute an objective obstacle to the performance of duties.

In view of the above considerations, it may be noted that the concept of the '*expiry of the mandate*' of an elected member of the National Council of the Judiciary is not contrary to Article 187(3) of the Constitution. It may exist on the basis of an ordinary statute which specifies reasons for (conditions of) the expiry of the mandate. It is also possible to introduce a general mechanism envisaging '*the expiry of the mandate*' of all elected members of the Council. Naturally, Article 2 of the Constitution must be complied with and the principle of proportionality must be taken into account. A ground for the expiry of the mandate must be specific and relevant, while the provision providing for such mechanism cannot unreasonably interfere with the functioning of the National Council of the Judiciary. Under the current legal order, Article 14(1) of the Act of 12 May 2011 on the National Council of the Judiciary defines the conditions for '*the expiry of the mandate*' of an elected member of the Council. The conditions named therein are of individual nature and must be established in any specific case, which means that the provision applies to specific people sitting on the Council. As pointed out earlier, the Constitution does not preclude another general solution allowing for the '*the expiry of the mandate*' of all elected members of the Council, as well as those belonging to one of the groups referred to in Article 187(1)(2) or (3) of the Constitution, as no prohibition in this regard has been expressed, nor can any be derived from the principle of the term of office. The principle of the term of office does not preclude an early termination of the mission (mandate) of elected members of the Council. The legislator may significantly change the manner in which the Council functions by shaping it in a manner that is radically different than it was earlier, and which makes it necessary to consider whether the composition of the Council shaped under the previously applicable law is still sufficiently legitimate to perform its duties and obligations, given that at the date when its members were chosen, a significantly different regulation on the Council›s functioning applied. Any fundamental change in the philosophy of the Council›s functioning, combined with a change in the shaping of its composition in terms of elected members, may constitute a circumstance justifying the need to change the composition of the Council, as current members of the Council were elected under a different legal reality than the one which will apply after the aforementioned change enters into force. The burden of specifying the circumstances that justify the introduction of the mechanism lies with the entity entitled to submit a legislative proposal that exercises this

right. It is necessary to point out that in the earlier case-law, the Constitutional Court accepted '*the shortening of the term of office*' by legislative mechanisms, but limited this option to exceptional circumstances. According to the Court, it is possibly where this is not prohibited by a specific constitutional provision and if it is justified by specific circumstances.[263] It does not transpire from the Constitution which circumstances must arise for them to be regarded as '*specific*' within the meaning used above. It may be said that '*their specific nature*' may arise from their essence, character, scale, etc. A group of specific circumstances, which in isolation fail to satisfy the criterion of '*specific nature*', may lead to a situation in which the overall assessment leads to a finding of the '*specific nature*' of a given case. This is, however, a matter subject to interpretation, and it is impossible to specify rigid and clear-cut limits.

In my opinion it is not, as a rule, contrary to the Constitution to adopt a mechanism by means of an ordinary statute that assumes '*the expiry of the mandate*' of an elected member of the National Council of the Judiciary and any general mechanism in this regard. From the perspective of compliance with the Constitution, it will be important to specify which arguments related to the changes in the composition of the Council and its functioning will justify the necessity of terminating the mandate of current elected members. These must be fundamental changes which essentially affect the manner of appointing new members to the National Council of the Judiciary and the functioning of the Council as such. As the mandate of specific members of the Council is to expire, the new mode of appointing the members of the National Council of the Judiciary must significantly differ from the previous one and there must be grounds for introducing changes and for the termination of the mandate of current members during their term of office. Also, the very manner in which the Council functions must be significantly changed and an entirely new legal framework for this authority must be created. Since it is possible to dismiss a member of the Council, which was raised in the opinion, one cannot *a priori* rule out the possibility of terminating the mandate of the current elected members of the Council in the situation referred to above. It is worth mentioning that the literature referring to the Act of 2001, in which it was explicitly allowed to dismiss an elected member of the Council, points out that dismissal could happen under any circumstances and without stating reasons. What mattered was the will of the body expressed in a democratic

263 Judgment of the Polish Constitutional Court of 26 May 1998, Case K 17/98, OTK 1998, No. 4, item 48; Judgment of the Polish Constitutional Court of 23 March 2006, Case K 4/06, OTK A 2006, No. 3, item 32.

manner by the act of dismissal.[264] No reference to the principle of the term of office was made. The provision was not challenged in terms of its constitutionality and it was in force until another Act on the National Council of the Judiciary replaced it. Thus in addition, any essential change relating to the elected members of the National Council of the Judiciary and the mode of its functioning may justify '*the expiry of the mandate*' of current members who took part in the elections, naturally as long as the above criteria are satisfied. For the purpose of assessing constitutionality of specific mechanism, the concrete proposed legislative solution and their *ratio legis* will play a decisive role.

The National Council of the Judiciary has the following *ex officio* members: the First President of the Supreme Court, the Minister of Justice and the President of the Supreme Administrative Court. This may be clearly concluded based on Article 187(1)(1) of the Constitution. One person is, in turn, appointed. This is a representative of the President of the Republic of Poland. This can also be clearly concluded from Article 187(1)(1) of the Constitution of the Republic of Poland. Even though the basic law does not use the notion of '*representative*', given that the President of the Republic of Poland appoints a person to sit in the National Council of the Judiciary, it is reasonable to assume that this person represents the President, and therefore he or she is the President›s representative. It is true that it has been stated in the literature that the 'Constitution refers to the 'person appointed by the President of the Republic' and not to the President's representative,[265] but the fact that the Constitution fails to call the person appointed by the President his representative does not imply that such person is not a representative. The framers of the Constitution provided for the person appointed by the President of the Republic in the National Council of the Judiciary to ensure that the head of State has his say during the Council›s meetings, and to make it possible to present the position of the head of State in matters within the Council›s jurisdiction. This is why this 'person' is appointed, which fits the idea of representing the head of State in the National Council of the Judiciary. Certainly, it cannot be claimed that the person appointed by the President of the Republic of Poland is a member of the National Council of the Judiciary '*ex officio*'.[266] '*Ex officio members*' of the Council are those who hold specific functions. In con-

264 See, for instance. T. Ereciński, J. Gudowski, J. Iwulski, Komentarz … [Commentary…], p. 533.

265 M. Masternak – Kubiak, M. Haczowska, Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary, ed. M. Haczowska, Warsaw 2014, p. 474.

266 Also: W. Skrzydło, Konstytucja… [Constitution…], p. 199.

trast, when a person is appointed to the Council, the head of State must make a personal decision with respect to a specific individual, and without such decision, the person is not a member of the Council. Therefore, it cannot be said that the person sits in the Council '*ex officio*' since the *sine qua non* in this regard is the appointment made by the President of the Republic of Poland. The Minister of Justice or the First President of the Supreme Court are not appointed to sit in the National Council of the Judiciary, as they automatically acquire the status of a member of the National Council of the Judiciary when they take office; thus, the fact of taking office determines membership in the Council. The Minister of Justice, the First President of the Supreme Court and the President of the Supreme Administrative Court cease to be members of the Council as soon as they stop holding the office that entitles them to be a member of the Council.

The Constitution clearly states that the deputies chosen to sit in the National Council of the Judiciary are elected by the Sejm, while Senators are chosen by the Senate (Article 187(1)(3). Therefore, it is not only specified who can be elected to the National Council of the Judiciary (member of the Sejm and member of the Senate), but also which body elects such persons (the Sejm and the Senate, respectively). The Constitution is also clear on how many members of the Sejm are to be elected by the Sejm (four) and how many members of the Senate are to be elected by the Senate (two). The literature is correct in pointing out that the Parliament should be able to modify its personal decisions.[267] From this perspective, it is acceptable for the Sejm or the Senate to dismiss specific members of the National Council of the Judiciary elected by a given chamber. As already mentioned, the Constitution does not prohibit the dismissal of an elected member of the National Council of the Judiciary. However, no similar mechanism was provided for in the existing legal order, even though the legislator had the full right to create one. Therefore, in the existing legal order, it is impossible for the Sejm or the Senate to dismiss members of the National Council of the Judiciary elected among the members of the Sejm and Senate.

With respect to the main (largest) group of members of the National Council of the Judiciary referred to in Article 187(1)(2), the Constitution assumes that it is composed of judges ('*fifteen members elected from among judges*') by stating that they are elected '*from among judges of the Supreme Court*,

267 L. Garlicki, [In:] Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary]…, thesis 6 to Article 187.

common courts, administrative courts and military courts'). Based on the provision, the following conclusions should be reached:

- Fifteen members of the National Council of the Judiciary as referred to in Article 187(1)(2) of the Constitution are *'elected'*, which means that it is necessary to have *'elections'*, a procedure which is not defined by the Constitution. Therefore, the procedure for elections of *'elected'* members of the National Council of the Judiciary from among judges is regulated by an ordinary statute (Article 187(4) of the Constitution).

- It transpires from the Constitution that the group in question is elected *'from among judges'*, and therefore only a judge can be elected to sit on the National Council of the Judiciary on these grounds, not any person who satisfies the criteria of applying for judicial office but who does not hold one, i.e. not a person who has been appointed by the President of the Republic under Article 179 of the Constitution to hold judicial office or a retired judge. The Constitution introduces a clear distinction between *'a judge'* and *'a retired judge'* (for example Article 180(3) and (4)), which is why they cannot be perceived and treated in the same manner for the purposes of their eligibility to the National Council of the Judiciary; as a result, a retired judge cannot be elected to sit in the Council.

- It was enumerated that the National Council of the Judiciary should consist of judges of the Supreme Court, common courts, administrative courts and military courts, which literally means (due to the conjunction '*and*") that the judges of all these types of courts must sit on the Council, so it is impossible to accept a mechanism that will not ensure such representation in the Council. The question is, however, whether the above means that it is only necessary to ensure the possibility of electing members of the National Council of the Judiciary *'from among judges'* of the enumerated courts, or whether it should be assumed that as least one judge of a specific type of court must sit on the National Council of the Judiciary. On the one hand, accepting the latter interpretation would mean that if judges of a specific type of court are not interested in membership in the National Council of the Judiciary, the body could not function; on the other hand, accepting that it is enough to create conditions (*'to the extent practicable'*) for judges of specific types of courts to take part in the National Council of the Judiciary›s work could result in a mechanism whereby, for example, only judges of common courts would be in the Council or that there would be no judge from the Supreme Administrative Court. No one can be forced to assume a public office, including membership in the National Council of the Judiciary. On the other

hand, given that the Council submits requests to the President of the Republic of Poland for the appointment to judicial office in the Supreme Court, common courts, administrative courts and military courts (Article 179 of the Constitution), it is reasonable to have as members of the Council judges of all the types of courts referred to in Article 187(1)(1) of the Constitution. Ultimately, the interpretation that should be advocated is the one based on the assumption that the National Council of the Judiciary should be composed of the judges of the Supreme Court, common courts, administrative courts, military courts, which means that the manner of election as referred to in Article 187(4) of the Constitution should provide for the possibility of electing at least one judge from each of these courts, but to establish conditions for the uninterrupted functioning of the National Council of the Judiciary, due to its specific constitutional role referred to in Article 186(1) of the basic law, it is necessary to adopt a contingent mechanism 'just in case' of a lack of interest, for one reason or another, among judges from specific types of courts in holding membership in the National Council of the Judiciary. Only after it has been determined that there are no candidates from a specific type of courts should the mandate of a Council member be taken by a judge from another type of court. Adopting such a solution is necessary to create an optimum environment for the Council›s to function and perform its constitutional and statutory tasks. Certainly, the lack of any mechanism that would enable the Council to function if there is no interest in the Council›s work among judges from specific types of courts would contravene the effectiveness of a public institution as referred to in the preamble to the Constitution.

- Members are elected *'from among judges'*, but Article 187(1)(2) of the Constitution does not indicate which body (entity) is the one who elects them. Clearly, another solution has been used here than in point 3 where it was unequivocally stated that the choice is made by the Sejm and the Senate. In Article 187(1)(2), the electing entity is not clearly indicated. This means that the matter not only can, but should be regulated by an ordinary statute (Article 187(4) of the Constitution). Since the Constitution fails to indicate which body must elect members, the decision should be made by the legislator as it is the legislator who is supposed to specify, among others, *'the manner of electing'* (i.e. National Council of the Judiciary) *'its members'*), and if so, the concept of *'manner'* also includes the indication of the body which elects members, as the notion encompasses the mode of elections and detailed rules, while the mode of elections also covers the matter of which body is competent to elect a member.

- The Constitution does not suggest that *'the election from among judges'* is made by judges alone. It is true that the Constitutional Tribunal in its judgment of 18 July 2007 in Case K 25/07 held that the members of the National Council of the Judiciary *'may be judges elected by judges'* (p. 9 of the statement of reasons), but this position is not supported by the explicit wording of Article 187(1)(2) of the Constitution, especially when the provision at issue is juxtaposed with point 3 of the same Article and when it is observed that the Constitution specifies an entity which is supposed to make specific decisions in a very clear manner (see Article 194(2), Article 199(1), Article 205(1) or Article 209(1)). Pursuant to the principle of legitimacy (Article 7 of the Constitution), the competence to make decisions cannot be implied. At this point, it is necessary to quote the position represented by the Supreme Court in its judgment of 15 March 2011, III KRS 1/11, OSNP 2012, Nos. 9-10, item 131 that the constitutional regulation (Article 187(1)(2) of the Constitution) does not exclusively regulate the right of judges to elect fifteen members of the National Council of the Judiciary, but does state that members are elected *'from among the judges of the Supreme Court, common courts, administrative courts and military court'*. According to the Supreme Court, this is a source of explicit guidelines provided by the authors of the Constitution, with a link between the constitutionally shaped composition of the National Council of the Judiciary and the presence of judges (*'from among judges'*) who represent the Supreme Court and other courts, but it was not decided that such judges should be absolutely elected by judges themselves.

- The Constitution remains silent on how many judges of each specific category of courts are to be elected, and therefore it is an ordinary statute that specifies the proportions of seats for specific courts; simple arithmetic shows that it is impossible to adopt an equal share of judges from specific types of courts in the National Council of the Judiciary (15:4 equals 3.75); therefore, it may be assumed that the equality in the number of seats for specific categories of courts was excluded and it was assumed that the seats would not be divided equally among specific categories of courts.

Having regard to the above and to the text of Article 187(4) of the Constitution, I believe that the Constitution does not require that the members of the National Council of the Judiciary *'elected from among judges'* be elected exclusively by judges. If this had been the intention of the author of the Constitution, the wording of Article 187(1)(2) would be different. These days, for instance, the Constitution of the Kingdom of Belgium[268] explicitly assumes

268 Konstytucje państw Unii Europejskiej… [Constitutions of the EU Member States], pp.

that judges are elected to the Supreme Justice Council by their '*community*' Article 151 para 2 second sentence). There is no provision in the Constitution of the Republic of Poland of 2 April 1997 that would prevent the parliament's election in this regard, and it is possible that such elections will be held by the Sejm alone or by the Sejm upon the Senate's approval. This matter in Poland is regulated under an ordinary statute (Article 187(4) of the Constitution). An argument to the contrary would be that as long as the members of the Sejm to sit in the Council are elected by the Sejm, and the members of the Senate are elected by the Senate, judges should be elected by judges. This simple statement is undermined by the wording of Article 187(1)(2) and (3) of the Constitution. As already mentioned, the Constitution fails to name a body that elects members *from among judges*. This naturally does not prevent judges from making such elections, but it also suggests that it is not the only possible option. From the constitutional point of view, it is essential that the majority of the National Council of the Judiciary are judges. This solution raises no controversy since it explicitly arises from the very basic law itself. The Constitution combines the right to elect with a specific status of a given person, but it does not determine which body should elect members. It should be also pointed out that these days, there are solutions providing for the election by the Parliament of members to bodies that are responsible for appointing judges. Such a solution was adopted, for instance, in Article 95(2) of the Basic Law of the German Federal Republic.[269]

85-112.

269 Konstytucje państw Unii Europejskiej… [Constitutions of the EU Member States], pp. 519-563.