SECOND INSTANCE COURT'S BENCH COMPOSITION IN CIVIL PROCEEDINGS

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INTRODUCTION

The bench composition in civil proceedings is not only a technical issue, but has great systemic and procedural significance. Article 45(1) of the Constitution of the Republic of Poland lays down fundamental guarantees of a fair trial, which means that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. The organisational structure and jurisdiction as well as procedure of the courts shall be specified by statute (Article 176(2) of the Constitution).

Thus, the issue concerning which court will hear a case is especially important for parties to and participants in a proceeding because it concerns their most important procedural rights.[1] Designation of the composition of a court, compliance with granted territorial, subject matter related and functional jurisdiction, as well as the system of allocating cases and a bench composition are not only strictly formal matters but also directly affect the implementation of the right to a fair trial. A competent court within the meaning of Article 45(1) of the Constitution is the one that, in accordance with the provisions laid down in statutes, has the authority to hear a case based on the regulations concerning its subject matter related, territorial and functional jurisdiction, and in which a properly composed bench adjudicates

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1 Żyznowski, T., in: Wiśniewski, T. (ed.), *Kodeks postępowania cywilnego, Komentarz Vol. I, Artykuły 1–366*, Warszawa, 2021, p. 274; Jędrzejewska, M., Gudowski, J., in: Ereciński, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze*, Warszawa, 2012, p. 264; Jodłowski, J., in: Jodłowski, J., Resich, Z., Lapierre, J., Misiuk-Jodłowska, T., Weitz, K., *Postępowanie cywilne*, Warszawa, 2009, p. 163.

in conformity with its competence.[2] A properly composed court bench is also a fundamental guarantee of functional independence.[3]

In accordance with the constitutional principle of definiteness of the law in civil proceedings, a court composition, in the same way as its competence, is strictly determined in the provisions that result from the adopted model of dispute resolution, functional division of competence and conditions connected with ensuring efficiency of a proceeding. The issue concerning the actual court composition, i.e. whether it will be one-person or collective, has great procedural importance because the violation of those provisions may even result in invalidity of a proceeding.[4] On the other hand, however, these are regulations strictly connected with the economics of a proceeding. Thus, the issue concerning a court composition is not subject to a court's discretion but provisions usually regulate the composition of a court adjudicating on particular cases.

Already in the period before the COVID-19 pandemic, in civil proceedings before first instance courts, a one-person bench used to hear cases unless a special provision stipulated otherwise. On the other hand, in second instance courts, a collective bench was designated as a rule and a one-judge bench was an exception.

Act of 28 May 2021[5] amending Code of Civil Procedure introduced the rules determining a one-person bench composition not only in first instance but also second instance courts. Such a solution was adopted for the period of the pandemic for pragmatic reasons. However, the legislator left the regulation allowing a court president to designate a three-person bench unchanged (Article 47 § 4 CCP). Therefore, it seems interesting to consider to what extent this mechanism, which has been very rarely used in practice, will find its practical application and what the process of application of those provisions will finally look like in compliance with the guarantee of a fair trial and the principle of judicial independence. Some solutions arouse a lot of controversy and one can form an opinion that they interfere with judicial independence.

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[2] Sanetra, W., 'Sąd właściwy w rozumieniu Konstytucji RP', *Przegląd Sądowy*, 2011, No. 9, p. 13.

[3] Łazarska, A., *Rzetelny proces cywilny*, Warszawa, 2012, p. 181; Łazarska, A., *Niezawisłość sędziowska i jej gwarancje w procesie cywilnym*, Warszawa, 2018, p. 198 et seq.; Artymiak, G., 'Pojęcie, zakres, definicja zasady kolegialności w znaczeniu opisowym', in: Wiliński, P. (ed.), *Zasady procesu karnego. System Prawa Karnego Procesowego*, Vol. III, part 2, Warszawa, 2014, p. 1364; Defecińska, D., 'Skład sądu w cywilnym postępowaniu rozpoznawczym', *Przegląd Sądowy*, 1993, No. 6, p. 63 et seq.

[4] A court composition that is in conflict with the provisions results in invalidity of a proceeding; thus, for example, the Supreme Court resolution of 18.12.1968, III CZP119/68, OSNPG 1969, No. 4, item 23. Zembrzuski, T., *Nieważność postępowania w procesie cywilnym*, Warszawa, 2017, p. 232 et seq.

[5] Act of 28 May 2021 amending Act: Code of Civil Procedure and some other acts, Journal of Laws of 2021, item 1104 – hereinafter referred to as "the amendment".

1. FIRST AND SECOND INSTANCE COURT COMPOSITION BEFORE AND AFTER THE AMENDMENT

In general, a court composition can be determined to be one-person or collective depending on the type and mode of a case and the instance in which this case is heard, as well as the procedural model adopted in order to resolve a given type of disputes.[6] A one-person bench, as the term suggests, means that a judge adjudicates solo. When statute stipulates that more judges shall be involved in the performance of a given procedural activity, we deal with a team (collective) action, which is the opposite of a one-person bench composition.[7]

Before the amendment, as a rule, one-person benches heard cases in first instance courts, and three judges composed benches in second instance courts (Article 47 § 1 CCP). However, there were exceptions in first instance proceedings, inter alia, in cases concerning employment law or family matters laid down in Article 47 § 2 CCP. In such cases heard in first instance courts, a bench was composed of one chair-judge and two lay judges. The rule that one judge without lay judges adjudicates is constituted in a non-trial proceeding – Article 509 CP.

It should be emphasised, however, that a one-person bench composition of first instance courts was introduced on 30 June 1996; earlier, a collective composition was obligatory and lay judges took part in first instance proceedings. The rules were not absolutely binding because Article XII of the Regulations Implementing Code of Civil Procedure (repealed) gave a district court president wide powers to issue orders to refer cases for hearing by one-person benches and limited that possibility only in relation to cases concerning employment and family relations matters.[8] However, those changes reflected the belief that a collective court composition does not ensure more efficient proceedings or more insightful assessment.[9]

On the other hand, in second instance courts, as a rule, three judges heard cases, and a one-judge bench adjudicated only in closed sessions. However, it was not applicable to sentencing (Article 367 § 3 CCP). In other words, as a rule, three professional judges used to hear an appeal. Exceptionally, one judge could adjudicate on accident related cases (not requiring the issue of a sentence). Another exception concerned a simplified mode of hearing an appeal (Article 505(10) § 1 CCP).

Nobody claimed that hearing summary cases before second instance one-person benches resulted in lowering the "standard of legal protection". It is so because the whole system of judicial protection should be based on the presumption of professional knowledge and experience of appellate court judges.

The amendment to Act of 2 March 2020 on special solutions for preventing, counteracting and combating COVID-19, other contagious diseases and crisis

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[6] May, J., 'Skład sądu w postępowaniu cywilnym', in: Lubiński, K. (ed.), *Studia z prawa publicznego*, Toruń, 2001, p. 109.

[7] Waligórski, M., *Polskie prawo procesowe cywilne*, Warszawa, 1947, pp. 236–237; Wengerek, E., 'Zasada kolegialności w postępowaniu cywilnym', *Państwo i Prawo*, 1959, No. 3, p. 480 et seq.

[8] Jędrzejewska, M., Gudowski, J., *Kodeks postępowania…*, op. cit., p. 264.

[9] Żyznowski, T., *Kodeks postępowania…*, op. cit., p. 275.

situations caused by them[10] has been introduced by Article 4 of the Act of 28 May 2021. The regulations were provided for the period of epidemic risk and the state of the COVID-19 pandemic and within the period of one year from the moment the latter is revoked. As a result of the amendment to Article 15zzs[1] (1) (4) Act of 2 March 2020, in accordance with which both first and second instance courts' one-person benches hear cases, a court president may order a three-judge bench to hear a case if he recognises that as advisable due to special complexity of a case or its precedent-like nature.

Thus, within the changes, the legislator departs from the rule of a collective bench composition, which due to the above-mentioned regulations is especially important for second instance courts, because a collective bench was exceptionally applicable in first instance courts and in cases in which lay judges used to compose a bench. The reasons for the changes were purely pragmatic and included the pandemic related risks and a desire to increase the efficiency of proceedings in civil cases. It aimed at improving adjudication in appellate courts, which were most exposed to risk to life and health due to the COVID-19 pandemic.[11]

In advance of further considerations, it should be pointed out that the COVID related solutions met with criticism that they lead to a decrease in legal protection standards both in cases in which a first instance court's collective bench adjudicated and in appellate proceedings, and they should disappear from the legal space after the pandemic.[12] Therefore, it should be emphasised that before the COVID Act an appellate court as a one-person bench also heard some cases.

Thus, it is admissible that an appellate court adjudicates as a one-person bench. It is hard to agree with a general opinion that the introduction of a one-person bench composition immediately decreased the standard of legal protection. The problem does not consist in the fact whether one judge adjudicates in a second instance court but in which cases should be heard before collective benches due to their subject matter and the level of complexity. Therefore, the rule itself should not be criticised; but what can be criticised is the way in which the legislator stipulated subject matters of cases in which collective adjudication is possible.

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[10] Journal of Laws, item 1842, as amended.

[11] Justification for the governmental Bill amending Code of Civil Procedure and some other acts, Sejm IXth term, print No. 899. Nevertheless, in the doctrine, it is also pointed out that the aim of the changes was not only the fight against the pandemic, but it was only an excuse. "Because it is not important whether one or three judges adjudicate on a case." may be interpreted only as a declared aim of changes and not the real one. It results from the fact that this way of fighting against the pandemic was introduced at the time when the Polish legislator gave up legal regulations introducing COVID-19 restrictions and, at the same time, there were opinions of the advocates general and judgements of the European Court of Human Rights (ECHR) and the CJEU concerning the interpretation of the term 'court established by statute'; thus Markiewicz, K., 'Wpływ regulacji "covidowych" na zasadę niezmienności (stabilności) oraz kolegialność składów sądów odwoławczych', *Polski Proces Cywilny*, 2022, No. 1, p. 38 et seq.

[12] Zembrzuski, T., 'Przeciwdziałanie i zwalczanie epidemii COVID-19 w postępowaniu cywilnym, czyli pożegnanie z kolegialnością orzekania', *Polski Proces Cywilny*, 2022, No. 1, p. 74, Markiewicz, K., 'Wpływ regulacji…', op. cit., p. 47.

It also seems that while searching for axiological justification of the amendment,[13] it is also necessary to take into consideration the value of an efficient proceeding. A judgement issued by a collective bench but after several years, even if it is perfect from the juridical point of view, may have a symbolic value then. Thus, during the pandemic, the two values of a fair trial, i.e. efficiency of a proceeding and an appropriate value of court judgements must be ensured and matched.

However, the legislator introduces definitely further reaching changes concerning the composition of benches with lay judges[14] that are in conflict with Article 182 Constitution because they practically eliminate their participation, which rightly raises objections and axiological and constitutional doubts. Regardless of the epidemiological conditions, it is worth considering the time span of the changes introduced, their purposefulness and the need to maintain them not only at the time of the epidemic risk or the COVID-19 pandemic but also for a year after the latter is revoked.

2. ONE-PERSON VS. COLLECTIVE BENCH COMPOSITION

The procedure of adjudicating on matters in an appellate court by a collective bench undoubtedly has a long tradition. E. Waśkowski wrote about the principle of collectiveness as early as in 1930 and pointed out that a judge who knows that the whole collective bench supports him and shares responsibility with him feels more independent and acts more freely than when he judges solo.[15] Apart from that, it cannot be ignored that, therefore, collective hearing of cases constitutes an important guarantee of judicial independence[16] because while exerting pressure on one judge may be easy, influencing the whole bench may prove to be much more difficult.

There is no doubt that a collective bench composition serves to increase the quality of judgements, intensifies the supervisory function of second instance courts because a judgement results from a detailed discussion on the matter by judges, which is conducive to its comprehensive analysis from different points of view, sometimes comparison of different possible ways of interpreting regulations and, as a result, serves to issue a just judgement. There are reasons for treating a collective judgement as a guarantee of a just one.[17] Collective adjudication should ensure more diligent and comprehensive consideration of matters.[18]

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[13] Cieślak, S., 'Założenia aksjologiczne postępowania cywilnego – propozycja sformułowania kryteriów aksjologicznej oceny regulacji procesowej', in: Cieślak, S. (ed.), "Założenia aksjologiczne nowelizacji KPC z 4 lipca 2019 r.", *Jurysprudencja*, 2021, No. 14, p. 14 et seq.

[14] Piotrowski, R. (ed.), *Udział obywateli w sprawowaniu wymiaru sprawiedliwości*, Warszawa, 2021; Zembrzuski, T., 'Przeciwdziałanie i zwalczanie epidemii COVID-19 w postępowaniu cywilnym, czyli pożegnanie z kolegialnością orzekania', *Polski Proces Cywilny*, 2022, No. 1, p. 67.

[15] Waśkowski, E., 'Zasady procesu cywilnego', *Rocznik Prawniczy Wileński*, 1930, p. 329.

[16] Łazarska, A., *Niezawisłość sędziowska…*, op. cit., p. 543.

[17] Rosenberg, L., Schwab, K.H., Gottwald, P., *Zivilprozessrecht*, München, 2010, p. 596.

[18] Waśkowski, E., *Podręcznik procesu cywilnego*, Wilno, 1932, p. 106.

A collective bench composition is believed to be one of the guarantees of judicial independence and impartiality.[19] Bench collectiveness serves to adopt a pluralistic approach to adjudication. In the course of discussion, reasons for and against a particular resolution are considered, which allows highlighting various points of view and organise a discussion. What is of major importance is not a discussion alone and voting on the judgement but the presentation of stances during a discussion and the analysis of the judgement. A pluralistic attitude to judgements, on the other hand, contributes to case law stabilisation and considerably increases the possibility of issuing a proper judgement. Despite those unquestionable advantages of the collective system, probably for pragmatic reasons, hearing civil cases before first instance courts, as a rule, takes place before one-person benches.[20]

Still, E. Waśkowski also lists disadvantages of the collective system. A one-person bench hears a matter faster while a collective bench needs more time so that judges can get acquainted with the case material and discuss the matter together. Apart from that, according to Waśkowski, in practice it happens that one judge respects another one and it is the chair-judge who proposes a judgement and other judges approve of his stance.[21] Nevertheless, Waśkowski assesses the comparison of advantages and disadvantages of the rule of collective and one-person adjudication and decides the collective system is better because it ensures more in-depth, diligent and just judgement. On the other hand, the one-person system may be applied to petty and uncomplicated cases, which require summary proceedings and fast closing of a case; they can be more successfully judged by single judges, who are more available to parties and know them better.[22]

Such opinions created a collective model in appellate courts for successive dozens of years. That is because the legislator decided to introduce collective benches composed of professional judges to second instance courts. Nevertheless, within this area, the statute has also evolved. In a summary proceeding, due to the trial economics, one-person benches were introduced (Article 505(10) § 1 CCP). Moreover, as a result of the amendment of 4 July 2019,[23] it was stipulated that a three-person bench should hear a case. On the other hand, a one-person bench should hear a case at a closed session, however, with the exception of the issue of a sentence (Article 367 § 3 CCP). This evolution shows the gradual departure from collective benches in favour of one-person benches in relation to petty, uncomplicated matters for pragmatic reasons and because of the trial economics.

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[19] Łazarska, A., *Niezawisłość sędziowska…*, op. cit., p. 546; Wengerek, E., 'Zasada kolegialności…', op. cit., p. 480 et seq.; Artymiak, G., 'Pojęcie, zakres, definicja zasady kolegialności', op. cit., p. 1364 et seq.

[20] Łazarska, A., in: Szanciło, T. (ed.), *Kodeks postepowania cywilnego, Vol. I Komentarz*, Warszawa, 2019, p. 160.

[21] Waśkowski, E., *Podręcznik procesu cywilnego*, Wilno, 1932, p. 106.

[22] Ibidem, pp. 106–109; Olaś, A., 'Kolegialność a jednoosobowość – skład sądu I instancji w procesie cywilnym: doświadczenia i perspektywy', *Polski Proces Cywilny*, 2020, No. 3, p. 497 et seq.

[23] Act of 4 July 2019 amending Act: Code of Civil Procedure and some other acts, Journal of Laws of 2019, item 1469.

By the way, similar tendencies can be observed in other systems. For example, a possibility of referring a case to a one-person bench was introduced in the German model (*einen entscheidenden Einzel-Richter*). However, the statute stipulates when such reference is possible (§§ 526 and 527 Zivilprozessordnung).[24]

Thus, undoubtedly, successive changes to a bench composition were necessary. Doubts were raised only in relation to whether collective benches in second instance courts should have been maintained as a rule or not, and to the need of a more detailed and flexible regulation of the situation when a court can refer a case to a one-person bench. However, taking into account second instance courts' workload, chair-judges would have to take those decisions. Thus, in practice, it would be a chair-judge who would suggest adjudicating on a matter collectively or solo. Therefore, probably for pragmatic reasons and in order to ease the burden in courts, different solutions were adopted.

It seems, however, that even in case of introducing one-person adjudication as a rule, there should be mechanisms ensuring the possibility of composing a collective bench depending on the type and nature of matters. Thus, it is essential to introduce such regulations that may fully protect parties' rights in case a matter requires the composition of a collective bench.

3. COLLECTIVE BENCH COMPOSITION VS. RANDOM ALLOCATION OF CASES

The issue of a court composition is strictly connected with the systemic regulations on the allocation of cases to judges. Collective adjudication in second instance courts considerably complicated the introduction of random allocation of cases to judges. Since 12 August 2017 when Article 47a § 1 was introduced to Act: Law on the system of common courts, in accordance with it, cases have been randomly allocated to judges within the scope of particular categories unless a case is subject to allocation to a judge who is on standby duty.[25] The so-called random case allocation system (RCAS) determines, inter alia, the methods of picking cases at random, the rules of designating multi-person benches, division of cases into categories in which they are randomly allocated, and decreasing the number of cases allocated to a judge because of his extra functions, or justified leave of absence, as well as other rules concerning substitutions or being on duty. The Minister of Justice has gained great power to determine those rules, although the division of cases in courts is a core area that is subject to judicial independence.[26] The system was introduced in order to ensure transparency and objectiveness, and to avoid manipulation of designation a bench composition and this way to ensure the guarantee of the right to a statutory judge. Therefore, the members of the adjudicating bench shall be selected with the use of

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[24] Rosenberg, L., Schwab, K.H., Gottwald, P., *Zivilprozessrecht*…, op. cit., p. 596.

[25] Act of 27.07.2001: Law on the system of common courts (Journal of Laws of 2020, item 2072, as amended), hereinafter referred to as LSCC.

[26] Łazarska, A., *System losowego przydziału spraw w praktyce*, LEX, 2019, online version.

the IT system designed for random allocation of cases and tasks (Article 47 Act: Law on the system of common courts).[27]

However, the system of random allocation of cases has not been adjusted to multi-person appellate departments and collective benches. It is so because appellate courts have not adopted a division into the so-called permanent benches. A bench composition, both a chair-judge and other complementing judges individually one by one, is selected at random.[28] Thus, if there are several adjudicating judges in a department, it means that they are selected at random in all possible bench composition configurations. Therefore, there may be five cases scheduled for hearing on the same day and several different judges involved in the sessions, which obviously, beside logistic difficulties and disorganisation of work time, poses a threat to health in the pandemic period.

As a result of numerous requirements for the system of designating benches in second instance courts, there were also practical difficulties in ensuring the uniformity of a bench composition at sessions. Especially the lack of a possibility of establishing the so-called permanent benches during the pandemic became a minor inconvenience to courts and judges. The necessity of designating substitutions for judges in case of their illness or leave of absence becomes a real organisational challenge, especially as the allocation system designates judges for the future while cases are heard within a few weeks or months when the allocated judges may be absent from work, e.g. because of illness or annual leave. Allocation of judges at random is applicable to every case without exception, which caused many organisational problems in case of multi-person appellate departments.

4. ORDERING A THREE-JUDGE BENCH TO HEAR A CASE

It was indicated above that, as a result of the amendment, a one-judge bench would hear second instance cases. However, it was also decided to introduce an exception to the rule. A court president of order a three-judge bench to hear a case. In accordance with the amended Article 15zzs[1] (1) (4) of the statute in the period of the epidemic threat announced in connection with the COVID-19 pandemic and for a year after the state of pandemic is revoked, in cases heard based on the provisions of Act of 17 November 1964: Code of Civil Procedure, a one-judge bench hears cases in first and second instance courts; a court president may order a three-judge bench to hear a case provided he recognises that to be advisable due to special complexity of a case or its precedent-like nature.

The provision was modelled on the regulation of Article 47 § 4 CCP, which stipulates that the president of a first instance court may order a three-judge bench to hear a case provided he recognises that to be advisable due to special complexity of

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[27] Ibidem; Pytlewska, M., 'System Losowego Przydziału Spraw jako gwarancja bezstronnego prawa do sądu w kontekście Unii Europejskiej', *Prawo w Działaniu*, 2019, No. 40, p. 265 et seq.; Rygiel, P., 'Losowy przydział spraw cywilnych w sądzie drugiej instancji', *Przegląd Sądowy*, 2019, No. 2, p. 40.

[28] Łazarska, A., *System losowego…*, op. cit.

a case or its precedent-like nature. The application of the provision to a proceeding before a first instance court was in fact exceptional or even extraordinary in nature.[29] It is indicated in the judicature that the provision is systemic as it decides about a court composition, however, it has procedural consequences as it decides about the proper court composition, which is connected with the possible recognition of a proceeding as invalid.[30]

In addition, the provision indicates two indefinite conditions, i.e. special complexity of a case and its precedent-like nature. Each of them is independent and may constitute grounds for designating a bench. It is pointed out in the doctrine that a case is complex when it is e.g. multifaceted, when accumulated claims are made, there is joint participation or it is necessary to apply foreign law.[31] The provision does not limit the intricacies to legal issues but there may also be actual problems or necessity of conducting a complex evidence proceeding or multi-volume files, i.e. procedural material. The second condition is a precedent-like nature. It consists in the need to solve some complex issues concerning interpretation of law or establishing an adjudication policy. A case does not have to be complicated but due to the occurrence of new and important problems, it requires especially in-depth and mature consideration based on very good knowledge of law.[32] For example, in loan related cases, a court's judgement may affect thousands of other cases. Thus, the influence of a given case on social and economic life or the social-legal significance of a given case will be very important. Moreover, from the perspective of a given department, a provision may have fundamental importance for ensuring uniformity of adjudication. It often happens that individual judges issue different judgements based on the same actual state. The issue of a collective judgement might serve to eliminate those discrepancies. Within this meaning, adjudicating on a given case may be of precedent-like importance.

5. NATURE OF A COURT PRESIDENT'S ORDER TO DESIGNATE A BENCH

The nature of a court president's order to designate a bench may raise doubts. This order is not classified in the doctrine. The placement of the competence norm in Code of Civil Procedure may indicate the procedural nature of this order. On the other hand, the judicature points out that e.g. such an order in the procedural mode may be overruled due to the change of circumstances (Article 359 § 1 CCP

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[29] Łazarska, A., in: Szanciło, T. (ed.), *Kodeks postępowania cywilnego, Vol. I Komentarz*, Warszawa, 2019, p. 160.

[30] Uwagi na tle art. XII PWKPC uchwała SN z 21.07.1966 r., III CZP 62/66, OSNCP 1966, No. 12, item 212.

[31] Harla, A., 'Charakter precedensowy sprawy cywilnej w rozumieniu k.p.c. – uwagi de lege lata i de lege ferenda', *Przegląd Sądowy*, 2001, No. 4, p. 23; Jędrzejewska, M., Gudowski, J., *Kodeks postępowania…*, op. cit., pp. 264–265.

[32] Jędrzejewska, M., Gudowski, J., *Kodeks postępowania…*, op. cit., pp. 264–265.

in conjunction with Article 362 CCP).[33] It seems, however, due to the nature and placement in Code of Civil Procedure, that it has a procedural-systemic character.

There are no doubts that an order referred to in the above-mentioned provision does not fit in the frameworks of administrative supervision at all. A court president is an organ of a court appointed to manage a court and represent it (Article 22 LSCC). A court president also performs activities within the scope of internal administrative supervision. In accordance with Article 8 LSCC, the Minister of Justice exercises administrative supervision over courts. Administrative activity of courts consists in the provision of proper technical, organisational and financial conditions for the functioning of courts and performing tasks referred to in Article 1 §§ 2 and 3; ensuring proper course of internal office working, which is directly connected with the performance of a court's tasks referred to in Article 1 §§ 2 and 3 LSCC. In accordance with Article 9a § 1 LSCC, presidents of courts shall exercise internal administrative supervision over courts' activities.[34]

According to the judgement of the Constitutional Tribunal of 25 May 2016,[35] a judge being subject to administrative supervision of the Minister of Justice or the president of a given court cannot be deprived of the guarantees of independent adjudication. "The constitutional principle of independence should be understood as independence from any organs, both court and non-court bodies. Administrative supervision cannot ignore the specificity of judicial power and its constituting special feature – independence. That is why, assessing the supervision model, one cannot interpret the principle of checks and balances resulting from Article 10 Constitution of the Republic of Poland only as mutual limitation of powers, but should admit the superiority of the principle of separation, i.e. isolation of judicial power from other powers".[36] In jurisprudence, supervision is unambiguously assessed as being in conflict with the principle of definiteness and proportionality. R. Piotrowski believes that the legislator excessively interferes with the principle of judicial independence by introducing the higher authority supervision of the Minister of Justice, and this way poses a risk to judicial independence in the way that is disproportional to the intended objective.[37]

It would be difficult to classify an order to designate a bench as a supervisory one because it does not concern administrative activities. Its aim and legal grounds are different.

A court president cannot designate a particular judge (Judge X or Judge Y) to adjudicate on a given matter, either. Systemic provisions regulate the issue of division of duties between judges, namely those concerning random designation

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[33] Thus the Supreme Court resolution of 18.12.2014, III SZP 3/14, OSNP 2015, No. 9, item 129.

[34] Piotrowski, R., 'Sędziowie a władza wykonawcza', *Studia Iuridica*, 2008, year XLVIII, p. 202; idem, 'Status ustrojowy sędziego a zakres i charakter zarządzeń nadzorczych', in: Piotrowski, R. (ed.), *Pozycja ustrojowa sędziego*, Warszawa, 2015, p. 177.

[35] The Constitutional Tribunal judgement of 26 May 2016, Kp5/15, OTK.

[36] Łazarska, A., *Rzetelny proces cywilny*, Warszawa, 2012, p. 161.

[37] Piotrowski, R., 'Sędziowie a władza wykonawcza', op. cit., p. 202; Piotrowski, R., 'Status…', op. cit., p. 177.

of judges to adjudicating benches. Thus, the order of a court president may only concern abstract designation of a three-judge bench.

The major doubt is raised in connection with the question whether the president of a court should assess a case on its merits; whether he is authorised and competent to do this. In the judicature, it is pointed out that a decision on designating a three-judge bench is an autonomous decision of the president of a court although the president does not have discretion over that and must base it on strictly determined circumstances.[38] In the doctrine, the blanket nature of this order is excluded. This order cannot be of general character and should always be issued in connection with a particular case.[39] This interpretation of the provision would mean that a court president should each time analyse every case lodged to a court and assess whether a three-judge bench is necessary.

However, it is obvious that the president of a court does not analyse all cases lodged to a court and particular judges or even departments. What is more, such analyses might be recognised as the infringement of the principle of judicial independence. Thus, how does the president of a court acquire information about cases lodged to a court and whether he should designate a three-judge bench? Is he able to assess special complexity of a case without specialist knowledge? This is what shows the uselessness of the regulation.

It is obvious that it is not a court president but a chair-judge randomly selected to adjudicate on a given case is able to assess whether it is necessary to designate a three-judge bench. Thus, this judge should propose a motion to designate such a bench justifying it by stating that the above-mentioned circumstances may occur. A question arises whether the head of a department may do this when, the moment a case is registered or formal deficiencies are supplemented, he recognises that it is complex or precedent-like in nature. It can also happen that a statement of claim will result in a plaintiff's motion to designate a collective bench with arguments provided. In the judicature, it is also pointed out that the president of a court cannot delegate the competence to order a case hearing by a bench composed of three professional judges to another entity, e.g. a head of department.[40]

In the same way as the president of a court, a head of department is not able to assess the nature of a case based on its cursory examination. Especially as it may require an analysis of complex matters from different areas and fields of law that often need specialisation. In other words, the evaluation of the circumstances of special complexity and precedence-like nature of a case, due to the need to its analysis, should be reserved for a chair-judge.

Judicial management of a proceeding is an argument for this approach. Appropriate understanding of the principle of judicial management of a proceeding requires that a chair-judge conduct all activities in a case from the moment it is filed to a competent court. First of all, he should examine a case provisionally and issue adequate orders if necessary. A chair-judge should endorse a statement of claim and

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38 The Supreme Court ruling of 6.12.2017, III PK 34/17, Legalis.

39 Żyznowski, T., *Kodeks postępowania…*, op. cit., p. 277.

40 The Supreme Court judgement of 27 May 1971, II CR 122/71, Legalis.

assign the date of trial. A head of department is just a court administrative organ and his powers are laid down in a court rules and regulations.[41]

For pragmatic reasons, the provision will be very difficult to apply in practice and probably also for these reasons, Article 47 § 4 CCP was not often applied. Also, it cannot be ignored that it can be in conflict with the principle of judicial independence. How can a situation when a chair-judge recognises a case to be a precedent be reconciled with the one when a court president does not share the opinion?

It would also be difficult to accept the interpretation that a court president might not approve of a motion proposed by a judge. Although the provision stipulates that a court president "may" order that a case should be heard by a three-judge bench, when a chair-judge's assessment indicates the occurrence of statutory circumstances, the activity of designating a bench composition should have an exclusively technical character. The possibility of revoking such an order by a court president raises even more doubts. For these reasons, it should be postulated that the provision is changed, which will be discussed below. The more so as the latest amendments to Law on the system of common courts[42] considerably strengthened the competence of the Minister of Justice, who gained total discretion to appoint and dismiss basic presidents and vice-presidents of all courts. The Minister's of Justice powers to supervise court presidents and judges holding some functions were also strengthened, which means that, at present, Article 47 § 4 CCP and its procedural significance should be interpreted in a completely changed systemic context.

6. PRESIDENT'S ABILITY TO REVOKE HIS OWN ORDER

As it was indicated above, a court president shall take a decision concerning designation of a bench in the form of an order. In the judicature, it is pointed out that it is an order that due to the change of circumstances may be revoked in a procedural mode (Article 359 § 1 CCP in conjunction with Article 362 CCP).[43] In its resolution of 18 December 2014, the Supreme Court pointed out pragmatic reasons why, in the course of a proceeding, it may turn out that, due to the change of circumstances, a case may stop being complex, e.g. as a result of the withdrawal of a lawsuit, the subject or object elated changes, the change of the legal state, and a resolution adopted by the Supreme Court or the Court of Justice of the European Union. In such a situation, a court president has powers to revoke an order issued in accordance with Article 47 § 4 CCP, which will result in a 'return' to hearing a case by a bench determined by statute.

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[41] Koniuszewski, S., 'Przewodniczący wydziału a przewodniczący rozprawy', *Głos Sądownictwa*, 1937, No. 7–8, p. 471.

[42] Act of 12.07.2017 amending Act: Law on the system of common courts and some other acts (Journal of Laws, item 1452).

[43] Thus the Supreme Court resolution of 18.12.2014, III SZP 3/14, OSNP 2015, No. 9, item 129.

This opinion may obviously be recognised as controversial. Approval of such interpretation would give a court president a possibility of interference with the sphere of judicial independence and discrete evaluation whether a case continues to be complex and precedent-like. Respect for judicial independence and the guarantee of the right to a statutory judge (Article 45 (1) of the Constitution), which ensure protection of an individual against an arbitrary change of a court composition, object to such interpretation. Moreover, Law on the system of common courts lays down a principle of invariability of a bench composition (Article 47b LSCC). In accordance with the provision, the change of a bench composition may take place only if the formerly composed bench cannot hear a case or there is a long-term obstacle in the way of the formerly composed bench hearing a case. Thus, since the designation of a bench by a court president pursuant to Article 47 § 4 CCP has the nature of a systemic norm, it means that the order cannot be revoked in the procedural mode (Article 359 § 1 CCP), because this way the provisions would serve avoiding systemic regulations, in addition, ones that are very important as they concern a bench composition.

Moreover, as the Supreme Court states in its resolution of 5 December 2019 concerning the case III UZP 10/19, the legislator introduced the principle of invariability of a bench in order to ensure efficiency of proceedings, emphasising that once a randomly selected bench (thus, the legislator referred the principle to the already selected bench before it starts any activities in a case still at the stage of drafting the provisions) should not be changed until the end of a proceeding. However, exceptions to the principle are laid down in statute and are due to organisational reasons and the efficiency of a proceeding.[44] In its judgement, the Supreme Court emphasises the axiological and systemic significance of the principle of invariability of a bench.

Therefore, there are no grounds for extensive interpretation of Article 47 § 4 CCP, especially as respect for judicial independence objects it. Judges are also not obliged to inform a court president about the course of activities or the change of circumstances of a case (within the meaning of Article 359 § 1 CCP). That is why the provision should be interpreted in a narrowing way, especially as a president's order is not subject to justification or appeal.

7. RANDOMLY CHOSEN BENCHES – TEMPORARY STATE

A basic problem occurs in a situation when collective benches have already been randomly selected in appellate courts. As it was mentioned above, RCAS randomly selects cases for judges 'for the future' and many more cases than judges can complete within a month's time. This results in designation of benches and chair-judges to cases that can be heard even next year. Therefore, a question arises whether the regulation is not in conflict with the principle of invariability of benches, because it introduces changes with immediate effect also to cases in which benches had

[44] The Supreme Court resolution of 5.12.2019, III UZP 10/19.

already been designated and those collective benches had heard cases allocated to them. In accordance with Article 6(2) of the Act of 28 May 2021, cases that a court had started hearing in a composition different from a one-person bench before the act entered into force should continue to be heard by the same judge who was selected to be a chair-judge until its conclusion in a given instance court.

Interpreting those provisions, one cannot ignore the principle of invariability of court benches. The principle is also a guarantee of judicial independence. On the other hand, Article 47b LSCC stipulates that a change of a bench may only take place if the former bench cannot hear a case or there is a long-term obstacle for the former bench in the way of hearing a case. The provision of Article 47a shall be applied by analogy. The exception to the rule is laid down in Article 6(2) of the Act of 28 May 2021, which allows continuation of a case before a one-person bench, i.e. a chair-judge designated to a given case. Thus, a question is raised whether such a change is admissible and whether those proceedings should not be continued before collective benches.

In the light of this, an opinion[45] was expressed that the amendment interferes with the principle of continuity and invariability of a court bench adjudicating on a matter. This way, it results in a conflict because the change of a bench may take place only in case of a permanent or long-term obstacle in the way of the former bench hearing a case (Article 47b § 1 LSCC) or an obstacle that is urgent in nature (Article 47b § 2 LSCC) when the necessity of undertaking activities in a case results from other provisions or efficiency of a proceeding is a reason. The obstacles should really exist and should not be created by the legislator in order to achieve other political-procedural objectives.[46]

Undoubtedly, the act departs from the principle of bench invariability and interferes with judicial independence to some extent. The pandemic was recognised as a permanent obstacle and used as justification. However, the pandemic did not result in complete closure of courts but only caused difficulties in organising court work; thus, it is not a permanent obstacle but rather a temporary one. Therefore, the maintenance of the principle of invariability of benches in cases in which they had already been selected and established should support respect for the principle of judicial independence. It is so because the problem of those cases is temporary;

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45 Recommendation of the Polish Judges Association Iustitia: iustitia.pl/dzialalnosc/opinie-i-raporty/4195-rekomendacje-stowarzyszenia-sedziow-polskich-iustitia-w-sprawie-stosowania-przepisow-ustawy-z-dnia-28-maja-2021-r-o-zmianie-ustawy-kodeks-postepowania cywilnego [accessed on: 7.06.2022].

46 Recommendations of the Polish Judges Association Iustitia: iustitia.pl/dzialalnosc/opinie-i-raporty/4195-rekomendacje-stowarzyszenia-sedziow-polskich-iustitia-w-sprawie-stosowania-przepisow-ustawy-z-dnia-28-maja-2021-r-o-zmianie-ustawy-kodeks-postepowania cywilnego. For these reasons, the Association recommends: further hearing of a case in accordance with the former rules due to unconstitutionality of the above-mentioned regulations; it recognises the hearing of such cases by a former bench after a prior issue of an order by a court president as admissible due to the fact that the introduction of COVID related changes alone should be treated as special complexity or precedent-like nature of a case for the reasons discussed above; and in case of refusal to accept such a motion, it recommends filing a legal question to the Supreme Court or a prejudicial question to the CJEU and refraining from further hearing of a case until the above legal issues are resolved.

it concerns a certain number of 'old' cases with formerly designated benches. Thus, the principle of invariability of benches should be superior in nature due to its guarantee related significance. It is also not possible to reject the stance that the departure from the principle of collective hearing introduced by the COVID-19 Act is perspective as well as retrospective in nature. The disturbance to the principle of invariability of the composition of adjudicating benches raises serious objections due to the change of rules of proceeding in the course of hearing a case. A party has the right to expect that the shape and rules of a proceeding from the beginning to its conclusion will not be basically changed.[47] Especially, when a court continues the hearing after its adjournment or has already conducted a part of evidence examination procedure. The reasons for respect for the right to a statutory court should be in this case superior without harm to the guarantee of a fair trial.

Due to those constitutional reasons, it is hard to approve of the Supreme Court resolution of 26 May 2022[48] in accordance with which, provided that a court president has ordered an appeal hearing by a three-judge bench based on Article 15zzs[1] (1)(4) of the Act on special solutions to problems connected with preventing, counteracting and combating COVID-19, other contagious diseases and crisis situations resulting from them, the case should be heard by the former chair-judge and other judges should be designated randomly in accordance with Article 47a of the Law on the system of common courts. The principle of randomly chosen benches should not annihilate the principle of unchangeable bench composition, which is of fundamental importance to respect for judicial independence. The provisions concerning the system of randomly designating benches should not be instrumentally used to oust judges from adjudication or manipulate a bench composition. Once selected and established composition of a court bench should not be changed, especially as the efficiency related reasons are also against that.

However, I do not share the opinion that the introduction of the changes will weaken supervision over proper designation of benches due to allegations of defectiveness of judges designation and that it constitutes a decrease in the standard of legal protection due to depriving collective benches of supervision over the proper process of appointing one judge of a bench who was designated to the office of a judge in the course of defective proceedings conducted by the 'neo-KRS' [new National Council of the Judiciary].[49] In fact, the procedure does not exclude parties' ability to raise objections to a bench composition or even file a motion to

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[47] Zembrzuski, T., 'Przeciwdziałanie i zwalczanie epidemii…', op. cit., p. 69.

[48] The Supreme Court resolution of 26 May 2022, III CZP 82/21, www.sn.pl.

[49] According to K. Markiewicz, "It should be pointed out that this step is, additionally, dangerous because adjudication by such persons in appellate courts as the last instance – and their main problem concerns, due to the principle of collectiveness, the composition of appellate court benches – may result in the recognition of judgements issued by them as non-existent. Situations in which persons who have become judges as a result of defective selection will come to a self-reflective conclusion that responsibility for the stability of a judgement and the guarantees for the right to a court should result in their refraining from adjudication will constitute exceptions. I do not know such cases in case law. On the other hand, I know cases in which judges appointed in an appropriate way refused to exercise justice together with defectively appointed judges, which in general resulted in the instigation of disciplinary proceedings against them. Therefore, it is necessary to remember that the former practice of disciplinary representatives that consisted in

exclude a judge in case of justified doubts concerning his/her impartiality or judicial independence. Thus, it is not important whether a one-judge bench or a collective bench adjudicates on a matter.[50]

At present, however, there is another issue concerning the actuality of supervision over the processes of appointing judges due to the threat of disciplinary proceedings freezing the activities of judges and professional proxies in case they attempt to apply pro-EU interpretation of, inter alia, Article 42a LSCC, which stipulates that, within the activity of courts or court bodies, it is inadmissible to question the empowerment of courts and tribunals, constitutional state bodies and organs of supervision and protection of law, and determining or assessing by a common court or any other authority whether the appointment of a judge is lawful or whether an appointed judge is authorised to perform activities within the scope of justice enforcement. The practice in the months to come will show whether courts will in fact check such appointment processes ex officio or because of the parties' allegations.[51]

8. WEAKNESSES OF THE NEW REGULATIONS

As it was mentioned above, the issue of a one-person or collective bench of a second instance court may be controversial. In the period of the pandemic, however, it is necessary to consider the functioning of appellate departments comprehensively

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the instigation of disciplinary proceedings for the issue of a judgement will be much easier in case of hearing by a one-person bench." Markiewicz, K., 'Wpływ regulacji…', op. cit., p. 11.

[50] At present, also "activities challenging the existence of a judge's employment relationship, validity of a judge's appointment or constitutional empowerment of an organ of the Republic of Poland", i.e. examination whether somebody is a judge carry the most severe disciplinary penalties: a judge's relegation to another post or dismissal from office (Article 109 § 1a in conjunction with Article 107 § 1 (2)–(4) LSCC). There are many cases concerning judges against whom a disciplinary proceeding was instigated because they undertook steps aimed at the supervision of appointing processes, https://www.hfhr.pl/etpc-skarga-sedzia-juszczyszyn/ [accessed on: 7.06.2022].

Act of 20.12.2019 amending Act: Law on the system of common courts, Act on the Supreme Court and some other acts (Journal of Laws of 2020, item 190, as amended).

[51] The Constitutional Tribunal judgement of 15.07.2021, C-791/19, the European Commission versus the Republic of Poland, ECLI:EU:C:2021:596; and the Court of Justice ruling of 14.07.2021, C-204/21, in the case the European *Commission versus the Republic of Poland*, LEX No. 3196955. It is worth pointing out that within the President's Bill, there is a plan to introduce changes to Article 42a para. 1 and 2 Act: Law on the system of common courts. In accordance with the Bill, §§ 3–19 are to be added to the provision. Thus, based on the motion of parties, it will be admissible to examine the fulfilment of the requirements for independence and impartiality of judges and to take into account circumstances in which they were appointed, conduct after the appointment on a motion filed by an authorised person provided that in the circumstances of a particular case it may result in the infringement of the standard of judicial independence or impartiality, which may have impact on the case result. A motion can be lodged in relation to a judge designated to hear a case in a first instance court or an appellate court and should be filed within three days from the moment a party is notified about an adjudicating bench composition. After the deadline, the right to lodge a motion shall expire. Bill amending Act on the Supreme Court and some other acts proposed by the President of the Republic of Poland, print no 2011, https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=2011.

and take into account problems that judges of appellate courts face as a result of the introduction of the random case allocation system.

As a rule, one should approve of the solution that, *ex lege*, one judge should hear cases in a second instance court (without creating complicated exceptions). It should also be seen in positive light that the legislator did not introduce a catalogue of cases excluded from this regulation because what usually happens when such catalogues are developed, there is a risk of omitting or insufficiently determining cases subject to hearing by another bench. Secondly, as case law concerning Article 47 CCP shows, establishing exceptions to the rule in general always leads to interpretation related disputes.

In addition, what really decides whether a case is complex and should be heard by a collective bench are actual circumstances. Thus, even if a rule is laid down that one-person benches shall hear summary cases, it does not mean that they never include really complex cases. Thus, it is hard to draft abstract regulations that would constitute grounds for a statutory catalogue of cases for which a collective bench should be designated.

The regulation concerning designation of a bench composition should be based not on strict formal rules but on trust in judges. However, in case of this regulation, there is a lack of such trust. A chair judge is not the one who decides about a bench composition; it is a court president. And a court president does not have procedural competence in a case but is in general an organ of administrative supervision. Thus, a president should not undertake activities that are within the scope of holding office by a judge. Thus, the regulation would probably not raise serious doubts if a president's competence were strictly technical and were limited only to endorsement based on a judge's binding motion.

Unfortunately, there are no such regulations and the present interpretation of Article 47 § 4 CCP, as it was pointed out in case law, leads to a conclusion that a president's competence means his own discrete decision, which is hard to approve of. Such a regulation for both pragmatic and systemic reasons is out of touch with reality of the functioning of courts. *De lege ferenda*, a provision stipulating that a court president orders hearing a case by a collective bench based on a chair-judge's binding motion should be introduced. And ultimately the model should be changed.

9. PROPOSALS *DE LEGE FERENDA*

Looking for systemic solutions, also after the pandemic, completely different models should be introduced. It is worth noticing that the German model applies a different rule. This is a collective bench that can refer a case for hearing to one judge when a one-person first instance bench has already heard the case and when the case does not have any legal or actual difficulties, and it is not really significant (§ 526 ZPO). As a result, it is not an organ of administrative supervision that decides about a bench composition but a collective bench, which having analysed a case takes a decision to refer it for hearing to a single judge.

Such a regulation would allow maintaining the rule of collectiveness in second instance courts and would be in conformity with the principle of judicial independence. The fact that a collective bench would refer a case to a one-person bench would also be an advantage. This way, in-depth and thorough assessment of a case would be ensured. The assessment would be based on the lack of problematic legal or actual issues and lack of real significance of a case, thus statutory conditions and not a court's arbitrary decision.

There is one more shortcoming of the present regulation concerning a president's order to designate a collective bench. It was indicated above that the regulation under Article 47 § 4 CCP was rarely applied. It resulted from the fact that the competence to apply it was granted to a court president as well as a narrow scope of conditions for designating a collective bench. The provision requires that a case should not only be complex but it should be especially complex. However, most cases in courts are complex, which does not always mean that there is the so-called classified complexity. On the other hand, precedents are absolute exceptions. Thus, one can forecast that the introduction of such rigorous conditions for designating collective benches will lead in practice to their non-application in second instance courts.

10. CONSEQUENCES OF THE INFRINGEMENT OF THE PROVISIONS ON A BENCH COMPOSITION

Due to the fact that the provisions concerning allocation of cases, a court jurisdiction, as well as a bench composition have a guarantee related importance, the legislator laid down very strict consequences of the infringement of the provisions concerning the composition of a bench. The infringement of the provisions concerning an adjudicating bench results in invalidity of a proceeding, which takes place in every situation when the composition of an adjudicating bench is in conflict with the law.[52] If a case is heard by a first instance court composed of one judge and two lay judges and the condition for adjudication consists in the recognition that the parties were involved in a civil law contract, it leads to the annulment of this proceeding.[53]

It is pointed out in the doctrine that the significance of an adjudicating bench composition in the whole proceeding aims at avoiding arbitrariness. It allows examination of all civil cases by such court benches that are stipulated in legal regulations for a given type of cases.[54]

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[52] See the Supreme Court resolution of 18.12.1968, III CZP 119/68, OSNPG 1969, No. 4, item 23 and the Supreme Court ruling of 9.6.2009, II PZP 5/09, Legalis.

[53] The Supreme Court judgement of 25.11.2004, I PK 42/04, OSNAPiUS 2005, No. 14, item 209.

[54] Żyznowski, T., *Kodeks postępowania…*, op. cit., p. 274; Zembrzuski, T., *Nieważność postępowania w procesie cywilnym*, Warszawa, 2017, p. 232 et seq.

It is argued in case law that there are no better or worse benches; there are only benches that are in conformity or in conflict with legal provisions.[55] Undoubtedly, such strict interpretation of the provisions also has guarantee related importance because it does not allow sanctioning whatever manipulation of a bench composition. The moment one-person benches are introduced, the process of adjudicating for sure will be considerably simplified and there will be no need to resolve complicated disputes concerning a court composition. Nevertheless, a court president's order concerning a bench designation becomes especially important. That is why, undoubtedly, the issue concerning a possibility of revoking an order by a court president should be confronted with the principle of judicial independence. This, however, may lead to a conclusion that a court president cannot interfere with the proceeding in progress, and thus, he should not change the order concerning a bench composition. Such interpretation should be disapproved of because judges, in accordance with Article 178(1) of the Constitution, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

CONCLUSIONS

A court bench composition in a civil proceeding has fundamental procedural and systemic importance. The right to hearing before a competent and independent court is a guarantee of a fair trial. Collective adjudication has been a long tradition in second instance courts up till now.

The amendment to Code of Civil Procedure by means of Act of 28 May 2021 changes the rules by determining a court composition as a one-person bench not only in first instance but also second instance courts. The new solutions provoke a lot of controversy and one can formulate a thesis that in many aspects they interfere with judicial independence. Changing the rule of collective into one-person benches, the legislator did not ensure sufficient guarantees of continuation of the so-called old cases before already established collective benches, which violates the principle of invariability of court benches. Secondly, giving a court president the power to decide on the composition of a bench, the legislator did not ensure respect for judicial independence. The decision of a court president whether there is a need to designate a bench due to an especially complex or precedent-like nature of a case is disapproved of. It is not within a court president's competence to assess a nature of a case, on which a judge adjudicates. On the other hand, classified conditions for designating a collective bench cause that the discussed regulation will be very rarely applied and can interfere with a sensitive matter of judicial independence.

It is also not possible to approve of the opinion about admissibility of revoking an order by a court president because such a regulation requires confrontation with the principle of judicial independence. Thus, it is obvious that a court president cannot interfere with a case that is in progress and change orders concerning

[55] Justification for the Supreme Court judgement of 28.03.1957, I CR 605/56, NP. 1958, no 5, p. 115; the Supreme Court resolution of 18.12.1968, III CZP 119/68, OSNPG 1969, No. 4, item 23.

a bench composition. The more so as the provisions concerning a bench composition have great procedural importance and their infringement may result in invalidity of a proceeding. First and foremost, such a solution hits the constitutional guarantees of the right to a statutory court (Article 45(1) of the Constitution).

De lege ferenda, it is necessary to call for an amendment to Article 15zzs[1] (1) of the Act of 2 March 2020 so that a collective bench will adjudicate in an appellate proceeding. A collective composition of a bench may refer a case to a one-person bench when a one-person bench has already heard that case in a first instance court and when there are no legal or actual difficulties in that case, and when it is not of considerable importance. A statute should determine the conditions and thus, it would be possible if a case were not legally and actually complex and did not have great significance. This way, an important value of a collective bench in a second instance court would be restored.

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SECOND INSTANCE COURT'S BENCH COMPOSITION IN CIVIL PROCEEDINGS

Summary

The aim of the article is to discuss the effects of the amendment to Code of Civil Procedure introduced by Act of 28 May 2021 within the scope of a change of a court bench composition in appeal proceedings. The new solutions are controversial and in some aspects interfere with the principle of judicial independence. By reversing the principle of a collective composition in favour of a one-person composition, there were insufficient guarantees for the continuation of the so-called unchanged bench composition for old cases, which may violate the principle of invariability of a bench composition. Secondly, entrusting a decision on a court composition to a court president that is an administrative body did not provide sufficient guarantees for respect for judicial independence. A court president's decision on whether it is necessary to designate a bench due to the complexity or precedent-like nature of a case also raises objections. It is not within a court president's competence to assess a nature of a case on which a judge adjudicates. On the other hand, classified conditions for establishing collective benches cause that the discussed regulation will be very rarely applied.

Keywords: bench composition, one-person composition, collective composition, judicial independence, order of a court president, invalidity of a bench composition, invalidity of a proceeding

SKŁAD SĄDU DRUGIEJ INSTANCJI W POSTĘPOWANIU CYWILNYM

Streszczenie

Celem artykułu jest omówienie skutków nowelizacji Kodeksu postępowania cywilnego, wprowadzonych Ustawą z dnia 28 maja 2021 r. w zakresie zmiany składu sądu w postępowaniu apelacyjnym. Nowe rozwiązania budzą liczne kontrowersje i w wielu aspektach ingerują

w niezawisłość sędziowską. Po pierwsze, odwracając zasadę składów kolegialnych na rzecz jednoosobowych, nie zapewniono wystarczających gwarancji kontynuacji tak zwanych starych spraw w niezmienionym składzie, co może naruszać zasadę niezmienności składów. Po drugie, powierzając wyłącznie czynnikowi administracyjnemu prezesowi sądu decydowanie o składzie sądu, nie zapewniono wystarczających gwarancji poszanowania niezawisłości sędziowskiej. Sprzeciw budzi decydowanie przez prezesa sądu o tym, czy zachodzi potrzeba wyznaczenia składu z uwagi na szczególną zawiłość lub precedensowy charakter sprawy. Nie jest rzeczą prezesa ocenianie charakteru sprawy, którą rozstrzyga sędzia. Kwalifikowane przesłanki zaś do ustanowienia składu kolegialnego sprawią, że przedmiotowa regulacja będzie niezwykle rzadko stosowana.

Słowa kluczowe: skład sądu, skład jednoosobowy, skład kolegialny, niezawisłość sędziowska, zarządzenie prezesa, niezmienność składu, nieważność postępowania

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