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A NEW DESTINATION ON THE ROAD TOWARDS THE RULE OF LAW?

A report on cases against Poland
before the European Court of Human Rights

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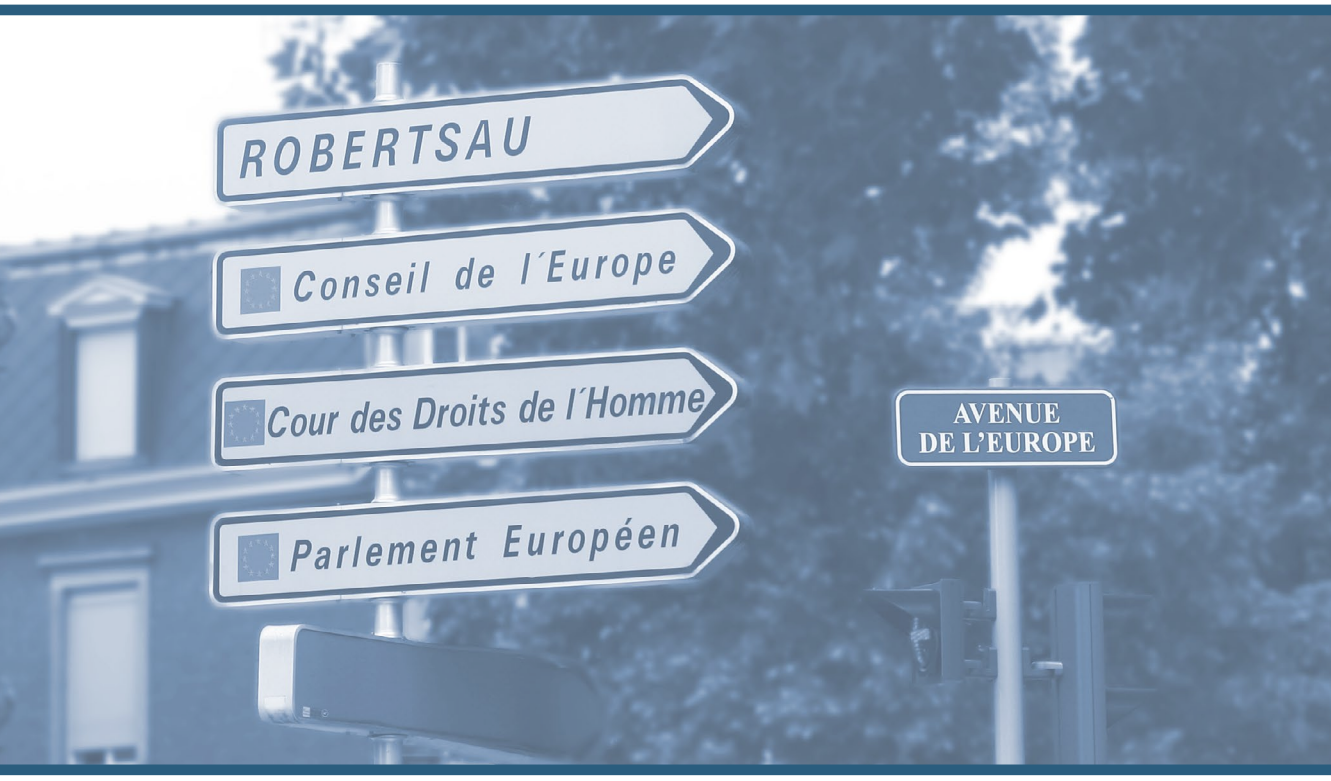

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General highlights

➞ In recent months, the attention of audiences following the developments concerning the rule of law in Poland has been focused on the Court of Justice of the European Union.

➞ However, the role and potential of the European Court of Human Rights (ECtHR) and the European Convention on Human Rights (ECHR) should not be ignored.

➞ Over the years, the ECtHR has established many important standards in its case law on the protection of the rule of law, in particular concerning the protection of the independence of the judiciary. These standards have also had a remarkable impact on the development of the relevant EU standards.

➞ However, the protection of the rule of law in proceedings before the ECtHR is ensured through the consideration of specific applications submitted to the Court, which include complaints of violations of certain freedoms and rights enshrined in the ECHR.

➞ The above means that it is the applicants and their representatives who are primarily responsible for involving the European Court of Human Rights in the rule of law cases.

➞ The Court examines cases concerning the broadly defined rule of law primarily in order to decide whether Article 6 (1) ECHR, which grants individuals the right to a court, has been infringed. However, certain important standards can also be derived from Article 8 ECHR (right to privacy) and Article 10 ECHR (freedom of expression).

➞ At present, the ECtHR's docket includes more than ten cases against Poland that are related to reforms in the justice system understood in the broadest sense.

➞ The ECtHR has so far communicated six groups of cases to the Polish authorities, which include a total of 14 cases. In all these cases the ECtHR asked the Government of Poland questions about Article 6 (right to a court). In three groups of cases, the Court's questions concerned Article 13 of the Convention (right to an effective remedy), while in three cases the questions were raised about other infringements, i.e. Article 8 (right to respect for private and family life), Article 10 (freedom of expression) and Article 1 of Protocol 1 (protection of property).

➞ The pending cases concern, inter alia, the status of the Polish Constitutional Court, the new National Council of the Judiciary, the new Chambers of the Polish Supreme Court, as well as the appointments and dismissals of judges from their functions within the judiciary.

➞ Notably, although the beginning of the crisis of the rule of law in Poland dates back

to autumn 2015, the first of these cases was not communicated until mid-2019.

→ Even at this stage, a review of the communicated cases shows that the duration of ECtHR proceedings in the „rule of law cases" brought against Poland, understood as the period between the lodging of an application and the delivery of the Chamber's judgment, is likely to be longer than two years in most cases.

→ However, the pace of processing certain applications (not only those originating from Poland) suggests that the ECtHR is increasingly giving priority to applications concerning the rule of law.

→ The ECtHR's finding that there has been a breach of Article 6(1) ECHR in any of the communicated cases may be extremely important in practice, although the effects of such a judgment will obviously depend on its specific wording. For instance, if the Court rules that the newly created chambers of the Supreme Court do not constitute a "tribunal established by law", this will mean that, in principle, any proceedings before these bodies are defective for the Convention purposes. In a similar vein, any ECtHR's holding that the participation of persons elected by the Parliament in December 2015 in the examination of cases before the Constitutional Tribunal violates Article 6 ECHR would pave the way for the submission of applications for many Polish citizens. It is even possible that the ECtHR may one day issue a pilot judgment on this matter.

→ The currently pending cases involve only some of the issues concerning current developments and circumstances in the justice system that may appear on the Strasbourg Court's case list in the future. These include, for example, matters relating to disciplinary proceedings, judicial secondments and the status of associate judges.

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Introduction

In recent months, the Court of Justice of the European Union has attracted the attention of everyone who follows topics related to the rule of law in Poland. The CJEU has become a forefront venue for the hearings exploring the nature of changes in the Polish justice system.

However, the question arises as to whether the Luxembourg Court is the only destination for defenders of human rights and, above all, of the right to an independent court. This report constitutes an attempt to answer another question: are we witnessing a new phase of the fight for the rule of law in Poland, the one taking place before the European Court of Human Rights? We would also like to use the report as an opportunity to reflect on the possible outcomes of the "rule of law" proceedings pending in Strasbourg. Such a discussion inevitably poses further crucial questions: do lawyers fully utilise the potential of the European Convention on Human Rights in cases involving the rule of law? Is the European Court of Human Rights now capable of serving as an effective guardian of the right to an independent court?

In conclusion, the report seeks to identify the key ECtHR standards relevant to the protection of the rule of law (and specifically of the independence of the judiciary) and discuss the "Polish" rule of law cases currently pending before the Court, being viewed against the background of these standards. Finally, the report attempts to analyse how the ECtHR adjudication of these cases may influence the situation in Poland.

II.

Protection of the rule of law in the ECtHR case law

1. Introduction

Over the years, the ECtHR has formulated in its case law a number of important standards on the protection of the rule of law, in particular in the context of safeguarding the independence of the judiciary. These standards have influenced the jurisprudence of national constitutional courts, as well as the development of EU rule of law standards. Notably, a recent example of this EU impact of the ECtHR is the CJEU judgment concerning the Polish National Council of the Judiciary and the Disciplinary Chamber of the Supreme Court contains many references to the case law of the ECtHR.[1]

At the same time, it is quite evident that the ECtHR standards concerning the protection of the rule of law continue to evolve, while their certain aspects remain ambiguous. These include themes such as respect for the independence of constitutional courts or the impact of the shortcomings in the judicial appointment process on individuals' right to a tribunal established by law. The numerous Polish applications that address different aspects of the governmental policies threatening the independence of the judiciary can provide the Court with an opportunity to clarify the case law in this area.

2. Protection of the rule of law in the ECtHR case law – the legal framework

2.1. General observations

There are no provisions in the European Convention on Human Rights that would explicitly express the principle of separation of powers or directly impose on the State-Parties to the Convention any obligation to determine the status of national courts and judges as the Convention only deals with the freedoms and rights of individuals and certain matters relating to the organisation and procedure of the ECtHR. The primary role of the ECtHR is to resolve individual and specific cases pending before it rather than to rule on the abstract compliance of particular measures adopted by parties to the Convention with "European standards of the rule of law". In this context, it is evident that the proceedings before the ECtHR may only be used to uphold the rule of law if specific applications are made to the Court, alleging infringements of certain freedoms and rights guaranteed by the ECHR.

1 CJEU judgment of 19 November 2019, *A.K. v. Krajowa Rada Sądownictwa* (C-585/18) and *DO v. Sąd Najwyższy* (C-625/18), paragraphs 126-130, 133, 137, 145.

In practice, the protection of the rule of law can be linked to both the right to a court, afforded to all individuals, and the rights and freedoms of judges. This first aspect seems obvious: both the ECHR and other international conventions[2] grant individuals the right to have their cases heard by independent courts. This right would be jeopardised if, for example, authorities did not respect certain basic principles governing the status of the judge (known as "the guarantees of judicial independence"). Consequently, it is obvious that an application may be lodged based on the complaint that a right afforded to an individual (a party to judicial proceedings) has been infringed because of the insufficient independence of the court hearing a particular case resulting from inappropriate systemic solutions or the practice of exerting illegal political pressure on judges. Apart from the above, one should also remember that public officials, among them judges, are given no lesser protection under the Convention. Judges may, therefore, argue that the exclusion of judicial recourse in a matter relating to their official role, or an absence of such recourse resulting from a wrongful or unfair disciplinary disposition, has led to an infringement of their rights. Accordingly, in this case, the rule of law is protected as long as judges' rights are upheld.

The Strasbourg Court examines cases concerning the broadly defined rule of law primarily in order to decide whether Article 6 (1) ECHR, which grants individuals the right to a court, has been infringed. However, certain important standards can also be derived from Article 8 ECHR (right to privacy) and Article 10 ECHR (freedom of expression).

2.2. Article 6(1) ECHR

The first sentence of Article 6 (1) ECHR contains several basic guarantees, such as the right to a fair and public hearing, the right to be heard within a reasonable time, the right to be heard by an impartial court, the right to be heard by an independent court, the right to be heard by a court ("tribunal") established by law, and the right to enforce a judgment.[3]

The right to an independent court and the right to a court established by law clearly have a crucial impact on the protection of the rule of law. The ECtHR's assessment of a court's independence is based, in particular, on the manner in which the court's judges are appointed, the length of their term of office and the existence of mechanisms that protect them against external pressures. The Strasbourg Court also considers whether the court in question presents an appearance of independence.[4] The ECtHR attaches particular

2 See in particular Article 14 of the International Covenant on Civil and Political Rights (Journal of Laws of 1977, No. 38, item. 167).

3 Cf. P. Hofmański, A. Wróbel, *Komentarz do art. 6 EKPC* in L. Garlicki (Ed.), *Konwencja o ochronie praw człowieka i podstawowych wolności*, Vol. I, Warszawa 2010, pp. 248-249.

4 See, e.g. *Ramos Nunes de Carvalho e Sá v. Portugal* (GC), nos. 55391/13, 57728/13 and 74041/13, § 144, 6 November 2018.

importance to guarantees against an arbitrary removal of judges from office.[5] The right to a court established by law entails the obligation to ensure that a court hearing a particular case is constituted in accordance with the law. This requirement applies to the validity of the process of appointing a given judge[6], the lawfulness of the composition of the bench in a case[7], compliance with the rules on judicial jurisdiction,[8] as well as to the prohibition of adjudication beyond the scope of the legal authority given to a given judicial officer.[9] To a certain extent, also the requirement of impartiality is relevant for the protection of the rule of law. Here, impartiality encompasses both to a judge's approach towards a party to the proceedings (subjective impartiality) and to the existence of factors which may objectively influence the perception of a judge as impartial, irrespective of his actual attitude towards the parties (objective impartiality).[10]

Importantly, the guarantees deriving from Article 6 ECHR are independent of each other in the sense that a breach of any of them amounts to a violation of Article 6 (1) ECHR, regardless of whether another guarantee has or has not been breached.[11] For example, if a court is not established by law, the ECtHR will establish a violation of Article 6 (1) ECHR without necessity to examine whether the deficiencies in this respect led to, for example, procedural unfairness.

Guarantees under Article 6 ECHR may be invoked by a party to national proceedings decided by a court deprived of guarantees of independence or, in some cases, by a judge affected by the same deprivation as the rights and freedoms expressed in the Convention are afforded to judges, too. The state must, therefore, ensure that judges have the right to a court and fair trial in cases involving judicial "labour disputes", i.e. the matters relating to, inter alia, dismissal, promotion and remuneration of judges.[12]

Perceived from the perspective of the rights of judges, Article 6 ECHR is notably a provision of a procedural nature, referring to the necessity to ensure that a judge has the right to a court and a fair procedure. However, this article will not provide an adequate basis for an application in a case where a judge has been granted the right to a court, albeit received a sanction that raises controversy concerning its legitimacy and proportionality. Other provisions, in particular the aforementioned Articles 8 and 10 ECHR, should be invoked in such a case.

5 See, e.g. *Henryk Urban and Ryszard Urban v. Poland,* no. 23614/08, § 45, 30 November 2010.
6 See, e.g. *Guðmundur Andri Ástráðsson v. Iceland,* no. 26374/18, § 98, 12 March 2019.
7 See, e.g. *Chim and Przywieczerski v. Poland,* nos. 36661/07 and 38433/07, § 137, 12 April 2018.
8 See, e.g. *Miracle Europe Kft v. Hungary,* no. 57774/13, §§ 57-67, 12 January 2016.
9 Cf. *Ezgeta v. Croatia,* no. 40562/12, §§ 38-45, 7 September 2017.
10 See, e.g. *Kyprianou v. Cyprus* (GC), no. 73797/01, §§ 118-121, 15 December 2005.
11 *Guðmundur Andri Ástráðsson v. Iceland*, § 100.
12 See, e.g. *Baka v. Hungary* (GC), no. 20261/12, §§ 102-105, 23 June 2016.

2.3. Article 8 ECHR

Article 8 ECHR ensures the protection of privacy and family life. However, the guarantees expressed in Article 8 also apply, to an extent, to professional life. A violation of this provision may thus occur if, for example, a judge is disciplined or dismissed from the position of president of the court for reasons related to their private life, or if the penalty or dismissal negatively affects their private life.[13] The latter situation may arise, in particular, if the reputation or good name of the official in question is damaged. Consequently, Article 8 ECHR makes it possible to challenge the merits of sanctions imposed on a judge.

2.4. Article 10 ECHR

Article 10 ECHR guarantees individuals freedom of expression. Along with Articles 6 and 8 ECHR, Article 10 applies with full force and effect to judges and other public officials. As the Court has emphasised, given the nature of their functions, judges should exercise their freedom of expression with a certain degree of restraint so as to protect public confidence in the independence and impartiality of the judiciary. However, judges may not be completely deprived of the right to express their opinions and views, in particular in matters relating to the protection of the rule of law, the separation of powers and the independence of the judiciary.[14]

3. Protection of the rule of law in the ECtHR case law – selected problems

3.1. Removal of court presidents

The ECtHR has considered several applications concerning the removal of court presidents.

The case of *Baka v. Hungary* concerned the removal of the President of the Hungarian Supreme Court, who was dismissed from the office under the laws introducing the new constitution, which replaced the Supreme Court with a new institution, the *Kúria*. The establishment of the *Kúria* was accompanied by laying down new conditions for the eligibility to hold the office of its president. It has been argued that these conditions were deliberately designed to deprive the then-current president of Hungarian Supreme Court, A. Baka, a vocal

13 See *Denisov v. Ukraine* (GC), no. 76639/11, §§ 100-117, 25 September 2018; cf. *Volkov v. Ukraine,* no. 21722/11, §§ 165-187, 9 January 2013.

14 *Baka v. Hungary*, §§ 162-167.

critic of legislative reforms introduced by the Orban Government, of the opportunity to hold the office of president of the *Kúria.* In *Baka*, the ECtHR found a violation of Article 6 (1) and Article 10 ECHR. As regards the former, the Court recalled that the "civil" limb of Article 6 (1) ECHR covers labour disputes concerning public officials unless national law expressly excludes judicial recourse in such disputes and the exclusion is justified on objective grounds in the State's interest. When referring to those criteria in the *Baka* case, the ECtHR pointed out that Hungarian law did not explicitly exclude the possibility of requesting a judicial review of a removal of a court president; the lack of such a possibility in the applicant's case was due solely to the fact that his dismissal was based on provisions implementing the constitution. Given the above, it was possible to apply Article 6 (1) ECHR in the case. At the same time, Article 6 (1) was clearly violated since the applicant was unable to as a court to review the lawfulness of his removal from office. Consequently, there has been a violation of the essence of the right to a court. In that connection, the Court noted that the instruments adopted by the Council of Europe and other international bodies attach increasing importance to the necessity of ensuring procedural fairness in cases involving dismissals of judges, in particular by subjecting decisions of executive and legislative bodies to review by independent bodies. The ECtHR also found a breach of Article 10 of the ECHR, holding that the applicant's removal from the office of President of the Supreme Court was linked to his criticisms of the actions of Viktor Orban's government (see below).

A similar issue was raised in *Denisov v. Ukraine.* In *Denisov*, the applicant was dismissed from the position of the President of the Kyiv Administrative Court of Appeal by a decision of the High Council of Justice. The applicant unsuccessfully challenged the decision before the Supreme Administrative Court. In its judgment made in the case, the ECtHR found an infringement of Article 6 (1) ECHR, noting that the High Council of Justice was not sufficiently independent and impartial while deciding on the applicant's removal from office. The Court found that the majority of the Council's members were not judges and, moreover, some were professionally subordinated to other state bodies. Furthermore, the proceedings before the Supreme Administrative Court did not meet the Convention standards. The Supreme Administrative Court did not sufficiently examine all aspects of the applicant's case and the judges deciding the case were subject to a disciplinary liability regime operated by the High Council of Justice, which meant that they were not sufficiently independent and impartial in examining the lawfulness of the Council's decision. On the other hand, in *Denisov* the ECtHR did not find a breach of Article 8 ECHR, which, in the applicant's view, has taken the form of an infringement of the right to privacy caused by his removal from office of court president).

3.2. Disciplinary liability of judges

Disciplinary proceedings brought against judges cannot be considered to constitute "criminal charges" within the meaning of Article 6 (1) ECHR. However, such proceedings

may involve "civil rights and obligations", especially when they involve more severe sanctions. For this reason, disciplinary proceedings should conform to the standards of a fair trial.

The ECtHR has addressed disciplinary proceedings against judges in its case law, for example in the Grand Chamber judgment in *Ramos Nunes de Carvalho E Sa v. Portugal.* The applicant, a judge, was subject to a total of three disciplinary proceedings. In all three proceedings, the High Council of the Judiciary disciplined the applicant by imposing sanctions which included suspension from official duties. The applicant appealed to the Supreme Court, which upheld the contested disciplinary decisions. In her appeal, the applicant complained, inter alia, that the High Judicial Council and the Supreme Court were not impartial and independent bodies. However, her complaints proved unsuccessful. Nevertheless, the ECtHR found an infringement of Article 6 (1) ECHR on account of the excessively limited jurisdiction of the Portuguese Supreme Court and the failure to conduct a trial. With regard to the former, the ECtHR recalled that the right to a court may only be exercised if the court hearing a case has "full jurisdiction". However, the Portuguese Supreme Court limited itself to reviewing the lawfulness of the disciplinary ruling, considering that it had no power to assess the facts. According to the ECtHR, such a review is not sufficient for the purposes of Article 6 ECHR as "the issues of fact" are crucial in disciplinary matters. The Court also held that there was no reasonable justification for waiving a hearing, all the more so since the applicant herself requested a hearing. The ECtHR also noted that there no hearing had been held as part of the proceedings before the High Judicial Council. In these circumstances, having regard to both of these deficiencies, the ECtHR concluded that there has been a violation of Article 6 (1) ECHR.

Another important decision concerning the disciplinary liability of judges is the ECtHR judgment in *Paluda v. Slovakia.*[15] Mr Paulda, a Slovakian judge, became subject to disciplinary proceedings by the Judicial Council of the Slovak Republic and simultaneously suspended him from his duties. The suspension decision entailed a 50% reduction in the applicant's salary. The applicant appealed to a court, but the court ruled that the Council's decision to suspend him from his judicial duties falls outside the jurisdiction of courts. This ruling was upheld by the Supreme Court whereas the Constitutional Court rejected the applicant's constitutional complaint, considering it to be manifestly ill-founded. Ultimately, the disciplinary proceedings taken against the applicant was discontinued. The ECtHR found that there had been a violation of Article 6 (1) ECHR as the applicant was unreasonably and disproportionately deprived of access to a court in the context of a severe and prolonged measure (suspension from duties) that was imposed on him. The ECtHR also took account of the fact that the applicant had not been heard during the proceedings before the Judicial Council and also that the work of the Council was chaired by the President of the Supreme Court, who remained in dispute with the applicant.

15 *Paluda v. Slovakia,* no. 33392/12, 23 May 2017.

3.3. Freedom of expression for judges

Sometimes judges are subject to disciplinary sanctions because of their comments on topics related to policies implemented by the state. The necessity to protect the political neutrality of the judiciary, which is essential for public confidence in the impartiality of judges, is sometimes offered as a rationale for such sanctions. The political neutrality and impartiality of judges are undoubtedly the cornerstones of the judiciary in a democratic state, but in the light of the ECtHR case law, those two requirements cannot be interpreted in a way that completely deprives judges of their freedom of expression. This freedom, guaranteed by Article 10 ECHR, is afforded also to public officials, including judges.

The ECtHR has referred to judges' freedom of expression, inter alia, in the aforementioned judgment *Baka v. Hungary*. Although the overhaul of the eligibility requirements for the candidates for the office of President of the Supreme Court (or the newly created Kúria) was not openly motivated by the desire to deprive the applicant of his position, the ECtHR found that this was the real reason for the reform. The Court based its assertion on the fact that the proposal to shorten the applicant's term of office appeared in the wake of his criticisms of the government's actions. Furthermore, as the ECtHR held, the authorities had not put forward any objective rationale for Mr Baka's removal from office. The Court, therefore, concluded that there had been an interference with the applicant's freedom of expression. The interference has not served any justified purpose and was not necessary in a democratic society within the meaning of Article 10 (2) ECHR. The ECtHR acknowledged that, in view of their role, the judges should exercise their freedom of expression with restraint, in particular with regard to commenting on the cases they decide. However, statements on topics related to the principle of separation of powers and the independence of the judiciary are subject to special Convention protection, and the mere fact that a topic may have political implications should not deprive judges of the opportunity to speak up. The ECtHR also emphasised that sanctions imposed on judges may have the so-called "chilling effect", discouraging them from speaking out on issues concerning the justice system. In the applicant's case, he received a "sanction", which took the form of the shortening of his term, as a result of statements he gave as the Supreme Court President. However, as a top judicial officer, he not only could, but also was obliged to, give an opinion on any reforms of the justice system. His statements concerned exclusively legislative changes and did not go beyond *strictly* professional criticism. The sanction in the form of ending the applicant's term of office 42 months earlier than originally conceived was a severe measure, which is difficult to reconcile with the principle of independence of the judiciary. Accordingly, the Court held that Article 10 ECHR had been violated in Mr Baka's case.

The ECtHR has found a violation of Article 10 ECHR in other similar cases, including *Wille v. Liechtenstein.*[16] In *Wille*, the applicant was the President of the Administrative Court of

16 *Wille v. Liechtenstein*, no. 28396/95 (GC), 28 October 1999.

Liechtenstein. As part of a series of lectures on the jurisdiction of the Constitutional Court and fundamental rights, the applicant gave a public lecture at a research institute on the "Nature and Functions of the Liechtenstein Constitutional Court". In the lecture, the applicant expressed the view that the Constitutional Court was competent to decide on the "interpretation of the Constitution in case of disagreement between the Prince (government) and the Diet" (parliament). The applicant's lecture was discussed in a press article. Prince Hans-Adam II of Liechtenstein did not like the views set out in the lecture and sent a letter to the applicant, alleging that the latter's views were contrary to "the spirit and the letter" of the country's Constitution and indicating that the applicant was "unsuitable for public office". The Prince also informed the applicant that he did not intend to reappoint him to any public office in future. The ECtHR found that the applicant's freedom of expression had been interfered with, as the Prince's letter was a "reprimand" and could produce a chilling effect. The Court also held that the interference was disproportionate, noting that the applicant merely expressed his view on the interpretation of the Constitution, which was by no means uncommon. In his letter, the Prince did not invoke any other argument to prove that the applicant was unfit to perform a public function. Accordingly, in the Court's opinion, a violation of Article 10 ECHR has occurred.

Another noteworthy ECtHR judgment on judges' freedom of expression is *Kudeshkina v. Russia*.[17] The applicant, a judge of a Moscow court, gave several interviews saying that the court's president had put pressure on her during criminal proceedings against a police officer. She also pointed out that in Russia courts were frequently tampered with for political or business purposes. The applicant submitted a complaint against the president of the court to a disciplinary body, but that authority decided not to launch proceedings against the president. The president also filed a disciplinary complaint against the applicant. The disciplinary body found that the applicant had committed disciplinary offences and expelled her from the bench. This decision was first upheld by a Moscow court and later, by the Supreme Court. The key accusation against the applicant was that she had allegedly disclosed details of an active criminal case pending against the police officer to the media. The judge lodged an application with the ECtHR, which considered it to be well-founded and found a violation of Article 10 ECHR. The Court held that the applicant's statements concerned matters of public interest. The ECtHR ruled that the applicant's statement had not disclosed any information from the ongoing criminal proceedings and merely constituted a criticism of the pressure exerted by the president of the court. In the court's view, her statements should not be seen as a personal attack on the president. The sanction imposed on the applicant (termination of a judicial office) was extremely severe and certainly could have had a chilling effect. The Court also took account of the fact that the appeal against the disciplinary ruling was heard at first instance by a Moscow court, whose impartiality may be called into question because of the applicant's dispute with the president of that court.

17 *Kudeshkina v. Russia*, no. 29492/05, 26 February 2009.

3.4. Right to a tribunal established by law

As already noted, one of the guarantees established under Article 6 (1) ECHR is the right to a court ("tribunal") established by law. This right implies that judgments should be handed down only by duly authorised judges and a duly appointed court. The right to a court established by law is crucial from the perspective of the rule of law, as serious violations of the rule of law may result in judges having no legal legitimacy to issue judicial decisions.

A landmark ECtHR judgment in this area is *Guðmundur Andri Ástráðsson v. Iceland.* Candidates for the judges of the newly established Icelandic Court of Appeal were to be assessed by a special committee, designed to be free from any undue political influence. The committee submitted a shortlist of the top-rated candidates to the Minister of Justice. The Minister could override the committee's recommendation and present for appointment a candidate whom the Committee has considered not to be the most qualified only in justified cases and with the consent of the Icelandic Parliament. The Minister modified the shortlist without giving appropriate reasons for his decision. The Parliament approved the modified shortlist of candidates and the President appointed the judges designated by the Minister. The Icelandic Supreme Court found that the appointment procedure violated the law. The Supreme Court also found that it was unlawful to vote on all candidates at the same time and that a separate vote should have been held on each candidate. Consequently, the court awarded compensation for non-pecuniary damage to the candidates omitted by the Minister. However, in another judgment, the Supreme Court ruled that the appointments of judges were performed in a lawful manner and that the judgments made by the judges concerned are valid. In Ástráðsson, the ECtHR ruled on the application lodged by a man sentenced by a criminal court comprising an improperly appointed judge, finding a violation of Article 6 (1) ECHR. The ECtHR pointed out that it is capable of reviewing the compliance with the requirements established under national law in order to examine whether there has been a violation of the right to have a case heard by "a tribunal established by law". However, in this respect, the ECtHR will observe the findings of the courts of the state concerned, unless there has been "a flagrant violation of domestic law" in the case. In its assessment of whether such a flagrant breach has taken place, the Court considers the following circumstances. First, it determines what norm type of the norm of national law has been infringed. A violation of national law will be considered "flagrant" by the ECtHR only if it affects national rules of a "fundamental nature" which "form an integral part of the establishment and functioning of the judicial system". Second, the manner in which the authorities act is also important. Accordingly, a violation may only be considered flagrant where the authorities have deliberately violated the domestic rules on the appointment of judges or, at a minimum, have acted with "a manifest disregard" of such national laws. Third and finally, the Court also ascertains whether a breach of national laws created a risk that the "other organs of Government" may exercise undue pressure on the appointment process, "undermining the integrity" of the process. In this respect, the ECtHR emphasises the "close connection" between the requirement that a tribunal must be established by law and the principle of the rule of law.

The ECtHR also points to the necessity of examining the real effects of the legal violation and stresses that in doing so, it must "look behind appearances". On the other hand, the outcome of the above examination does not depend on whether or not the infringements of domestic rules have resulted, under national law, in the invalidity or nullity of the judicial appointments. The ECtHR criticised the Icelandic courts for having confined themselves to assessing the effectiveness of the appointment, instead of examining whether the infringements in the appointment process were "flagrant" within the meaning of the ECtHR case law. In Ástráðsson, the ECtHR found a flagrant breach of domestic law, noting that the violations affected provisions crucial for the whole appointment process, which has resulted in an increased influence of political bodies on judicial appointments.

However, the Ástráðsson judgment is not final as the case is currently pending before the Grand Chamber of the ECtHR. Nevertheless, it is worth noting that in the past the ECtHR has found many violations of the right to a "tribunal established by law" in various contexts. In some cases, a violation of this right was the result of unauthorised persons being permitted to issue judicial decisions. For example, the case of *Shaykhatarov and Others v. Russia*[18] involved the reinstatement into service of a judge who did not meet the conditions set out in a law; *Gurov v. Moldova*[19] concerned judges allowed to adjudicate after the expiry of the term of their appointments and *Fedotova v. Russia*[20] related to irregularities in appointing lay judges). Certain cases involved other types of violations, e.g. the examination of a case by an inappropriately constituted panel (*Momčilović v. Serbia*[21] – 5 judges instead of 7), incorrect appointments of judges to a panel (*Chim and Przywieczerski v. Poland*) *or* an arbitrary change of court competent to hear a case (*Miracle Europe Kft v. Hungary*).

3.5. The principle of the rule of law and the status of prosecutors

In practice, the principle of the rule of law is usually linked to the status of judges and the courts. This association is clearly correct: after all, the judiciary is one of the three constitutional branches of power, separate from the legislative and the executive, and its independence must be strongly protected as the courts play a crucial role in upholding individual rights and freedoms. However, it is worth noting that the principle of the rule of law is equally capable of obliging authorities to respect the independence of other bodies. The status of prosecutors seems particularly interesting from this perspective. International human rights conventions do not grant individuals the right to "an independent prosecution service" that would be styled after the right to a court. In European constitutional systems,

18 *Shaykhatarov and Others v. Russia*, no. 47737/10, 15 January 2019.

19 *Gurov v. Moldova*, no. 36455/02, 11 July 2006.

20 *Fedotova v. Russia*, no. 73225/01, 13 April 2006.

21 *Momčilović v. Serbia*, no. 23103/07, 2 April 2013.

the prosecution service is often established as part of the executive, which inherently results in its limited independence. On the other hand, an efficient and independent prosecution service is a foundation of the national human rights system. A prosecution service that is subject to undue political interferences will not be able to carry out its responsibilities in an impartial manner, especially in those cases where certain human rights violations may be attributed to the ruling party politicians. Conversely, a politically subordinated prosecution service may be exploited as a means of launching politically motivated criminal proceedings. Therefore, the principle of the rule of law prohibits the excessive politicisation of the prosecution service.

In this context, the most relevant ECtHR ruling is the judgment made in *Kövesi v. Romania.*[22] Since October 2019, the applicant in this case, Laura Codruța Kövesi, has been serving as the European Public Prosecutor. From 2006 to 2012, she served as Romanian Prosecutor General. In 2013, she was appointed as chief prosecutor of the National Anticorruption Directorate. Her performance was highly appraised and in July 2016 the President appointed her for another three-year term. However, the position of Ms Kövesi was weakened after the parliamentary elections of December 2016. The new government has introduced legislation to reduce criminal liability for corruption offences and announced sweeping judicial reforms. These actions were criticised in Romania and abroad, also by Ms Kövesi. In February 2018, the Romanian Minister of Justice sent a report containing a negative assessment of Ms Kövesi's work to the *Consiliul Superior al Magistraturii* ("CSM"), the Romanian national body supervising courts and prosecutors). The report alleges that Ms Kövesi has abused her authority and undermined the powers of the Parliament, Government and Constitutional Court, which has led to the EU and international bodies unfairly responding to legislative developments in Romania. The report ended with the Minister's request for the removal of Ms Kövesi from office. The CSM negatively evaluated the proposal to dismiss the applicant and, on that basis, the President refused to issue a decree dismissing her from her post. However, the Minister declared that the President did not have the authority to do so, lodging a request with the Constitutional Court to resolve a constitutional dispute. The Constitutional Court ruled that the President was unable to refuse the Minister's request and was obliged to dismiss the applicant. The President complied with the ruling and issued a decree dismissing the applicant from her post.

Ms Kövesi lodged an application with the ECtHR, complaining that the Romanian authorities have violated the following Convention provisions: Article 6 (right to a court), Article 10 (freedom of expression) and Article 13 (right to an effective remedy). She argued that she had been unable to challenge the presidential decree and that her dismissal had been motivated by her critical opinions of the Government's legislative activities, to which she was entitled as chief prosecutor.

22 *Kövesi v. Romania*, no. 3594/19, 5 May 2020.

The ECtHR held for the applicant, finding a violation of Articles 6 and 10 of the European Convention on Human Rights.

With regard to the former, the ECtHR recalled that disputes relating to the removal of a public official from office fall within the scope of Article 6 ECHR, provided that domestic law does not explicitly exclude access to a court in this respect and providing that such an exclusion is justified. In *Kövesi,* the Court held that Romanian law did not rule out judicial recourse, and even if it did, such an exclusion would have been unjustified. In those circumstances, depriving the applicant of judicial recourse was contrary to Article 6 (1) ECHR. The ECtHR noted that, in theory, the applicant could have challenged the Presidential decree before an administrative court but observed that the court had only the power of formal review and could not examine "the appropriateness of the reasons" for the applicant's removal from office. Importantly, in finding a breach of the Convention, the ECtHR also referred to the growing importance of the Council of Europe and the European Union instruments concerning the need to ensure that dismissed prosecutors are afforded a fair procedure.

The ECtHR also ruled that the guarantees of freedom of speech were violated. The Minister's report, which included a request for the removal of Ms Kövesi from office, extensively referred to her numerous criticisms of the Government's legislative activities. The Court, therefore, held that the applicant's dismissal was linked to the exercise of her freedom of expression. Such a restriction was unjustified as it did not serve any legitimate purpose, in particular, it was not aimed to protect the rule of law. The restrictive measures taken against the applicant were also disproportionate. As Chief Prosecutor of the National Anticorruption Directorate, the applicant was entitled to speak up on matters relating to reforms that could adversely affect the independence of the judiciary and the effectiveness of the fight against corruption. In this respect, the Court referred to a Recommendation of the Committee of Ministers of the Council of Europe issued in 2000, which recognises that prosecutors should have the right to take part in public discussions on matters concerning the administration of justice and protection of human rights. The applicant's statements did not constitute a personal attack and did not go beyond the limits of strictly professional criticism. The ECtHR stressed that the applicant's dismissal threatened the independence of the judiciary, as the independence of courts and prosecutors is linked according to international standards. The dismissal was considered of being capable of generating a "chilling effect", discouraging other prosecutors and judges from speaking out in the public debate.

III. The key communicated cases against Poland and their possible consequences

1. Xero Flor w Polsce sp. z o.o. v. Poland[23]

One of the most interesting "Polish" cases presently pending before the ECtHR is the matter brought by the company Xero Flor concerning the ruling of a panel of the Polish Constitutional Court (*Trybunał Konstytucyjny*, "TK") composed of a defectively appointed person.

In April 2015, Xero Flor filed a constitutional complaint with the TK. The complaint was initially admitted for examination on the merits but on 5 July 2017, the TK dismissed the case for procedural reasons. One of the judges hearing the complaint submitted a dissenting opinion in which he indicated that the composition of the TK panel was inappropriate as the panel included a person (M. Muszyński) unauthorised to adjudicate. In January 2018, Xero Flor lodged an application with the ECtHR, alleging, inter alia, an infringement of Article 6 ECHR. The applicant argued that due to the participation of an unauthorized person in the adjudicating panel led to a violation of the applicant's right to a tribunal established by law.

While examining the application, the ECtHR will first of all have to determine whether the proceedings before the Constitutional Court, initiated by the constitutional complaint, are covered by the guarantees arising from Article 6 (1) ECHR. According to the existing case-law of the ECtHR, Article 6 (1) ECHR may be applied to proceedings before constitutional courts provided that the outcome of such proceedings has a decisive impact on civil rights or freedoms of individuals. Clearly, if a national constitutional court examining a constitutional complaint can review the constitutionality of not only legal provisions, but also their application, and also is capable of overturning the judgment contested in the complaint, then the proceedings before that court can fall under the ambit of Article 6 ECHR. However, the Polish Constitutional Court is only authorised to review legal norms, and its judgment declaring that a contested norm is unconstitutional has no direct or automatic effect on a court's judgment issued in the complainant's case. Nevertheless, it may reasonably be argued that Article 6 ECHR may be applied for the assessment of proceedings before the TK. In the Polish legal system, the constitutional complaint constitutes an important human rights protection mechanism. If a complaint is successful, the complainant may be able to apply for the reopening of proceedings or seek damages for the loss caused by the application of unconstitutional provisions. Moreover, in some cases, a constitutional complaint may be the only legal remedy for the effective exercise of rights of an individual.[24]

23 No. 4907/18, communicated on 2 September 2019.

24 See M. Szwed, "Orzekanie przez wadliwie powołanych sędziów jako naruszenie prawa do sądu w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r., 26374/18, Guðmundur Andri Ástráðsson przeciwko Islandii", *Europejski Przegląd Sądowy* (7)2019, pp. 47-48; Helsińska Fundacja Praw Człowieka, amicus curiae brief submitted in the case *Xero Flor w Polsce sp. z o.o. v. Poland*, 17 January 2020, paras. 5-15.

Assuming that Article 6 ECHR can be applied to constitutional complaint proceedings before the TK, it is fairly likely that the ECtHR would find a violation of that provision in the *Xero Flor* case. The above assertion is based on the strong argument that the three persons appointed to sit on the Constitutional Court in December 2015 were defectively elected. These persons were elected for the positions filled by judges elected by the previous Parliament based on a legal authority which was declared constitutional by the Constitutional Court.[25] Although no TK judgement explicitly nullified the parliamentary resolutions on the election of these three persons to the TK (the Constitutional Court has no competence to examine such resolutions), a logical conclusion of the Court's judgments is that these persons have not been effectively elected. The above conclusion is based on the fact that these persons were elected to positions already filled by lawfully appointed judges, which is inadmissible. Furthermore, the Parliament does not have the power to invalidate an election made by the previous Parliament. Irregularities in the election of the three persons are noted by the legal scholarship, in judicial decisions and also by the Ombudsman, who regularly requests the exclusion of defectively elected persons from the composition of TK panels hearing particular cases. Moreover, certain international bodies, including the European Commission and the UN Special Rapporteur on the independence of judges and lawyers, have noted that these persons have not been lawfully elected and should not be involved in the adjudication of cases.

If the ECtHR held that the participation of persons elected by the Parliament in December 2015 in the examination of cases before the TK violates Article 6 ECHR, such a holding would pave the way for the submission of applications for many Polish citizens. It is equally possible that the ECtHR may one day issue a pilot judgment on this matter. Furthermore, the execution of such a judgment would be supervised by the Committee of Ministers of the Council of Europe. It is also possible that the ECtHR decision would also affect the jurisprudence of the CJEU and encourage Polish courts to ask the CJEU to give a preliminary ruling on questions concerning e.g. whether the judgments handed down by improperly constituted TK panels are at all binding.

2. Grzęda v. Poland[26]

The case of *Grzęda v. Poland* involves the shortening of terms of judicial members of the National Council of Judiciary of Poland (*Krajowa Rada Sądownictwa*, "KRS"), which was a consequence of the parliamentary adoption of a controversial law changing the rules of the election of the KRS members.

25 Judgment of Constitutional Tribunal, case no. K 34/15, 3 October 2015.

26 No. 43572/18, communicated on 9 July 2019.

Jan Grzęda is a judge of the Supreme Administrative Court. In January 2016, he was elected to sit on the KRS. According to the Constitution, the term of office of the Council's elected members is four years, which means that the applicant's term should end in 2020. However, in December 2017, the Parliament passed a law which terminated the mandate of all judges sitting on the KRS. As the law's drafters explained, the new legislation was to implement the judgment of the Constitutional Court of 20 June 2017. In this judgment, the provisions setting out the rules of the election of the KRS members appointed by the judiciary and introducing "individual" term of office for each elected member were declared unconstitutional by the TK. The new law introduced a completely different model for the election of judges to the NCJ – from that moment on, they were to be appointed not by other judges, but by the Parliament. Since the law did not provide the prematurely recalled members of the KRS with any remedy against their dismissal, Judge Grzęda turned to the ECtHR, lodging the application in which he complained of a breach of Convention Article 6 (1) (right to a court) and Article 13 (right to an effective remedy).

The fundamental legal problem that the ECtHR will need to resolve is whether the shortening of a KRS member's term of office can be considered a matter of "civil rights and obligations". As mentioned above, disputes relating to dismissals of judges or court presidents and other "labour disputes" involving judges and other public officials are covered by the guarantees stemming from Article 6 ECHR. However, the KRS members are not the Council's employees (which is reflected e.g. in the fact that the members only receive per diem allowances for their involvement in the KRS work rather than regular remuneration). This inevitably raises the question of whether the KRS membership is at all connected with any civil rights and obligations. Assuming that Article 6 ECHR applies in the context of prematurely dismissed KRS members, it is quite obvious that in *Grzęda* the Article has been violated: after all, the applicant was removed from his post without a judicial remedy and the exclusion of legal recourse was not justified by any legitimate reason. Neither the Constitution nor the ordinary legislation in force on the day of the applicant's election allowed for the dismissal of a judge elected as a member of the KRS. Moreover, the termination of terms of KRS judicial members, accompanied by other changes introduced by the law adopted in December 2017, has undermined the independence of the Council and, given the crucial powers vested in the KRS, affected the independence of the judiciary.

A judgment of the ECtHR finding a breach of Article 6 ECHR will not reinstate the applicant, let alone other dismissed members of the NCJ, to their posts. However, it may be relevant in the context of other proceedings before the ECtHR or the CJEU concerning, for example, the correctness of presidential appointment of judges made on the basis of resolutions adopted by the newly constituted KRS. In this context, one should point to the CJEU judgment of 19 November 2019, in which the CJEU held that the fact that the "neo-KRS" was established following the early termination of the term of its former members is a key consideration to be taken into account in an assessment of the Council's independence.

3. Żurek v. Poland[27]

The case of Żurek v. Poland is somewhat similar to the above-discussed *Grzęda* case as it also concerns the shortening of the term of a KRS judicial member. It also raises other important legal issues. The applicant, Waldemar Żurek, is a judge of the Regional Court in Kraków, former spokesman of the KRS and an active member of the Judges' Association "Themis", complains of him of being subject to harassment in connection with the critical statements he made about the Government's judicial reforms. In this context, the applicant points out, inter alia, that tax authorities and the Central Anti-corruption Bureau have audited him and his family, and he was repeatedly summoned to testify by the prosecution service. According to the applicant, all these actions were linked to his statements and were intended to produce a "chilling effect", which would deter him and other judges from criticising the Government. In his view, such practices violate Article 10 ECHR.

This aspect of the application seems to be very interesting. Non-governmental organisations and professional associations of judges have repeatedly reported on the pressure exerted on judges who oppose the Government's policies in the area of justice.[28] Such actions undoubtedly constitute a serious threat to the independence of the judiciary. A judgment of the ECtHR finding a violation of Article 10 ECHR could show that the judges subject to such pressures are able to successfully invoke international protection.

4. Broda and Bojara v. Poland[29]

The cases of *Broda v. Poland* and *Bojara v. Poland* concern the dismissal of court vice-presidents ordered by the Minister of Justice on the basis of the controversial law of 12 July 2017, which extended the Minister's powers in this area.

In 2014, the applicants were appointed vice-presidents of the Regional Court in Kielce, for a term of 6 years. In January 2018, they received a letter from the Ministry of Justice, which informed them that they had been dismissed from their positions of vice-presidents. When the applicants asked about the reasons for the dismissal, the Minister referred to the temporary authority conferred on him by the law of 12 July 2017, which allows the Minister to dismiss

27 No. 39650/18, communicated on 14 May 2020.

28 See, for example, the Amnesty International report *Wolne sądy, wolni ludzie*, pp. 11-20, https://amnesty.org.pl/wp-content/uploads/2019/07/Wolne-Sady-Wolni-Ludzie-Report_PL.pdf (last accessed on 17 July 2020); M. Szuleka, M. Wolny, M. Kalisz, *Czas próby. Polscy sędziowie wobec zmian w wymiarze sprawiedliwości*, Helsińska Fundacja Praw Człowieka, Warszawa 2019, pp. 31-46, https://www.hfhr.pl/wp-content/uploads/2019/07/czas-proby-FIN_EMBARGO_24072019-1.pdf (last accessed on 17 July 2020); J. Kościerzyński, *Sędziowie pod presją – raport o metodach szykanowania przez władzę niezależnych sędziów*, Stowarzyszenie Sędziów Polskich „Iustitia" 2019, https://www.iustitia.pl/images/pliki/Raport_Sedziowie_pod_presja_2019.pdf (last accessed on 17 July 2020).

29 Nos. 26691/18 and 27367/18, communicated on 2 September 2019.

court presidents with or without cause. A dismissal decision, which the Minister was allowed to issue within 6 months from the date of the law's entry into force, was subject to no judicial or administrative review. The applicants replied to the dismissal letters stating that there were no objective grounds for their dismissals and noting that the principle of a democratic state ruled by the law of law required the Minister to give reasons for his decisions. However, the Minister responded that the law does not require him to give reasons for the decisions. In January 2018, the dismissed vice-presidents lodged applications with the ECtHR, in which they complained about infringement of Article 6 ECHR.

The ECtHR case law on the right to access to a court exercisable by dismissed court presidents is arguably already well-developed. Depriving presidents of the possibility to request a judicial review of a decision to dismiss them from office, therefore, appears to be incompatible with Article 6 ECHR. A possible ECtHR judgment finding a breach of the Convention is unlikely to reinstate the applicants to their previous posts, but may prevent further, similarly arbitrary, dismissals of court presidents.

5. Reczkowicz and Others v. Poland[30]

The case of *Reczkowicz and Others v. Poland* concerns a crucial contemporary problem related to the state of the rule of law in Poland, namely the judicial activity of the Supreme Court judges appointed by the President based on resolutions adopted by the National Council of the Judiciary after the controversial change of the rules governing the election of judicial members of this body.

In these proceedings, the ECtHR will hear three joined applications. The first one involves the applicant's cassation appeal against a decision of the Bar disciplinary authority, which was dismissed by the Disciplinary Chamber of the Supreme Court. The other two applications concern judgments issued by the Chamber of Extraordinary Control and Public Affairs after examination of the applicants' appeals against the resolutions of the National Council of the Judiciary in which the Council refused to recommend appointing the applicants as judges. All applicants complain that the Supreme Court panels that examined their appeals did not constitute an "independent and impartial tribunal established by law" within the meaning of Article 6 (1) ECHR. In addition, the applicants complaining about the judicial appointments procedure allege that the proceedings before the KRS do not meet the standards of impartiality and independence.

As a first step, the ECtHR will need to determine whether Article 6 (1) ECHR applies at all to the matters discussed above. There is no doubt that Article 6 (1) can be applied in a case involving disciplinary proceedings, especially since the disciplinary penalty imposed on the

30 Nos. 43447/19, 49868/19 i 57511/19, communicated on 5 June 2020.

applicant was quite severe (a three-year suspension from the Bar). The other two applications are more problematic: while the dismissal of a judge could certainly be regarded as a case concerning "civil rights and obligations", the existing case law of the ECtHR does not provide a clear answer as to whether the same conclusion can be drawn with regard to the appointment of judges (see also the overview of *Sobczyńska and Others v. Poland*).

If the applications are declared admissible *ratione materiae*, the ECtHR will have to examine whether there has been a breach of the Convention's standards in relation to the right to an independent and impartial court established by law. Perhaps unsurprisingly, this issue has been raised in the case law of the CJEU and the Supreme Court, which will certainly be taken into consideration by the ECtHR in *Reczkowicz*. The outcome of this case may also be affected by the future Grand Chamber's judgment in Ástráðsson v. Iceland, in which the ECtHR will clarify the standards concerning the right to a court established by law. However, the controversy surrounding the status of judges appointed on the recommendation of the newly established KRS appears to be even more serious than those expressed in the Icelandic case.

The ECtHR's finding that there has been a breach of Article 6 (1) ECHR in any of the communicated cases may be extremely important in practice, although the effects of the judgment will obviously depend on its specific wording. If the Court rules that the newly created chambers of the Supreme Court do not constitute a "tribunal established by law", this will mean that, in principle, any proceedings before these bodies are defective for the Convention purposes. Such a conclusion may entail the payment of compensation to a significant number of applicants and may lead to an ECtHR pilot judgment. However, it is also possible that the Court may pass a more restrained judgment, holding, for example, that the infringement in question may affect the principles of impartiality and independence rather than the "right to a tribunal established by law" subject to the proviso that this should be assessed in the light of the facts of a specific case.

6. Sobczyńska and Others v. Poland[31]

The case of *Sobczyńska and Others v. Poland* concerns the admissibility of a judicial review of the President's decision refusing to appoint a judge candidate recommended in a resolution of the National Council of the Judiciary, a problem that is well-known to and widely discussed by the Polish legal scholarship.

In these (joined) proceedings, the ECtHR will examine the applications of six non-appointed candidates. Three of them took part in competitions for judicial posts in 2005 and 2006. All of them were positively assessed by general assemblies of judges at their courts and

31 Nos. 62765/14, 62769/14, 62772/14 and 11708/18, communicated on 14 May 2020.

recommended for the appointment in a resolution of the National Council of the Judiciary. Nevertheless, in January 2008 the President issued an unreasoned order refusing their appointments. In the following years, proceedings were held simultaneously before administrative courts and the Constitutional Tribunal. Finally, in October 2012, the Supreme Administrative Court dismissed the cassation appeal of the non-appointed candidates, indicating, inter alia, that the issue of judicial appointments is a constitutional matter and as such falls outside of the jurisdiction of the administrative courts. The Constitutional Court, on its part, in decisions issued in June 2012 and June 2013 (upheld by a 2014 decision) refused to proceed with the constitutional complaints lodged by the candidates.

The appointments of the three remaining applicants in *Sobczyńska* were refused by President Andrzej Duda in 2016. They appealed to the Provincial Administrative Court in Warsaw, which rejected their appeals in December 2016. Referring to the existing jurisprudence based on the aforementioned cases, the Provincial Administrative Court ruled that the presidential authority to appoint judges is a discretionary power and as such is not subject to a judicial review. In December 2017, the Supreme Administrative Court dismissed the cassation appeals filed by the candidates. The Ombudsman and Helsinki Foundation for Human Rights also participated in the proceedings. In its cassation appeal, the HFHR argued, inter alia, that the assumption that the President has an unlimited and unchecked power to refuse judicial appointments would jeopardise the independence of the judiciary and the courts and would be incompatible with international standards.

In their applications to the ECtHR, the non-appointed candidates complained about a violation of Article 6 ECHR (right to a court) and Article 13 ECHR (right to an effective remedy). Furthermore, the candidates whose appointments were refused by President Duda also alleged a violation of Article 8 ECHR (right to privacy), pointing out that the arbitrary refusal to appoint them destroyed their judicial careers.

The ECtHR judgment in *Sobczyńska* is likely to be a landmark ruling. The existing case law of the ECtHR does not provide a clear answer as to whether judicial appointments proceedings can be considered matters of "civil rights and obligations". In a decision issued following the examination of cassation appeals brought by the candidates refused appointments by President Duda, the Supreme Administrative Court held that Article 6 ECHR does not apply in their case, distinguishing between the appointment of a judge and the appeal of a judge or court president.[32] However, one can reasonably argue in favour of the opposite conclusion. The appointment, especially to a higher judicial post may be considered a "promotion". Accordingly, a refusal of such an appointment can arguably be seen as a "labour dispute" within the meaning developed in the case law of the ECtHR. Moreover, the judicial appointments process in Poland is not purely discretionary as the presidential act of appointment merely concludes a time-consuming legal procedure. One should also not to ignore the

32 Decision (*postanowienie*) of the Supreme Administrative Court of 7 December 2017, case no. I OSK 857/17.

fact that rules on judicial appointments, especially for a higher post, are important for the independence of the judiciary.

If the ECtHR finds a violation of Article 6 ECHR in *Sobczyńska*, the judgment will need to be executed. In order to do so, will it be sufficient to modify the line of reasoning of administrative courts? Or maybe it will be necessary to amend the provisions of statutory law or even the Constitution, assuming that a constitutional amendment is needed so that presidential discretionary decision may be submitted to a judicial review?

IV.

Duration of ECtHR proceedings

1. Background information

The temporal dimension of proceedings conducted before the European Court of Human Rights is a factor that should be taken into account in the assessment of the ECtHR's response to the crisis of the rule of law in countries of the Council of Europe (including Poland). The time-effectiveness context is often a central feature of reflections on how the European courts address the changes in national legal systems that we have been experiencing in recent years. Although the temporal aspect should not overshadow the discussion on the merits of the complaints made and the resultant rulings, it is undoubtedly not without significance. Indeed, a ruling made too late may prove difficult to enforce or, if a complaint concerns systemic changes, to reverse effects of such changes.

Therefore, the issue should be presented from several perspectives, most importantly, those a given body's jurisdiction and legal and procedural framework, past practices, the number of cases processed and the resulting workload, but also those related to the changing circumstances and nature of cases under consideration. Furthermore, any discussion about the temporal dimension naturally involves references and comparisons to the Court of Justice of the European Union, which is the most often mentioned European court in the context of the rule of law cases. Until recently it has been associated mainly with commercial and economic disputes, but today the CJEU is a key destination on the road towards the rule of law and human rights. It is also clear that courts in Europe increasingly often use the opportunity to refer questions for a preliminary ruling. In 2019, a record number of 641 preliminary references were recorded as compared to 568 in 2018.[33]

Several preliminary caveats should precede a discussion on the length of European proceedings. The first one is the assumption that an automatic comparison of the temporal dimension of the work of ECtHR and CJEU is not entirely appropriate given the differences in the way the proceedings are initiated in those courts. While the Court of Justice of the European Union conducts proceedings in individual cases already in the course of the national proceedings, following the receipt of a question referred by a national court for a preliminary ruling, the submission of an application to the ECtHR must be preceded by the exhaustion of domestic remedies (provided that such remedies that are "effective" within the meaning of the Convention). Notably, the perception of the CJEU's efficiency (and its jurisprudential output) is also influenced by the proceedings conducted at the initiative of the European Commission which fall outside the ambit of this report.

33 Court of Justice of the European Union, *The Year in Review Annual Report 2019*, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/ra_pan_2019_interieur_en_final.pdf accessed on 21 July 2020).

Moreover, the fact that Poland has not adopted Protocol No. 16 to the Convention, which establishes a mechanism that can be seen as equivalent to the preliminary ruling procedure, is also of special importance in the context of the present analysis. Under the Protocol, "high courts and tribunals" (usually the supreme court and/or the constitutional court of a given state) may request the ECtHR to issue an advisory opinion on "questions of principle" concerning the interpretation or application of the Convention rights and freedoms. However, one should emphasise differences between the advisory opinion procedure and the CJEU preliminary reference procedure. First and foremost, the advisory opinion procedure may be initiated only at the request of a court or tribunal of the highest instance, and such a request is entirely optional. Moreover, advisory opinions issued in this procedure are not binding on the requesting court.[34]

Already at this point, one should note the problem of the limited applicability of the interim measure procedure by the ECtHR, which can be compared to the interim remedy proceedings. In accordance with the measures adopted under Rule 39 of the Rules of Court[35], the Court may order interim measures which are binding on the State concerned. These measures are applied only in exceptional cases if the ECtHR considers that the applicant is exposed to a real risk of serious and irreparable harm in the event that interim measures are not applied. Most often, the ECtHR indicate interim measures in extradition or expulsion cases where there is a risk of the death penalty, torture, inhuman treatment, loss of life or health. According to statistics, in 2017-2019, approximately 1500-1700 requests for interim measures were submitted to the Court each year. However, less than 10% of the requests were granted (from 117 in 2017 to 145 in 2019)[36]. In the context of cases concerning the judiciary, it is worth recalling a recent Court decision, namely that issued in the case of *Gyulumyan and Others v. Armenia* (application no. 25240/20)[37] The case concerned an amendment to the Constitution of Armenia. In 2015, the Armenian Constitution was amended to introduce a 12-year non-renewable term of office for judges of the Constitutional Court and to establish a six-year non-renewable mandate for the President of that Court. However, under a transitional arrangement, judges appointed before the entry into force of the amendment were to continue serving under the previous rules (until their retirement). Similarly, the President of the Court was to retain his mandate until retirement. However, pursuant to a subsequent amendment of the Constitution all judges of the Constitutional Court were given a 12-year term of office, regardless of the date of their appointment. The amendment was adopted by the Parliament and entered into force in June 2020, effectively terminating the term of office of three applicants in the case and the mandate of the fourth applicant as President of the

34 Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Strasbourg on 2 October 2013.

35 Rules of Court. This version of the Rules of Court entered into force on 1 January 2020. The most recent amendment incorporated is that made by the Plenary Court on 4 November 2019.

36 https://www.echr.coe.int/Documents/Stats_art_39_01_ENG.pdf(accessed on 13.07.2020).

37 https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6744576-8998072%22]}(accessed on 13.07.2020).

Constitutional Court. The applicants requested interim measures from the ECtHR. The Court decided to reject the request, considering that it remained outside the scope of application of Rule 39 (interim measures) of the Rules of Court because it did not involve a risk of serious and irreparable harm of a core Convention right. In their request, the applicants alleged that the last constitutional amendment had been adopted in violation of national law and in an arbitrary manner. They also alleged that the amendments were a consequence of "a long process of harassment" against the judges of the Constitutional Court, which started after the change of Government in 2018 and intensified after the Constitutional Court accepted an application from the former President of Armenia Robert Kocharyan concerning the constitutionality of criminal proceedings launched against him. In their application, the applicants invoked Convention Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 14 (prohibition of discrimination) and Article 18 (limitation on use of restrictions on rights), as well as Article 1 (protection of property) of Protocol No. 1 to Convention and Article 1 (general prohibition of discrimination) of Protocol No. 12 to Convention. Although the ECtHR found the applicants' request to be out of the scope of Rule 39, the Court noted that they still may lodge an application and assert their rights before the Court, which "may decide to give priority to certain applications".

Before proceeding with the analysis one should also note that the ECtHR is nevertheless a judicial forum frequently chosen by Poles; there is no doubt that this conclusion holds (and will hold) true for cases resulting from the "reform" of the justice system. On 1 January 2020, cases concerning Poland represented 2.1% of all matters pending before the Court. As a result, Poland ranked 10th among the countries under the Court's jurisdiction, having been preceded by Russia, Turkey, Ukraine, Romania, Italy, Azerbaijan, Armenia, Bosnia and Herzegovina and Serbia. Interestingly, in recent years the number of judgments handed down in "Polish" cases has been relatively low (21 in 2018, 12 in 2019). The figures for the communicated cases are similarly low. In 2019, we recorded 55 communications published on the Court's website. In 2018, 52 cases/groups of cases were communicated to the Government. In the first half of 2020, the Government received notice of 21 cases. Notably, the number of new judgements that are transmitted to the Committee of Ministers of the Council of Europe for execution is decreasing with each year. In 2011, there were 211 such judgments, whereas in 2019 – 38. Since the caseload undoubtedly affects the way the Court operates and the organisation of its work, this data should be taken into account in further considerations.

2. The temporal aspect of ECtHR proceedings

Despite the above reservations, the analysis of the temporal aspect of proceedings before the ECtHR is extremely important. Sometimes, time considerations may influence the decision on whether to lodge an application and initiate such proceedings. It is also important to answer the question of whether the frequent criticisms directed against the Court by observers, legal representatives and, last but not least, the parties to the proceedings are

objectively justified. In an attempt to answer this question, this report will not only examine the timelines of Strasbourg Court proceedings in cases involving the general crisis of the rule of law but will also demonstrate how these cases compare with other cases currently being lodged against Poland and compare them with proceedings brought against other countries where similar complaints have arisen.

The case of *Baka v. Hungary* is arguably an appropriate point of reference for Polish cases. The *Baka* case is frequently cited both in domestic proceedings, cases pending before European courts, as well as in discussions between scholars and experts. The case was communicated eight months after the application was lodged and, as a whole, the proceedings before the ECtHR lasted 4 years and 3 months, including 26 months that had passed before the Chamber made its judgment.

2.1. *Baka v. Hungary*

1. **1 January 2012**: the term of the President of the Hungarian Supreme Court expires.
2. **14 March 2012**: the applicant lodges his application.
3. **29 November 2012**: the case is communicated to the Government of Hungary.
4. **27 May 2014**: a Chamber of the ECtHR issues the judgment.
5. **23 June 2016:** the Grand Chamber pronounces the judgment.

This case is an important lesson and may serve as a starting point for a discussion on the duration of ECtHR proceedings in cases involving the judiciary. *Baka* is also an opportunity to note that, despite more than four years having passed since the final decision, the Committee of Ministers of the Council of Europe still considers the judgment not executed and continues to call for reforms, which, unsurprisingly, have not been launched for the lack of political will. The effectiveness of the Strasbourg Court's activities in cases concerning the rule of law and judicial independence must, therefore, be analysed also from the perspective of both individual and general effectiveness of the CoE system of execution of judgments.

3. The temporal aspect of "Polish" cases before the ECtHR

The Polish rule of law cases may follow the footsteps of *Baka*. However, it is worth noting that while the crisis of the rule of law in Poland commenced in autumn 2015, it was not until mid-2019 when the first cases in this area were communicated. A review of the timeline of these cases shows that they have been regularly brought before the Court since the beginning of 2018.

3.1. Cases concerning the functioning of the National Council of the Judiciary

Grzęda v. Poland

1. **6 March 2018**: the members of the new Council are elected.
2. **4 September 2018**: the application is lodged.
3. **9 July 2019**: the application is communicated to the Polish Government.

Żurek v. Poland[38]

1. **6 March 2018**: the members of the new Council are elected.
2. **6 August 2018**: the application is lodged with the ECtHR.
3. **14 May 2020**: the application is communicated to the Polish Government.

38 Żurek v. Poland, application no. 39650/18 https://hudoc.echr.coe.int/eng#{%22docname%22:[%22%C5%BBurek%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22,%22COMMUNICATEDCASES%22],%22itemid%22:[%22001-202650%22]}, accessed on 13.07.2020.

3.2. Cases concerning the judicial appointments refused by the President of Poland

Sobczyńska v. Poland, Klepacz v. Poland, Brukiewicz v. Poland

1. **7 September 2014**: the application is lodged.
2. **14 May 2020**: ECtHR communicates the application.

Hejosz v. Poland, Przysiężniak v. Poland, Piaseczny v. Poland[39]

1. **28 February 2018**: the application is lodged.
2. **14 May 2020**: ECtHR communicates the application.

3.3. Cases concerning the status of the Constitutional Court

Xero Flor v. Poland

1. **3 January 2018**: the application is lodged.
2. **2 September 2019**: ECtHR communicates the application.

3.4. Cases involving the removal of court presidents or vice-presidents

Broda and Bojara v. Poland

1. **1 June / 6 April 2018**: the application is lodged.
2. **2 September 2019**: ECtHR communicates the application.

39 *Hejosz v. Poland, Przysiężniak v. Poland, Piaseczny v. Poland, application nos.* https://hudoc.echr.coe.int/eng#{%22docname%22:[%22sobczy%C5%84ska%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22,%22COMMUNICATEDCASES%22],%22itemid%22:[%22001-202826%22, accessed on 13.07.2020.

3.5. Cases concerning the status of the Supreme Court and its new chambers

Reczkowicz v. Poland[40]

1. **6 August 2019**: the application is lodged.
2. **5 June 2020**: ECtHR communicates the application.

Dolińska-Ficek v. Poland[41]

1. **12 September 2019**: the application is lodged.
2. **5 June 2020**: ECtHR communicates the application.

Ozimek v. Poland[42]

1. **22 October 2019**: the application is lodged.
2. **5 June 2020**: ECtHR communicates the application.

The first of the cases directly related to the reforms of the judiciary that the ECtHR communicated to the Government of Poland was the aforementioned case of Judge Jan Grzęda, which concerned the early termination of the term of a member of the National Council of the Judiciary. The case was communicated after 10 months from the date of lodging the application with the Court. *Ozimek v. Poland* has been so far the fastest communicated case related to the functioning of the organisation and legal framework of the justice system. In that case, approx. 8 months passed between the application and communication. However, it is worth noting that *Ozimek* was joined with the case of *Reczkowicz v. Poland,* which had been initiated two months earlier. In other cases, this initial stage of the ECtHR

40 *Reczkowicz v. Poland*, application no. 43447/19 https://hudoc.echr.coe.int/eng#{%22respondent%22:[%22POL%22],%22documentcollectionid2%22:[%22COMMUNICATEDCASES%22],%22itemid%22:[%22001-203246%22]}, accessed on 13.07.2020.

41 *Dolińska-Ficek v. Poland*, application no. 49868/19 https://hudoc.echr.coe.int/eng#{%22respondent%22:[%22POL%22],%22documentcollectionid2%22:[%22COMMUNICATEDCASES%22],%22itemid%22:[%22001-203246%22]}, accessed on 13.07.2020.

42 *Ozimek v. Poland*, application no. 57511/19 https://hudoc.echr.coe.int/eng#{%22respondent%22:[%22POL%22],%22documentcollectionid2%22:[%22COMMUNICATEDCASES%22],%22itemid%22:[%22001-203246%22]}, accessed on 13.07.2020.

proceedings was longer and took, on average, 16 months. Special attention must be paid to the cases of *Sobkiewicz, Klepacz* and *Brukiewicz*, where nearly six years have elapsed between the registration of the applications and their communication to Polish authorities by the Strasbourg Court.

A review of the above cases already shows that the duration of ECtHR proceedings in the "rule of law cases" brought against Poland, understood as the period between the lodging of an application and the delivery of the Chamber's judgment, is most likely to be longer than two years. For anyone following developments of judicial "reforms" in Poland and the deepening crisis of the rule of law, the above finding must be a cause for concern, especially because there are cases which prove that certain proceedings can be "fast-tracked" before the ECtHR despite the arguably rigid procedural framework of the Court's operation. Rule 41 of the Rules of Court reads that *"In determining the order in which cases are to be dealt with, the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it. The Chamber, or its President, may, however, derogate from these criteria so as to give priority to a particular application."* Moreover, Rule 40 provides that "[i]*n any case of urgency the Registrar, with the authorisation of the President of the Chamber, may, without prejudice to the taking of any other procedural steps and by any available means, inform a Contracting Party concerned in an application of the introduction of the application and of a summary of its objects."* According to the Court's priority policy, cases have been divided into 7 categories:[43]

- **I.** urgent cases – cases related to a risk to life or health, cases of persons deprived of liberty, cases linked to the family situation, especially the situation of a child.
- **II.** cases whose resolution is capable of having an impact on the effectiveness of the Convention system or which raise an important question of general interest.
- **III.** cases which raise complaints issues under Convention Articles 2, 3, 4 or 5.
- **IV.** well-founded cases based on other Convention Articles.
- **V.** cases concerning well-established case law.
- **VI.** cases giving rise to a problem of admissibility.
- **VII.** cases that are manifestly inadmissible.

An example of a case in which the ECtHR's response was exceptionally fast (as compared to other pending cases) was *Rybicka and Solska v. Poland*[44], a case concerning the exhumation of a deceased person's remains against the wishes of the next of kin. In *Rybicka*, the application was communicated five months after it was lodged and the judgment was issued one year after the communication. Consequently, the whole procedure took 17 months. However, it is worth noting that the judgment was made after the exhumation had already taken place.

43 https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf

44 *Rybicka and Solska v. Poland, nos. 30491/17 and 31083/17.*

Rybicka and Solska v. Poland

1. **19 April 2017**: the application is lodged.
2. **22 September 2017**: the application is communicated to the Polish Government.
3. **20 September 2018**: ECtHR enters the judgment.

The case of Ástráðsson v. Iceland is currently receiving particular attention from commentators and the public. The case has showcased the role of the ECtHR in the development of standards of the rule of law. However, attention should also be directed at the timeline of ECtHR's steps taken in Ástráðsson. The case was communicated to the Icelandic Government 19 days after the lodging of the application, and the chamber judgment was announced 9 months later. The parties are currently awaiting the decision of the Grand Chamber of the Court.

Ástráðsson v. Iceland

1. **31 May 2018**: the applicant lodges his application.
2. **19 June 2018**: the case is communicated.
3. **12 March 2019**: a Chamber of the ECtHR issues the judgment.
4. **9 September 2019**: ECtHR Grand Chamber accepts the referral request.
5. **5 February 2020**: the Grand Chamber holds a hearing.

However, it is worth noting that in 2018 the ECtHR communicated only 9 cases against Iceland in total and issued only 2 judgments in such cases. The figures for 2019 are similar: the ECtHR published 6 judgments and communicated 5 cases against Iceland.

In this context, one should mention the timeline of the steps taken by the ECtHR in the aforementioned case of *Denisov v. Ukraine,* in which the proceedings took nearly 7 years. More than 2 years have passed between the time the application was lodged and it was communicated to the Ukrainian Government.

Denisov v. Ukraine

1. **8 December 2011**: the application is lodged with the ECtHR.
2. **15 January 2014**: the case is communicated to the Government of Ukraine.
3. **25 April 2017**: a Chamber decides to relinquish jurisdiction in favour of the Grand Chamber in the case.
4. **18 October 2017**: the Grand Chamber holds a hearing.
5. **25 September 2018**: the Grand Chamber pronounces the judgment.

One should also mention the aforesaid case of *Kovesi v. Romania*, which concerned the removal of the applicant from the post of the chief prosecutor of the National Anticorruption Directorate. In *Kovesi,* the application was communicated to the Romanian Government within one month of its submission to the Court and the Chamber's judgment was delivered less than one year and five months after the date of the communication.

Kovesi v. Romania

1. 28 December 2018: L. Kövesi lodges her application with the ECtHR.
2. 30 January 2019: the case is communicated to the Government of Romania.
3. 10 June 2019: HFHRS submits its amicus curiae brief.
4. 5 May 2020: ECtHR delivers the judgment.

However, it should be noted that the rule of law cases are not the only ones that remind us of the patience required in dealings with the ECtHR. In this context, it is worth recalling the cases of same-sex couples communicated in June 2020. Some of the applications then presented to the Polish Government were brought before the Court almost eight years ago.[45]

On the other hand, the majority of the cases communicated to the Government in 2020 are brought by applications submitted to the ECtHR in 2017-2019. At the same time, the

45 *Formela v. Poland* (application submitted in 2012), *Szypuła v. Poland* (2014), *Handzlik-Rosuł and Rosuł v. Poland* (2019), *Grochulski v. Poland* (2015), *Meszkes v. Poland* (2019), *Przybyszewska and Others v. Poland* (2017), *Starska v. Poland* (2018).

judgments issued by the ECtHR in 2020 are, in most of the cases, the result of applications communicated in 2015-2017 and brought before the Court as early as in 2011[46].

4. Conclusions

In conclusion, as far as the temporal aspect of proceedings in individual cases is concerned, the Court of Justice of the European Union has mostly been (and will continue to be) a more time-effective forum than the European Court of Human Rights, for structural and institutional reasons. On average, proceedings before the CJEU take 15 months, so much less than a case pending before the ECtHR. Also, a case may be brought to the former already in the course of the national proceedings. Given this advantage, the opening moves in the battle for the rule of law has been made in Luxembourg rather than Strasbourg.

It is difficult to estimate when the ECtHR resolves the aforementioned "Polish" cases: the exchange of pleadings (observations) between the Government and the applicants takes at least several months and it is entirely possible that, in some cases, the Court will also give the parties an opportunity to try to resolve the matter amicably. On the other hand, the relatively fast pace of the ECtHR's examination of certain applications suggests that the Court is increasingly more willing to give priority to cases involving the rule of law. There is also a strong impression that the Court tends to communicate cases in thematic groups and that this policy affects its operations. It is likely that legal representatives and applicants will take note of this policy, which may have a bearing on the future litigation strategy and tactics employed by actors involved in the defence of the rule of law.

46 For example, the application in Łabudek v. Poland was lodged in 2013 and communicated in 2016, *Jezior v. Poland* was brought in 2011 and communicated in 2012, whereas *Grobelny v. Poland*, a case brought in 2012, was communicated in 2015.

V.

The future of ECtHR proceedings

1. The rule of law cases that may emerge from Poland

As indicated above, a number of proceedings pending before the Strasbourg Court are crucial for the protection of the rule of law in Poland. However, there are other areas where litigation before the ECtHR may prove beneficial.

Disciplinary proceedings against judges are certainly one of such areas. *Reczkowicz and Others v. Poland* raises the question of the status of the Supreme Court's Disciplinary Chamber, but nothing seems to stand in the way of challenging other aspects of domestic disciplinary proceedings before the ECtHR. Such challenges may be based on Article 6 (1) ECHR (cases involving procedural unfairness) or on Article 8 or Article 10 ECHR (cases involving an unfair, disproportionate punishment or sanction in retaliation for a judge's exercise of their freedom of expression).

A case concerning judicial secondments would also be interesting. Here, the primary controversy relates to the absence of an appellate measure against the Minister's decision to cancel a judge's secondment, which may be perceived as a violation of the right to a court of the judge concerned. However, it also seems reasonable to argue that the participation of a seconded judge in the examination of cases, especially those of "political importance", interferes with the right to an impartial and independent court, since the judge may be recalled by the Minister of Justice at any time and for any reason.

Finally, applications concerning the legal status of associate judges (*asesorzy*) are likely to emerge. In this context, one should recall the judgment *Henryk Urban and Ryszard Urban v. Poland*, in which the ECtHR held that the issuance of judicial decisions by associate judges contravened Article 6 (1) ECHR. However, this judgment was made on the basis of the old law, which failed to provide the associate judges with sufficient protection against arbitrary removal from office. Currently, associate judges enjoy appropriate formal guarantees in this respect, but given the overall problems with the state of the rule of law in Poland, it can be argued that the independence of associate judge is insufficient. Such a conclusion may be inferred from the fact that an associate judge's appointment to a judicial post, based on an unappealable presidential decision, depends on a resolution of the KRS, a body whose legitimacy and independence is frequently called into question.

2. Summary

As emphasised above, the European Court of Human Rights protects the rule of law, and especially the right to an independent court, by examining specific applications submitted to the Court which allege violations of certain freedoms and rights enshrined in the European Convention on Human Rights. The above means that it is the applicants and their representatives who are primarily responsible for involving the ECtHR in such cases. This report demonstrates that the ECtHR can play an important role in the protection of the rule of law in Poland. Accordingly, it seems appropriate to take action to promote the standards developed by the Court. The creation of an accessible and constantly updated database of ECtHR judgments on the standards of access to an independent court (developed not only in cases brought against Poland) would be a vital step toward achieving this goal. Such a database would certainly be useful also in domestic proceedings as one must not forget that the European Convention on Human Rights is an instrument that should also be used in the national judicial context, on the true front lines of the struggle for the rule of law.

In the future, if the ECtHR issues a judgment or judgments finding infringements, Polish authorities will have to implement such judgments, on the individual and general level. When that moment comes, it will be crucial to involve civil society in the process and to draw up a detailed implementation plan, consulted with experts. This perspective shows that defenders of the rule of law are still a long way from succeeding...

Helsinki Foundation for Human Rights

The Helsinki Foundation for Human Rights ("HFHR") is a non-governmental organisation established in 1989 by members of the Helsinki Committee in Poland. Its mission is to develop standards and the culture of human rights in Poland and abroad. Since 2007, the HFHR has had consultative status with the UN Economic and Social Council (ECOSOC). The HFHR promotes the development of human rights through educational activities, legal programmes and its participation in the development of international research projects.

The HFHR has been operating the **Strategic Litigation Programme**, as part of which the Foundation originates or engages in strategically significant court and administrative proceedings. International human rights bodies are a key focus of the Programme's activities. Through its participation in strategic litigation cases, the Programme aims to obtain ground-breaking judgments, which change practices or laws on specific legal issues that raise serious human rights concerns.

The Programme's activities include the following:

- submitting amicus curiae briefs on behalf of the HFHR, in which we present specific human rights issues that are relevant from the perspective of constitutional and comparative law but do not directly refer to the facts of a case;
- taking part in court proceedings as a third party intervener, which means that representatives of the Foundation have the right to express their opinions and submit motions and statements during a trial;
- representing victims of human rights violations in proceedings before international bodies;
- working with law firms and individual lawyers to procure their pro bono representation and legal assistance for the HFHR's clients.

The main area of the Programme's operations is proceedings before the European Court of Human Rights. Recently, one of the objectives pursued by the Programme has been to encourage national courts to refer questions for a preliminary ruling to the Court of Justice of the European Union.

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