A JUDGE OR A NON-JUDGE?

THE MANNER OF REGULATING THE STATUS OF PERSONS APPOINTED TO JUDICIAL POSITIONS WITH THE PARTICIPATION OF THE "NEW" NATIONAL COUNCIL OF THE JUDICIARY

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Spis treści

1. SUMMARY

§ The process of restoring the rule of law must be in accordance with the principles governing a state ruled by law.

§ Since 2018, a total of 2,447 persons have been appointed to judgeships at the request of the "new" NCJ. The group of persons who have been appointed as judges with the participation of the "new" NCJ is very diverse.

§ In its current composition, the National Council of the Judiciary is not in a position to fulfil its constitutional task of safeguarding the independence of the judiciary. Irregularities in the appointment and functioning of the Council have a negative impact on all judicial appointments made with its participation and undermine the effectiveness of citizens' enjoyment of the right to a court. The act of appointing a judge by the President of the Republic of Poland does not cure the shortcomings associated with the appointment of a judge with the participation of the "new" NCJ.

§ The lack of statutory regulation of the status of persons appointed to judicial positions with the participation of the "new" NCJ creates legal uncertainty and undermines citizens' trust in the state.

§ To date, neither the European Court of Human Rights nor the Court of Justice of the European Union has questioned the judicial status of the persons appointed with the participation of the "new" NCJ.

§ The case law of the Supreme Court and the Supreme Administrative Court gives no reason to conclude that the persons appointed as judges with the participation of the "new" NCJ are not and never have been judges.

§ According to Article 180 (2) of the Constitution, a judge may be dismissed from office, suspended from office or transferred to another court or position against his or her will in the instances prescribed in a law. The existing case law of the ECtHR and the CJEU provides the basis for the application of this provision to at least some of the persons appointed to judicial positions with the participation of the "new" NCJ.

§ The exceptional nature of the removal of a judge from office and the constitutional requirement to apply such measures on the basis of a judicial decision make it impossible to introduce provisions that enable the automatic and statutory removal of judges from office.

§ Removing a judge from office, declaring his appointment void or invalid, without at the same time guaranteeing his right to a judicial review of such an act, may constitute a violation of Article 6 and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

§ According to the HFHR, the justification for the introduction of a personal vetting framework in Poland in relation to judges appointed with the participation of the "new" NCJ is the need to comply with the judgments of the ECtHR and the CJEU in relation to the so-called reform of the judiciary, including ensuring that courts will hear cases independently and impartially.

§ All persons appointed to the office of judge with the participation of the "new" NCJ should be subject to the mechanism of authorisation of their appointments by a properly constituted NCJ.

§ The way in which the authorisation mechanism is handled, including the level of detail of the vetting carried out, should vary between different groups of judges. This means, among other things, that judges who have obtained a position through the conversion of the position of an associate judge and those who have obtained an appointment to a position at the Supreme Court or the Supreme Administrative Court must be treated differently.

§ The properly constituted National Council of the Judiciary should play a central role in the authorisation process. Persons elected to the positions of judicial members of the NCJ from among the judges appointed with the participation of the "new" NCJ should be excluded by law from participating in the authorisation procedure.

§ The authorisation proceedings should guarantee the judge concerned the right to be heard and to request the admission of certain evidence.

§ The authorisation proceedings should be transparent.

§ The transfer of the power to carry out authorisation proceedings to the NCJ should be linked to an increase in its human resources and a change in the form of the compositions in which the NCJ has previously deliberated.

§ The NCJ should be able to address requests to the court to suspend a judge from office for the duration of the authorisation proceedings.

§ The criteria for the authorisation of persons appointed to a judicial position with the participation of the "new" NCJ should be based on the existing case law of the ECtHR and the CJEU and also take into account the case law of the Polish courts.

§ The criteria for the authorisation of persons appointed to judicial office with the participation of the "new" NCJ should refer to the following:

- the relationship between judges and participants in the appointment process and other public authorities;
- the conduct of the appointment process itself, including application of discriminatory criteria;
- the merits of the preparation of the candidate being evaluated in the nomination proceedings;
- the outcome of the nomination process in relation to the candidate's career to date;
- the behaviour of the appointee after receiving the nomination in connection with the exercise of non-judicial functions;

§ The authorisation criteria should not concern the judicial activity of a particular judge.

§ A decision by the National Council of the Judiciary not to authorise a judge should automatically result in an application to the Supreme Court to transfer the judge to another post or to remove him or her from office. In these proceedings, the court should examine of its own motion the correctness of the decision taken by the NCJ, taking into account the arguments put forward by the judge concerned.

§ A decision of the Supreme Court dismissing a judge from office or transferring him or her to another post should be subject to appeal to a different composition of the same court.

§ The legislator should consider how to regulate the status of rulings issued by persons who have been refused authorisation by the National Council of the Judiciary. The decision of the legislator should take into account the constitutional background in relation to the principle of legal certainty and citizens' trust in the state.

2. GLOSSARY OF ABBREVIATIONS

ECtHR – European Court of Human Rights

HFHR – Helsinki Foundation for Human Rights

ERPAC – Extraordinary Review and Public Affairs Chamber of the Supreme Court

NCJ – National Council of the Judiciary

SC – Supreme Court

CJEU – Court of Justice of the European Union

3. INTRODUCTION

The change to the method of electing judicial members of the National Council of the Judiciary, which was adopted in December 2017, was a key moment in the so-called "reform of the judiciary". As a result, the National Council of the Judiciary, which had been in office until then, was dissolved and replaced by a body whose activities were significantly influenced by the politicians of the ruling parliamentary majority, who elected the majority of NCJ members. This called into question the independence of the Council and the legality of its decisions, including those concerning the appointment of judges.

Since 2018, the President of the Republic of Poland has appointed or promoted more than 2,400 judges at the request of the new National Council of the Judiciary.[1]

The question of the independence of the NCJ was examined by the Court of Justice of the European Union. In 2019, the CJEU pointed out[2] that national courts are authorised to examine the independence of a court with regard to the circumstances of a judge's appointment. Following this decision, the Supreme Court set out the procedural consequences of the involvement of the "new" National Council of the Judiciary in the appointment of judges in a resolution of 23 January 2020[3]. With regard to such judges who sit on the Supreme Court, the resolution provided that their presence in the composition of the Court leads to the existence of an absolute ground for appeal or to the invalidity of the proceedings. In the case of judges of common courts and military courts, the resolution provided that the presence of a judge appointed with the participation of the "new" NCJ may lead to the existence of an absolute ground for appeal or to the invalidity of the proceedings, provided that the defectiveness of the appointment procedure in concrete circumstances leads to a breach of the standard of independence and impartiality

1 M. Szuleka, M. Szwed, M. Wolny, Powołania sędziów w latach 2018-2023 na wniosek tzw. „nowej" Krajowej Rady Sądownictwa. Analiza statystyczna (all online sources accessed on 17.10.2023).

2 Judgment of 19 November 2019 (Grand Chamber), C-585/18, C-624/18 and C-625/18.

3 Resolution of the Civil, Criminal, and Labour and Social Insurance Chambers of the Supreme Court sitting en banc, 23 January 2020 (BSA I-4110-1/20, OSNC 2020, no. 4, item 34) (the "En Banc Resolution").

within the meaning of Article 45 of the Constitution, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The European Court of Human Rights has assessed the question of the involvement of the National Council of the Judiciary in the process of appointing judges from a different perspective. Applying the test developed in *Guðmundur Andri Ástráðsson v. Iceland*[4] in *Reczkowicz v. Poland*[5], *Dolińska-Ficek and Ozimek v. Poland*[6] and *Advance Pharma v. Poland*[7], the ECtHR found that Poland had violated Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. According to the ECtHR, the applicants' rights protected by the Convention were violated by the mere presence at the Supreme Court of a person appointed to the office of judge with the participation of the National Council of the Judiciary formed in the manner described in the Act of 7 December 2017 amending the Act on the NCJ and certain other acts.

These judgments only applied directly to persons appointed as Supreme Court judges. To date, the ECtHR has not yet issued a judgment on the participation of persons appointed as judges in compositions of common courts, military courts or administrative courts. Nevertheless, the ECtHR has referred to the test established in *Guðmundur Andri Ástráðsson v. Iceland* in no less than 53 communicated cases[8] involving judges of such courts. Against this background, a question remains: will the Court also conclude in these cases that Poland has violated Article 6 of the Convention? However, the application of the *Ástráðsson* test in these cases, in conjunction with the reference to the Supreme Court's joint Chambers' resolution and the test of independence of the judge stated therein, does not necessarily lead to the assumption that the Court will find a violation of Article 6 of the Convention in each of the cases in question.

However, the very fact that the ECtHR has communicated cases relating to judges of common courts, military courts and administrative courts indicates that the manner in which the judges of these courts were appointed raises questions about the legality of their appointment and their independence.

When assessing the issue of defective judicial appointments, one cannot abstract from the legal arrangements proposed by the legislator, which address the problems raised in the case law of CJEU and the ECtHR. Amendments to the Act on the Supreme Court and other laws defining the judicial system introduced a procedure to verify the independence and impartiality of the court hearing the case. It includes, among other things, the examination of the circumstances of the appointment of a particular judge.[9] Under current law, this examination has only limited effect. Numerous formal obstacles, including the requirement to prove that the problematic circumstances of the appointment of a particular judge influence the outcome of the proceedings, make this solution illusory in practice.[10]

The lack of regulation of the status of judges appointed with the involvement of the NCJ since 2018 has a negative impact on confidence in the judiciary and the legal certainty in which the parties to legal proceedings find themselves. It also has the effect of prolonging court proceedings by encouraging the parties to scrutinise the standing of the judges adjudicating in the proceedings, either by formulating motions to recuse a judge or by conducting a test of their independence and impartiality.

4 Ástráðsson v. Iceland [GC], no. 26374/18, 1 December 2020.

5 Reczkowicz v. Poland, no. 43447/19, 22 July 2021.

6 Dolińska Ficek and Ozimek v. Poland, nos. 49868/19 and 57511/19, 8 November 2021.

7 Advance Pharma sp. z o.o. v. Poland, no. 1469/20, 3 February 2022.

8 As of 17 October 2023.

9 The Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts (Journal of Laws item 1259).

10 M. Laskowski, speech during the conference Wadliwe ukształtowanie sądów - sanacja czy kasacja powołań sędziowskich [Defective formation of courts – curation or cassation of judicial appointments].

More far-reaching solutions are provided for in the amendment to the Act on the Supreme Court adopted in January 2023.[11] Among other things, certain formal obstacles related to the examination of the independence and impartiality of the judge have been removed, which included the abolition of the requirement to prove the impact of shortcomings in the procedure for appointing a judge on the final outcome of the proceedings. However, as the President has applied to the Constitutional Court for an ex ante review of the constitutionality of these solutions, they have not yet entered into force at the time of writing.

However, neither of the two measures adopted by the Sejm assumes that the circumstances of a judge's appointment can be assessed only once and that such an assessment constitutes the final decision on his or her status. On the contrary, they allow (or would allow) multiple reviews of the same judge on the basis of the same or different criteria. The same applies to the test of independence, which is carried out on the basis of the en banc resolution of the three chambers of the Supreme Court of January 2020 (the "En Banc Resolution"). The above circumstances, combined with the possible finding of a violation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms by the ECtHR, also in connection with new judges deciding cases in common, military and administrative courts, give cause for concern about the functioning of the Polish judicial system in the coming years.

This requires the adoption of solutions that will systematically address the negative effects of activities of the new National Council of the Judiciary, guarantee the stability of judicial decisions and at least partially restore confidence in the judiciary. This result can only be achieved through a lasting solution to the problem of persons appointed to the judiciary with the involvement of the new National Council of the Judiciary. However, all proposals for change drawn up in this area must fulfil certain boundary conditions and also take into account, at least to a minimum extent, the risks associated with their implementation.

4. GUIDING ASSUMPTIONS AND PRINCIPLES OF THE AUTHORISATION MECHANISM

According to the HFHR, the authorisation mechanism based on four main assumptions should be the way to regulate the defective status of persons appointed to the positions of judges with the participation of the new NCJ.

First, it must be assumed that the authorisation process must be in accordance with the Constitution. In the HFHR's view, it is unacceptable to assume that a violation of the Constitution can in itself justify the adoption of solutions that lead to further constitutional violations. However, such an assumption makes it necessary to accept the restrictions imposed by the current Constitution. Given the current political situation, the possibility of amending the Constitution should also be considered unrealistic.

Second, any changes concerning the status of judges and other reforms in the judicial system must be in line with international law binding on Poland. They should therefore take into account ratified conventions and treaties as well as the acquis of European Union law. They should also respect soft law standards as far as possible. The Foundation believes that any proposed amendments must inherently respect the European legal tradition, including the case law of the European Court of Human Rights. Only such an approach makes it possible to minimise the risk that persons covered by the recovery mechanisms could claim to be victims of their own actions and seek redress before national courts and then request

11 Act of 13 January 2023 amending the Act on the Supreme Court and certain other acts.

a finding of a violation of the rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (see, in detail, Part 6 – Constitutional and international limits on the treatment of persons appointed to judicial positions with the involvement of the "new" NCJ).

Third, the need to authorise the status of judges arises from the fact that the formation of the National Council of the Judiciary since 2018 and its lack of independence render all appointments of judges made at its request defective. According to the HFHR, this defectiveness is as a rule, curable, so it is necessary to take corrective action.

Fourth, the analysis presented is based on the assumption that it cannot be presumed that all persons appointed to judicial positions by the new National Council of the Judiciary do not provide reasonable assurance that they are fit to hold judicial office (see Part 7 – Status of persons appointed to judicial positions by the "new" NCJ). While certain types of simplifications and presumptions in journalistic discourse are understandable to a certain extent, legislative solutions cannot be linked to such a priori judgments. The HFHR takes the view that these aspects must be assessed individually, in relation to individuals and without any generalisations. Furthermore, the authorisation mechanisms cannot be based on the criteria for assessing the jurisprudence of the person whose status is being reviewed. Any evaluation of rulings issued by a particular judge would essentially be a negation of the principle of judicial independence.

It is also important to adopt a catalogue of principles to guide the legislator in choosing an appropriate model for authorising the status of judges.

First and foremost, any measure leading to the authorisation of the status of judges should be free of revanchism, understood as a process of creating legal instruments that only lead to retribution for the injustices committed by some of those who were appointed or promoted with the involvement of the new NCJ, or to make amends for the judges who have been subjected to harassment in recent years. This is directly related to the principle of individualisation of behaviour and the renunciation of any form of collective responsibility.

At the same time, the HFHR would like to emphasise that the prohibition of revanchism cannot be equated with the prohibition of assuming individual disciplinary or criminal responsibility in justified cases, while ensuring adequate guarantees for a fair trial.

An important element of the proposed amendments should be solutions that are not arbitrary and automatic. This requires, on the one hand, the creation of corrective mechanisms through the adoption of appropriate legislative solutions and, on the other hand, the transfer of important competences within the framework of these mechanisms to the judiciary, which will be independent, impartial and lawful.

Finally, any changes affecting the status of judges and the judiciary should be subject to a careful legislative process, including consultations with national and international experts, including the Venice Commission and the Office for Democratic Institutions and Human Rights (OSCE-ODIHR). Such an approach will significantly reduce the risk that the proposed amendments will be seen as an attempt at instrumental and arbitrary interference in the independence of the judiciary.

The HFHR believes that the end result of the application of any corrective measures should be a better justice system that embodies the principles of impartiality, independence, fairness and transparency, is closer to the citizens and enjoys public confidence. This implies the need for changes that not only reverse the flawed remodelling of the judiciary that has taken place since 2016, but that are aimed at improving the functioning of all the institutions that make up the judicial system. This requires, among other things, changes related to the appointment of judicial members of the NCJ, the streamlining of the NCJ's work and greater public scrutiny of its functioning.

5. CONSTITUTIONAL AND INTERNATIONAL LIMITS ON THE TREATMENT OF PERSONS APPOINTED TO JUDICIAL POSITIONS WITH THE INVOLVEMENT OF THE "NEW" NCJ

The development of an optimal model for authorisation of the judges' status requires for this issue to be considered in the light of constitutional and international standards. Of central importance in this context are the constitutional principles of a democratic state ruled by law, the common good, the threefold separation of powers and the balance of powers, as well as the associated principle of the independence of the judiciary and the independence of judges. Furthermore, all measures relating to the status of judges must factor in the effective safeguarding of constitutional rights and freedoms, including the right to a fair trial, the right to equal access to public office, and the principle of non-discrimination.

From the point of view of international law, the most important are the standards expressed in the case law of the European Court of Human Rights, derived from the articles of the Convention guaranteeing the right to a fair trial, the right to the protection of private life and the right to an effective remedy. The standards arising from the case law of the Court of Justice of the European Union must also be taken into account. In addition, the opinions of the UN Human Rights Committee on principles such as the irremovability of judges or the independence of the judiciary can be important points of reference.

Finally, international soft law acts can be seen as an additional but important source of international standards in this area. Among them, the recommendations of the Council of Europe's Committee of Ministers, the OSCE studies, opinions prepared by the European Commission for Democracy through Law (Venice Commission) or recommendations issued by the UN General Assembly are of paramount importance.

5.1. National standards

5.1.1. Constitutional principles of the political system

The starting point in establishing a constitutional framework for regulating the status of judges who have been defectively appointed should be the systemic constitutional principles.

In this context, the principle of the **common good**, which is expressed in Article 1 of the Constitution, should be taken into account. The concept of the common good is ambiguous, but the literature nevertheless aptly points out that it refers, among other things, to the need to organise the state in such a way that it complies with its constitutional characteristics[12] and thus respects the norms and principles expressed in the Constitution. The Constitutional Court, in turn, has stated in one of its rulings that the common good is fulfilled in such a shaping of the external image of the justice system to create the conviction in society that the court is impartial.[13] This view should oblige the legislature to take measures to restore the legitimate functioning of the National Council of the Judiciary and to eliminate the negative effects of its functioning. However, the concept of the common good can also be linked to the principle of reliability and efficiency of public institutions[14]. It requires that in the process of making legal changes, their

12 J. Trzciński, Rzeczpospolita Polska dobrem Wspólnym wszystkich obywateli, in: Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980–2005, Warszawa 2005, p. 460, quoted in M. Zubik, W. Sokolewicz, Kom. do art. 1 in: L. Garlicki (ed.), Konstytucja Rzeczypospolitej Polskiej. Tom I, wyd. II, Warszawa 2016.

13 Judgment of the Constitutional Court of 27 January 1999, case no. K 1/98.

14 I. Niczyporuk, Konstytucyjna zasada rzetelności i sprawności działania instytucji publicznych na tle linii orzeczniczej Trybunału Konstytucyjnego w latach 2006–2016, Przegląd Prawa Konstytucyjnego 1 (35) 2017.

impact on the efficiency and conscientiousness of state institutions be taken into account. Therefore, this imperative implies the evaluation of all ideas about the status of judges through the prism of their impact on the condition of the Polish judicial system. It is therefore necessary to take into account not only the question of the independence and impartiality of the judiciary, but also the stability of judicial decisions or the efficiency of the justice system, and thus the ability to resolve court cases within a reasonable time.

Article 2 of the Constitution expressing the principle of a **democratic state ruled by law** is also important in defining the principles for restoring the rule of law in Poland. In the past, the Constitutional Court derived from this article the principle of protecting the citizen's trust in the state and the law created by it, as well as a number of principles of decent legislation, such as the protection of legitimately acquired rights, the prohibition of retroactivity, the requirement of specificity of the law, among others.[15] Article 2 of the Constitution also refers to the concept of "social justice". As indicated in the literature, it is also relevant in the process of recovering from the malevolent social structures created by the actions of public officials that are directed against the common good.[16] This value can therefore guarantee the constitutional legitimacy of measures to restore the independence of the judiciary and the legality of its functioning. However, the principle of a democratic state ruled by law obliges the legislator to respect certain requirements also in the process of restoring the rule of law. The Constitutional Court pointed out that the justice of the transitional period should be "free from subjective interests and subjective form and arbitrary power, and thus be a justice that punishes and does not avenge".[17]

The principle of the state ruled by law is inextricably linked to the **principle of legalism** expressed in Article 7 of the Constitution, i.e. the requirement that all actions of state bodies must be carried out on the basis of and within the limits of the law. The principle of legalism can justify taking actions aimed at restoring the state of legal conformity. However, it should be noted that it cannot be interpreted in isolation from other important constitutional values, in particular legal certainty. In cases concerning the revocability of administrative decisions, the Constitutional Court has taken the position that restricting the time limits for challenging unlawful decisions "is justified for reasons of legal security"[18], emphasising that the setting of time limits is necessary for the stability of legal relations, the increasing evidentiary difficulties in the conduct of review proceedings over time and the protection of rights acquired by third parties[19]. Against this backdrop, the Constitutional Court also recognised the need to introduce legal solutions that "help to eliminate the state of uncertainty over time".[20] In this context, it is also worth noting a view expressed by Piotr Tuleja that the balance between the reasons underlying the obligation to comply with the law and the principle of legal certainty can lead to situations in which even a gross violation of the law does not lead to the annulment of the violating act.[21] There is therefore no doubt that the impact of adopting of the proposed solutions on legal security in the state should also be taken into account when regulating the status of judges who are not properly appointed.

Two further provisions of the Constitution are linked to the principle of legalism, on the one hand emphasising the role **of the Constitution as the supreme law of the Republic of** Poland, and on the other obliging Poland to **comply with international law binding on Poland**. Therefore, in the process of authorising the status of judges, both the provisions of the Constitution and international standard must be observed, including those arising from the jurisprudence of international bodies to which Poland has

15 Zubik, Sokolewicz, Komentarz....

16 M. Zubik, Prawo konstytucyjne współczesnej Polski, 4th edition, Warszawa 2023, p. 52

17 Judgment of the Constitutional Court of 6 July 1999., P 2/99, OTK 1999, No. 5, item 103.

18 Judgment of the Constitutional Court of 22 February 2000., SK 13/98, OTK 2000, No. 1, item 5.

19 Judgment of the Constitutional Court of 15 May 2000, SK 29/99, OTK ZU No. 4/2000, item 110.

20 Judgment of the Constitutional Court of 12 May 2015., P 46/13, OTK-A 2015, No. 5, item 62.

21 P. Tuleja, Komentarz do art. 7 Konstytucji in: M. Safjan, L. Bosek, Konstytucja Rzeczypospolitej Polskiej, Tom I, Komentarz Art. 1-86, Warszawa 2016, p. 306.

granted competence to do so. In the area of human rights protection, discrepancies may arise when the same issue is regulated differently on the basis of different legal acts. The assumption of being bound by each of them must lead to the conclusion that the national minimum standard is the one among them that sets the highest limits for the protection of human rights. Only with this approach can each of the binding standards be implemented simultaneously.

5.1.2. Independence of the judiciary

Any discussion on the status of judges appointed with the participation of the new National Council of the Judiciary cannot take place without the consideration of the arguments related to the application of Article 10 of the Constitution, which refers to the principle of the threefold separation of powers and the balance of powers. With regard to the judiciary, its wording is further strengthened by Article 173 of the Constitution, which introduces the principle of independence and separation of the judiciary from other state powers. Therefore, the legislature and the executive must enter the field of the functioning of the judiciary with restraint, which means that the limits of the legislature's freedom in taking measures to remedy deficiencies in the appointment of judges must be defined.

The principle of the independence of the judiciary is also expressed in the constitutional guarantees of judicial independence, in particular the principle of the irremovability of judges enshrined in Article 180. Although it is not absolute, the Constitution significantly limits exceptions to its application. Against the background of the principle of irremovability, legal scholars have emphasised the exceptional nature of the provisions that enable the removal of a judge. In particular, it is pointed out that a situation must be avoided in which an exception becomes a competent basis for the implementation of a systemic reform and leads to a situation in which it takes the form of a rule and loses its defensive functions.[22] That view is well reflected in the wording of Article 180 (2) of the Constitution. According to Article 180 (2) of the Constitution, a judge may only be recalled or suspended from office, transferred to another court or position against his or her will only by virtue of a court decision and only in those instances prescribed in statute.

The discussed constitutional regulation creates the systemic basis for the introduction of the mechanism of authorisation of judicial appointments. However, this mechanism cannot be shaped arbitrarily. It would be unacceptable to arbitrarily create reasons for removing a judge from office without regard to constitutionally protected values. The use of the authorisation mechanism also requires taking into account other constitutional standards and standards mentioned in the case law of the European Court of Human Rights. At the same time, this mechanism must be applied cautiously and with a strong legal justification. In the HFHR's view, the exceptional nature of the removal of a judge from office and the requirement to apply such a measure exclusively on the basis of a judicial decision make it impossible to introduce provisions allowing for the automatic removal of judges from office.

Moreover, any proceedings relating to the status of judges should include procedural safeguards that reflect the importance of the principle of the irremovability of judges and the exceptional nature of the rules contained in Article 180 (2) of the Constitution.

22 E. Łętowska, Świetlisty miecz konstytucjonalistów in: S. Biernat (ed.), Konstytucyjne granice zmian ustroju sądownictwa i statusu prawnego sędziów. (Nad?)użycie art. 180 ust. 5 Konstytucji RP.

5.1.3. Constitutional rights and freedoms of the individual

The adoption of an optimal model for the authorisation of judges also requires this problem to be considered in the light of the rights and freedoms of the individual.

In this context, the right to be heard within a reasonable time by an impartial and independent court is essential. On the one hand, such an approach forces the legislator to take measures to ensure the impartiality and independence of the judiciary. On the other hand, the legislator is obliged to choose solutions that have as little impact as possible on the efficiency of the functioning of the judicial system. According to the HFHR, this assumption requires such planning of the process of authorising the status of judges, the effects of which would be spread over time in order to minimise the negative impact on the daily work of the courts.

At the same time, it is impossible to ignore the fact that civil rights and freedoms also apply to persons who will be subject to any actions regarding their status. Issues such as respect for the right to protection of reputation, the right of access to public service, the principle of equality, the right to a court and the right to appeal against first instance judgments and decisions should be considered particularly important in this context.

Interference by public authorities in those rights requires the fulfilment of the conditions set out in Article 31 (3) of the Constitution. First, it must find legitimacy in one of the values listed in that provision. Against this background, the reasons for the permissibility of interference with the rights in question could lie in the need to guarantee other persons an effective right to an independent, impartial and legally established court. In addition, such interference would have to remain necessary in a democratic state ruled by law. This would involve the requirement to examine whether the proposed measures fulfil the criteria of necessity, suitability and proportionality in the strict sense. This would mean that the legislator would have to assess the effects of the proposed solutions and select those that least interfere with constitutionally protected rights and freedoms.

It is possible that the procedure for assessing the status of judges who have not been duly appointed could be considered a repressive mechanism, which would also entail the need to respect the standards deriving from Article 42 of the Constitution and regulating the principles of criminal liability. Although the measures analysed here are not aimed at punishing a person, but primarily at restoring the state of legality in the area of the judiciary, there is no doubt that, for example, the removal of a judge from office or even the transfer to a position in another court is associated with considerable discomfort and stigmatisation. The repressive nature of a particular solution can also be supported by the review criteria chosen and the procedure by which it is carried out. Therefore, certain analogies can be found here with disciplinary proceedings, for which the Constitutional Court provides for the appropriate application of the guarantees of Article 42 of the Constitution.[23] Recognising the repressive nature of solutions aimed at authorising judicial appointments should go hand in hand with the rejection of forms of collective responsibility, as well as ensuring adequate precision and clarity in the grounds adopted for such responsibility and the appropriate adjustment of the level of procedural guarantees that ensure the reliability of the entire procedure.

On the other hand, there is an argument in the public discourse about the need to take into account the right of access to public service, the implementation of which has been significantly reduced as a result of political changes in the National Council of the Judiciary. In this context, it is argued in particular that some judges have refrained from appearing before the Council altogether in view of the announced boycott of the NCJ's work. However, the number of these judges is difficult to estimate.

23 Judgment of the Constitutional Court of 6 November 2012., K 21/11, OTK 2012, No. 10, item 119.

Arguably, a kind of "compensation" for the judges who did not run in competitions before the post-2018 NCJ could be the competitions that are advertised for vacant judicial positions or those that will become vacant as a result of corrective procedures. It seems self-evident that the previously presented attitudes of candidates for judicial positions are taken into account when assessing appointments to higher courts. Such a solution will clearly not reward all those who have boycotted the activities of the "new" NCJ. However, it is difficult to say that it would be any different if all competitions for higher judicial positions were repeated. For even in such a case, some of the judges who boycotted the activities of the "new" NCJ might not get a judicial position in a court of higher instance.

More serious in terms of the right of access to public service and the principle of non-discrimination and neutrality of the state in the sphere of worldview are the cases in which judges who participated in the proceedings before the so-called new National Council of the Judiciary were deprived of the possibility of obtaining a position on the basis of discriminatory criteria, for example in relation to their worldview, their assessment of the dispute over the rule of law, their attitude to the so-called "reform of the judiciary", the functioning of the Constitutional Court or its specific rulings. It seems that this issue clearly affected the fairness of such a competition, which should also be reflected in the way the legislator refers to the results of such a competition.

5.2. European Union law

Anyone analysing the permissibility of establishing corrective mechanisms and the framework for their functioning cannot ignore the evolving case law of the CJEU on judicial independence.

Associação Sindical dos Juízes Portugueses[24] was the first judgment in this respect in which the CJEU emphasised the need to guarantee the judicial independence of national courts not only at the level of the European Union but also at the level of the Member States.

In its judgments in cases C-619/18[25] and C-192/18[26], the CJEU negatively assessed the Polish provisions on the reduction of the retirement age of Supreme Court judges, taking the view that they are not justified by a legitimate aim and undermine the principle of the irremovability of judges, which is necessary to guarantee their independence. At the same time, the Court pointed out that the delegation to the executive bodies of the power to assess which judges may remain in active service despite exceeding the retirement age raises legitimate doubts as to the independence of the judges concerned from external factors and their neutrality with respect to the interests before them.

In cases C-585/18, C-624/18 and C-625/18[27] the CJEU referred to the independence of the National Council of the Judiciary and recognised the right of the national court to assess the degree of independence of the NCJ from the legislator, the fulfilment of its constitutional duties and effective guarantees for the review of the decisions of the National Council for the Judiciary.

The CJEU also criticised the changes to the functioning of the NCJ in a judgment concerning the disciplinary regime for judges.[28] Among other things, it emphasised that the premature termination of the judicial term of office of the members of the National Council of the Judiciary and the change in the

24 Judgment of 27 February 2018 (Grand Chamber), C-64/16, ECLI:EU:C:2018:117
25 Judgment of 24 June 2019 (Grand Chamber), C-619/18, ECLI:EU:C:2019:531
26 Judgment of 5 November 2019 (Grand Chamber), C-192/18, ECLI:EU:C:2019:924
27 Judgment of 19 November 2019 (Grand Chamber), C-585/18, C-624/18 and C-625/18.
28 Judgment of 15 July 2021 (Grand Chamber), Case C-791/19.

manner of electing its members took place in a situation in which the filling of a considerable number of judicial posts at the Supreme Court, and in particular in the Disciplinary Chamber of the Supreme Court, was expected.

The Court explained the appointment of judges in more detail in decision C-824/18[29]. In this ruling, the CJEU took the view that the appointment of judges must be defined in such a way that does not "give rise to reasonable doubts (...) in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests that may be the subject of argument before them, once appointed as judges". At the same time, the Court emphasised in this judgement the importance of an appeal against resolutions of the NCJ, particularly in connection with doubts about its independence. At the same time, it pointed out that the significance of this circumstance should be considered in a specific national legal and factual context.

In its judgment C-896/18 concerning Malta[30], the Court emphasised that a Member State cannot amend its legislation so as to reduce the protection of the rule of law. At the same time, it pointed out that the Member States are required to ensure that any regression of their laws on the organisation of justice is prevented, including refraining from adopting rules which would undermine the independence of the judiciary.

In addition, the CJEU's judgment C-487/19[31], which refers to the possibility of declaring the selected judgment non-existent under European Union law, should also be considered relevant. However, due to the specificity of the procedural context in which this judgment was issued, it cannot be assumed that it is applicable to a broader group of decisions and should therefore form the basis for any systemic responses to the problem of the functioning of the National Council of the Judiciary.

The recent case law of the CJEU therefore strongly emphasises the need to guarantee the independence and impartiality of the judiciary and traces the origins of these values back to the values of a democratic state governed by the rule of law. In doing so, the Court emphasises the need to assess the independence and impartiality of judges through the lens of the individual's perceptions.[32] At the same time, the CJEU has criticised the dependence of decisions on the status of judges on the executive and legislature. However, it also creates a strong basis for a critical analysis of the independence and functioning of the National Council of the Judiciary.

It should be noted that the CJEU has so far not expressly referred to proceedings aimed at the removal from office of incorrectly appointed judges or the authorisation of their status. However, this issue was raised by Advocate General Michal Bobek in his opinion in case C132/20. He noted that in a state ruled by law "the 'removability' of non-independent judges is as important as the 'irremovability' of independent judges. Indeed, the existence of judges subject to some political, economic or other private interest strikes at the heart of a legal system based on the rule of law and of a democracy predicated on the separation of powers"[33]. However, he emphasised that this does not mean "any judge whose appointment raises issues of independence should ipso facto be removed from office and his or her decisions invalidated. Yet, a legal system must be able to enforce compliance with the principle of independence of the judiciary"[34]. According to the Advocate General, not every breach of law in the appointment of a judge has a negative impact on his independence, and "[t]here is also no automatism vis-à-vis the consequences which flow from a finding that an individual was erroneously appointed to judicial office, in particular where the unlawfulness stems from a breach of the principle of independence. Instead, as a matter of EU law,

29 Judgment of 2 March 2021 (Grand Chamber), Case C-824/18.
30 Judgment of 20 April 2021 (Grand Chamber), Case C896/19.
31 Judgment of 6 October 2021 (Grand Chamber), Case C-487/19.
32 European Parliament, ECJ case law on judicial independence, A chronological overview.
33 Opinion of Advocate General Bobek in case C-132/20, 8 July 2021, para. 160.
34 Ibid., para. 161.

a reasonable correlation must be found between the rules or principles that have been breached, the seriousness of the infringement committed, and the type and scope of remedies available (and, if need be, the penalties imposed on the perpetrators), in the light of the facts and circumstances of a case. General principles of EU law such as, inter alia, proportionality, legal certainty, respect for res judicata, and fairness of the procedure will certainly not be foreign to any assessment of whether the national remedies in this field ensure compliance with, and the effectiveness of, EU law"[35].

5.3. The Council of Europe system

A discussion on the possible framework for remedial mechanisms in relation to the status of judges appointed with the participation of the new National Council of the Judiciary cannot ignore the requirements set out in numerous soft law instruments of the Council of Europe.

In this context, reference can be made, inter alia, to the standards of the European Charter on the statute for judges[36], which provides for optimal measures to guarantee the independence, impartiality and proper jurisdiction of the courts. The Charter takes a strict approach to ensuring the independence and impartiality of judges and opposes any provision and procedure that could undermine confidence in the competence, independence and impartiality of judges. At the same time, it emphasises the irreplaceability and irremovability of judges and points out that they cannot be appointed to another judicial office without their voluntary consent. The only exception in this regard provides for the transfer resulting from a disciplinary sanction, a lawful alteration of the court system and a temporary assignment.

The independence of the judiciary is similarly addressed by the Committee of Ministers of the Council of Europe[37], which emphasises the independence of the judiciary, including the irremovability of judges. According to Recommendation 50, appointment of judges can only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. According to the Committee, a judge can be moved to another judicial office without consenting to it only in cases of disciplinary sanctions or reform of the organisation of the judicial system.

The irremovability of judges has also been repeatedly addressed by the European Commission for Democracy through Law (Venice Commission), which pointed out that this issue should be taken into account in national constitutions. In this context, the Commission emphasised that the involuntary transfer of a judge to another post can only take place in exceptional cases.[38] On the other hand, in the context of judges' activities, the Commission emphasises that judges should not put themselves into a position where their independence or impartiality may be questioned.

In connection with the authorisation procedures, the 1996 resolution of the Parliamentary Assembly of the Council of Europe (PACE) on the vetting of public officials, including judges, in post-communist countries should also be noted.[39] The resolution refers to the means to be used in this process and stipulates that they must be consistent with the nature of a democratic state ruled by law. Such a state cannot use other means, "since it would then be no better than the totalitarian regime which is to be dismantled"[40].

35 Ibid., paras. 162–163.

36 Council of Europe, European Charter on the statute for Judges.

37 Council of Europe's Committee of Ministers, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.

38 European Commission for Democracy through Law (Venice Commission), Report on the independence of the judicial system. Part I: The independence of judges.

39 Council of Europe, Parliamentary Assembly, Resolution 1096 (1996), Measures to Dismantle the Heritage of Former Communist Totalitarian Systems.

40 Ibid., para. 4

According to PACE, the aim of such a procedure should primarily be to protect the democratic order and not to punish certain individuals, to take revenge on them or to achieve political goals. The resolution emphasises the need for individual measures and adequate procedural safeguards: "The democratic state (...) must apply them even to those people who, when they were in power, did not apply them themselves"[41].

5.3.1. Authorisation procedures in opinions of the Venice Commission

When analysing the issue of the irremovability of the judiciary, one should also be guided by a study by the Venice Commission[42], which summarises its opinions on the authorisation (vetting) procedures for judges designed or applied by various Council of Europe states, including Ukraine, Moldova, Albania and Croatia.

In this context, however, it should be emphasised that the reasons for which the procedures for the vetting of judges were applied or attempted to be introduced in these countries were very different. The reasons for their introduction were the desire to democratise the state and limit the influence of non-democratic groups on the exercise of power (Ukraine, Moldova), to reduce the links of judges and prosecutors to organised crime and limit the manifestations of corruption (Albania, Ukraine, Moldova), to reorganise the judiciary (Serbia) and to strengthen public confidence in the judiciary (Serbia, Croatia).[43]

Nevertheless, it should be emphasised that, in the view of the Venice Commission, the authorisation mechanism should be exceptional in nature and offer special guarantees for judges who fulfil the requirements for the exercise of their office. In doing so, the Commission emphasised that the choice of a way to deal with judges who do not meet certain standards should be preceded by a thorough analysis of the availability and effectiveness of the "ordinary" instruments provided for in the legal system, such as the evaluation of a judge, the initiation of disciplinary proceedings against him or her, or even criminal proceedings.[44]

On the basis of the individual opinions of the Venice Commission, a group of standards can be identified that should be taken into account when discussing the problem of the organisation of authorization procedures. In this context, the existence of a convincing justification for the need for extraordinary authorisation procedures for judges should be mentioned, relating to circumstances such as the lack of independence of the judiciary[45] or the need to curb corruption[46]. Such a justification should be systemic in nature and not have an individual dimension, which can also exist in well-functioning judicial systems.[47] At the same time, the Venice Commission points out that the vetting procedure should only lead to the identification of judges who do not meet guarantees in terms of independence or curbing corruption.[48] At the same time, the Commission considers the individual validation of selected judges as the preferred form of authorisation over the removal of all judges and their re-evaluation in a new appointment procedure.[49]

41 Ibid.

42 European Commission for Democracy by Law (Venice Commission), Compilation of Venice Commission Opinions and Reports Concerning Vetting of Judges and Prosecutors.

43 Venice Commission, Compilation...; and Avis sur la Constitution de La Republique de Serbie.

44 European Commission for Democracy through Law (Venice Commission), Interim Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Office, CDL-AD(2019)020.

45 Venice Commission, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on the Judicial System and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine, CDL-AD(2015)007.

46 Venice Commission, Interim Opinion on the Draft Constitutional Amendments of the Judiciary, CDL-AD(2015)045.

47 Venice Commission, Opinion on the Introduction of the Procedure of Renewal of Security Vetting Through Amendments to the Courts Act, CDL-AD(2022)005.

48 Venice Commission, Joint Opinion….

49 Venice Commission, Opinion on Amendments to the Legal Framework Governing the Supreme Court and Judicial Governance Bodies, CDL-AD(2019)027.

On the other hand, the Venice Commission pointed out several risks associated with the vetting of judges, including creating tensions in the judiciary, destabilising its work, undermining public confidence in the judiciary and diverting judges from judicial duties.[50] At the same time, the Commission emphasised the unprecedented nature of the authorisation procedure, which carries the risk of any subsequent government applying similar mechanisms[51], and the risk that the political forces driving the vetting process could take control of the judiciary[52].

The Commission pointed out that authorisation mechanisms require a certain degree of constitutional anchoring.[53] It also emphasised that any form of vetting of judges should be limited in time to prevent it from becoming a permanent mechanism operating alongside normal accountability mechanisms.[54]

5.3.2. Authorisation procedures in the case law of the ECtHR

The European Court of Human Rights has also developed relevant standards for the vetting procedures of judges in its case law. The ECtHR usually examines applications concerning such mechanisms in the light of two provisions: Article 6, which guarantees the right to a court, and Article 8, which expresses the right to the protection of privacy.

In the case of *Polyakh and Others v. Ukraine*[55], which concerned the vetting of civil servants in connection with their relations with former Ukrainian President Viktor Yanukovych, the ECtHR referred to the problem of the principles on which the authorisation procedure should be based. At the same time, the Court accepted that the Member States have a wide margin of appreciation in the context of transitional justice as regards measures to restore the rule of law. However, the ECtHR pointed out the need to individualise the authorisation measures taken. In the Court's view, individualisation does not always have to take the form of a separate procedure. It can also be more general and relate to groups of persons. In such a case, however, the legislator should provide "convincing reasons" for choosing such an approach. The ECtHR emphasised the need to ensure appropriate control of this choice. The Court emphasised that, when assessing such a solution, it takes into account the quality of the judicial review of the legislative scheme, the severity of the measures taken and whether the solution is proportionate to the objective of meeting a pressing social need relating to the introduction of authorisation mechanisms.

However, in *Polyakh*, the ECtHR took the view that the measures taken against the applicants, including their removal from office, were very harsh. This led the Court to consider that the proceedings against them should be individualised. It also reached similar conclusions in relation to a judge of the Ukrainian Supreme Court who was negatively scrutinised as part of the vetting procedure.[56] The ECtHR found that the lack of individualisation of the proceedings in the judge's case led directly to a violation of Article 8 of the Convention.

Therefore, the ECtHR does not reject the application of the authorisation procedures for judges in cases justified by exceptional circumstances. In this respect, it is worth paying particular attention to the case law of the ECtHR in cases concerning the vetting of judges in Albania. As part of the constitutional amendment adopted there in 2016, a procedure for the re-evaluation of judges and public prosecutors

50 Venice Commission, Interim Opinion....
51 Venice Commission, Interim Joint Opinion....
52 Venice Commission, Interim Opinion....
53 Venice Commission, Joint Opinion....
54 Venice Commission, Interim Opinion....
55 Polyakh and Others v. Ukraine, no. 58812/15, 17 October 2019.
56 Samsin v. Ukraine, no. 38977/19, 14 October 2021.

was introduced, under which two independent bodies (the Independent Qualification Commission and the Special Appeal Chamber) were given the task of assessing the assets of judges and public prosecutors, analysing their links to organised crime and examining their suitability for office.

In *Xhoxhaj v. Albania*[57], the ECtHR assessed this procedure with regard to compliance with Article 6 of the Convention, in the part relating to civil cases. On this occasion, the ECtHR assessed the applicant's allegations regarding the composition of the two bodies conducting the vetting procedure, the lack of transparency in the selection of their members, their limited term of office and their political participation. The applicant also criticised the procedural aspect of the entire evaluation mechanism, including the shifting of the burden of proof to her by requiring her to prove the sources of her assets. She also complained about the lack of adequate time to prepare her defence.

In Xhoxhaj, the Court found no violation of Article 6 of the Convention. The ECtHR accepted that in the context of the civil proceedings on which the process of evaluation of the judges was based, it was permissible to shift the burden of proof to the applicant and not to hold a public hearing before the court of second instance. The Court also did not question the independence and impartiality of the two bodies tasked with assessing the applicant's situation. In the view of the ECtHR, the proceedings before these bodies were fair.

However, the Strasbourg Court came to a different conclusion in *Besnik Cani v Albania*[58], which also concerned the functioning of the vetting mechanism. Applying the *Ástráðsson* test, the ECtHR found a violation of Article 6 of the Convention as it considered that the composition of one of the chambers set up to assess a judge was unlawfully organised.

On the one hand, the approach presented by the ECtHR opens the way for the creation of national mechanisms for the authorisation of the status of a judge assessed from the point of view of the values necessary to ensure the justice system characterized by independence, impartiality and reliability and constituted in a lawful manner. On the other hand, it opposes the automatic authoritative determination of the status of a judge without subjecting this determination to judicial review. According to the judgments of the ECtHR, this review should take on an effective and reliable dimension. It must be exercised by bodies that are independent and impartial and have been established by law.

5.4. The United Nations system

The standards for the independence of the judiciary and access to public service are also enshrined in the International Covenant on Civil and Political Rights. Against this background, the UN Human Rights Committee has repeatedly commented on the issue of the irremovability of judges.

In the case of *Pastukhov v. Belarus*[59], the Committee found that the removal of a judge before the end of his term of office constitutes an attack on the independence of the judiciary. At the same time, the Committee emphasised that the complainant's failure to have access to an adequate remedy had led to a violation of Article 14 of the International Covenant on Civil and Political Rights.

57 Xhoxhaj v. Albania, no. 15227/19, 19 February 2021.

58 Besnik Cani v. Albania, no. 37474/20, 4 October 2022.

59 Pastukhov v. Belarus, case no. 814/1998, views adopted on 5 August 2003, UN Doc. CCPR/C/78/D/814/1998 (2003).

The Committee reached similar conclusions in the cases of *Mundyo Busyo and Others v. Democratic Republic of the Congo*[60] and *Bandaranayake*[61]. In *Bandaranayake*, the Committee found that the right to access to public service without discrimination, as set out in Article 25 ICCPR, also applies to judges. According to the Committee, this right ensures that the rules for the appointment, promotion, suspension or dismissal of judges are "objective and reasonable". At the same time, the Committee pointed out that a particular procedure can only be considered objective and justified if it fulfils certain requirements of "basic procedural fairness".

The Committee also emphasised that the right of access to the civil service also includes the right not to be arbitrarily dismissed from the service. In the case discussed, the particular concern of the Human Rights Committee was that the applicant had not received any information about the reasons for his dismissal. In the Committee's view, such behaviour was incompatible with the requirements of procedural fairness, which meant that the applicant did not benefit from adequate safeguards.

In its General Comments[62], the Human Rights Committee also addressed the issue of the irremovability of judges and pointed out that it is incompatible with the independence of the judiciary to dismiss judges without effective judicial protection to contest the dismissal.

Similar standards can also be found in the UN Basic Principles on the Independence of the Judiciary[63]. They allow a judge to be suspended or removed from office solely for reasons of incapacity or behaviour that renders them unfit to discharge their duties. They also order that all decisions in disciplinary proceedings or those involving the suspension or removal of a judge from office must be subject to independent review.

The UN Special Rapporteur on the Independence of Judges and Lawyers has also emphasised the importance of the independence and impartiality of the judiciary in their recommendations. The Rapporteur pointed out that it is inadmissible to subject the judiciary to the influence of the legislature and the executive. The Rapporteur also emphasised that all reforms of the judiciary should be carried out taking into account the standards for the independence of the judiciary, the separation of powers and the principle of the rule of law.[64]

The standards used in transitional justice should also be taken into account. Among other things, they emphasise the importance of vetting processes to restore public confidence in state institutions. In this context, the Office of the UN High Commissioner for Human Rights draws attention to a number of elements that should be taken into account when designing authorisation (personal vetting) measures. Here, it emphasises above all the need to prevent the repetition of human rights violations and to hold violators accountable. At the same time, these recommendations point out that the role of authorisation procedures is primarily to restore public confidence in state institutions. They also emphasise that honesty is measured by a person's behaviour. "Vetting processes should, therefore, be based on assessments of individual conduct. Purges and other large-scale removals on the sole basis of group or party affiliation tend to cast the net too wide and to remove public employees of integrity who bear no individual responsibility for past abuses. (...) Such broadly construed collective processes violate basic due process standards", are unlikely to achieve the intended reform goals, may remove employees whose expertise is needed in the post-conflict or post-authoritarian period, and may create a pool of discontented employees that might undermine the transition."[65] The Office of the UN High Commissioner for Human Rights emphasises that

60 Mundyo Busyo and Others v. Democratic Republic of the Congo, case no. 933/2000, views adopted on 31 July 2001, UN Doc. CCPR/C/78/D/933/2000 (2003).

61 Bandaranayake v. Sri Lanka, case no. 1376/2005, views adopted on 24 July 2008, UN Doc. CCPR/C/93/D/1376/2005 (2008).

62 Human Rights Committee General Comment No. 32: Right to equality before courts and tribunals and to a fair trial.

63 The United Nations, Basic Principles on the Independence of the Judiciary.

64 UN Special Rapporteur on the Independence of Judges and Lawyers on his mission to Poland (16.06.2023).

65 Office of the UN High Commissioner for Human Rights, Rule-of-Law Tools for Post-conflict States. Vetting: An Operational Framework, (HR/PUB/06/5, 2006).

the use of such mechanisms can hinder the achievement of the desired goals as it removes people whose knowledge and experience will be crucial for functioning in the post-conflict period. Also, it may create a pool of discontented persons that might undermine the transition.[66]

The recommendations of the UN independent expert on combating impunity for persons responsible for gross human rights violations should also be taken into account.[67] According to these recommendations unlawfully appointed judges or those who derive their powers from an act of allegiance may be relieved of their functions by law. They must be provided with an opportunity to challenge their dismissal in a procedure that meets the criteria of independence and impartiality intending to seek reinstatement.

5.5. Summary

The guidelines and recommendations on judicial independence drawn up by the Council of Europe and the United Nations restrict the possibility of removing a judge from office and emphasise the importance of judicial review in this respect. At the same time, recommendations relating to transitional justice emphasise the importance of authorisation mechanisms to restore public confidence in the justice system. However, they also set certain limits to the adoption and functioning of such mechanisms.

6. STATUS OF PERSONS APPOINTED TO JUDICIAL POSITIONS BY THE "NEW" NCJ

6.1. Scale of the problem

Designing solutions to the challenges posed by the functioning of the National Council of the Judiciary, which was formed in violation of the Constitution, requires at least a basic analysis of the group of people who obtained judicial positions on its recommendation.

To this end, the HFHR has analysed all decisions of the President of the Republic of Poland on appointments to judicial office, published in the *Polish Official Gazette* (Monitor Polski) between April 2018 and August 2023. Therefore, the data only include persons appointed to judgeships. They do not include persons for whom the National Council of the Judiciary has adopted a decision on the submission of their candidature for judicial office and for whom the President of the Republic of Poland has not yet taken a corresponding decision.

The Foundation determined that the President appointed 2,447 persons as judges during the period in question.[68] 19.5% of them were associate judges of district courts who applied for their posts to be converted into full judgeships.

66 Ibid..

67 Economic and Social Council, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, (E/CN.4/2005/102/Add.1).

68 M. Szuleka et al., Powołania....

The analysis of the HFHR shows that most of the appointments (1110) concerned district courts, which is understandable given the large group whose associate posts were converted into judicial posts. This group accounted for nearly 43% of the new judges of district courts. Otherwise, the newly appointed district judges were former judicial clerks (119) and court registrars (265). In addition, a large proportion of the newly appointed employees were advocates (146) and legal advisors (67). A small number of persons, only 27, were recommended by the Council, whereas they had previously worked as public prosecutors. In individual cases, the Council requested a judicial appointment for persons holding the title of habilitated doctor of law or a higher academic rank.

Of the remaining candidates, 965 were nominated as circuit court judges and 194 as court of appeal judges. These new judges were mainly recruited from the lower courts (93% of the new circuit court judges are former district court judges, as is the case with new appellate court judges – 93% of them are persons who prior to their appointment occupied the positions of district court judges).

The number of the "new" NCJ appointees to the Supreme Court can also be considered high, especially when compared to the total number of judges. In its almost 6 years of operation, the new National Council of the Judiciary nominated 63 judges to be appointed to the Supreme Court. Never before have the judges of the Supreme Court been replaced so intensively. Interestingly, the HFHR's calculations show that only about 40% of the newly appointed Supreme Court judges held judicial office prior to their appointment.

As far as the military and administrative courts are concerned, only a relatively small group of judges appointed to the provincial administrative courts (80, 31 of whom had held the position of associate judge in a provincial administrative court before their appointment) and the Supreme Administrative Court (30 people) should be mentioned.

Furthermore, the HFHR determined considerable differences between individual common courts in terms of the number of judges appointed with the participation of the new NCJ. At the district courts, they accounted for between 7% and even 60% of all judges working at a given court. In the circuit courts and courts of appeal analysed, this percentage ranged from 13% to 45% and from 25% to as much as 56% respectively.

In the HFHR's view, the data presented should form the basis for the development of a systemic solution that meets the challenges associated with the functioning of the new National Council of the Judiciary to the highest degree. Such a system should, on the one hand, take into account the case law of the ECtHR and the CJEU in relation to the functioning of the NCJ and its impact on the justice system. On the other hand, it must respect the rights of persons appointed to judicial positions. It must also take into account the possible consequences of its application for the functioning of the justice system, including ensuring that the negative consequences for the judiciary are spread over time.

6.2. Proposals to solve the problem of the appointment of persons to judicial positions by the "new" NCJ

The problem of the functioning of the National Council of the Judiciary as established by the 2017 Act raises questions about the direction of the treatment of persons appointed as judges with the participation of the Council. There are a range of views in the public sphere about the status of these judges and its impact on the subsequent treatment of these judges as part of the restoration of the rule of law. These ideas require at least a brief discussion.

First, it is worth looking at a proposal for an act amending the Act on the National Council of the Judiciary and some other acts introduced by opposition senators.[69] The proposal contained solutions that envisaged depriving judges appointed to judicial positions with the participation of the new National Council of the Judiciary of the opportunity to perform the activities associated with this appointment. At the same time, it was proposed that a one-month period be set within which judges or associate judges should declare their resignation from office and their intention to return to the office previously held. The proposal also stipulated that holding the office of judge after the deadline for submitting the declaration would constitute an obvious and blatant violation of the law. Such misconduct would result in only one penalty: the judge's dismissal from office.[70]

The discussion of the proposal that took place during the legislative work of the Senate led to a significant change in its form.[71] The authors of the proposal assumed that the appointments of judges made with the participation of the new NCJ suffered from a significant legal deficiency related to the lack of an adequate guarantee for the protection of the independence of the courts and the judges. At the same time, they provided that cases concerning judicial appointments should be reconsidered by the properly elected NCJ within 2 years of the proposed legislation coming into force. Under the proposed provisions, a finding upon reconsideration by the properly established NCJ that an individual case involving the appointment of a judge was decided in violation of the principle of independence of the courts and the judges would automatically result in the initiation of disciplinary proceedings and an application to the disciplinary court to hear the disciplinary case and remove the judge from office. The proposal provides that the adoption of such a resolution by the National Council of the Judiciary is automatically equivalent to a ban on the exercise of activities arising from the appointment to judicial office.

A completely different perspective was presented by the authors of the legislative proposal[72] representing the political parties and social organisations[73] that have signed a document called "Accord for the Rule of Law". This proposal provides that resolutions adopted by the new NCJ in individual cases regarding the appointment of judges are null and void by law. At the same time, it states that the judicial positions affected by these resolutions "shall be considered vacant". The proposal also provides that these posts should be filled by means of repeated competitions organised by a properly constituted National Council of the Judiciary. An important element of the draft was the introduction of a provision declaring the service relationships of judges appointed by the new National Council of the Judiciary as "not established", but without specifying the consequences of this declaration. According to the regulation provided for in the proposal, a person who took up a judicial post had the right to return to their previous judicial post.

The procedure described above does not apply to associate judges who were appointed to a judicial office as part of the conversion of the office of associate judge into an ordinary judicial office. However, the proposal reserves the power of the Council to re-evaluate a judge appointed in this way. Under the proposal, the NCJ was required to adopt a resolution to submit to the disciplinary court a motion to remove a judge from office if any of the opinions on the qualifications of the associate judge, the opinion of the court's governing board or the general assembly of judges, did not justify the filing of a motion to appoint the associate judge as a judge.

69 The 10th Senate, Proposal for an act amending the Act on the National Council of the Judiciary and certain other acts (Senate Paper No. 50, text dated of 17 January 2020).

70 These solutions were criticised in an opinion statement of the HFHR.

71 The 10th Senate, Proposal for an act amending the Act on the National Council of the Judiciary and certain other acts (Senate Paper No. 50, text dated of 10 June 2022).

72 Stowarzyszenie Sędziów Polskich Iustitia [Association of Polish Judges Iustitia], Projekt ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa, ustawy o Sądzie Najwyższym [Proposal of an act amending the Act on the National Council of the Judiciary and the Act on the Supreme Court].

73 The HFHR did not endorse these solutions.

These solutions were largely incorporated into the proposal of a law regulating the effects of resolutions of the National Council of the Judiciary adopted in 2018–2024, which was developed by the Association of Polish Judges Iustitia.[74] This proposal takes the view that the resolutions adopted by the "new" NCJ on the submission of a proposal for appointment to judicial office have no legal effect. It effectively assumes that the service relationships of persons appointed as judges in this way are not established or converted. The only exceptions in this respect are the resolutions of the "new" NCJ, which relate to selected persons who were first time appointed to a judgeship at a district court and were appointed to a judgeship by converting the position of an associate judge. The authors of the proposal assume that the persons who return to the original judicial position after the entry into force of the law will be seconded by law for a period of 2 years to the court in which their converted service relationship was declared non-existent. Such a secondment may be terminated at any time by the president of the court to which the person was seconded. With regard to non-judges who were appointed to judicial office, the authors of this proposal envisage that former prosecutors should return to their posts, while lawyers practising as advocates or legal advisers should have the right to re-register as members of these professions.[75]

The position[76] of the Votum association, which is mainly made up of judges – graduates of the National School of Judiciary and Public Prosecution – should also be considered worthy of discussion. In letters addressed to the Minister of Justice, the association submitted a proposal to resolve the issue of judges appointed in the period 2018–2024, in which it pointed out, among other things, that the denial of the status of persons appointed as judges should lead to the non-existence of the decisions issued by these persons being recognised. At the same time, Votum emphasises the unprecedented nature of such solutions and the risk that they will be seen as a violation of the European Convention on Human Rights. The association is also in favour of setting up a special commission to examine the correctness of the nomination procedure in selected cases. The task of the commission would be to gather evidence that would be used to prepare an application for disciplinary proceedings against a judge.

6.3. Views of the scholarship on solving the problem of the appointment of persons to judgeships by the "new" NCJ

The literature on the legislative response to the problem of judges appointed with the participation of the "new" NCJ is still scarce, despite the scale and importance of the problem.

In this context, it is important to mention Adam Bodnar's vote in favour of adopting a vetting procedure for the appointment of judges on the basis of a properly constituted National Council of the Judiciary.[77] The author divides the group of persons appointed to judicial positions with the participation of the "new" NCJ into three categories: graduates of the National School of Judiciary and Public Prosecution; persons appointed to judicial positions in higher courts; persons appointed to the Supreme Court.[78]

74 Stowarzyszenie Sędziów Polskich Iustitia, Ustawa o uregulowaniu skutków uchwał Krajowej Rady Sądownictwa podjętych w latach 2018–2024 [Act on the regulation of resolutions of the National Council of the Judiciary adopted in 2018–2024].

75 The argument that these measures are constitutional was put forward in P. Tuleja, M. Krzemiński, B. Naleziński and M. Pach, Opinia o zgodności z Konstytucją projektów ustaw: Prawo o ustroju sądów powszechnych, Krajowej Radzie Sądownictwa oraz o uregulowaniu skutków uchwał KRS przygotowanych przez Stowarzyszenie Sędziów Polskich IUSTITIA.

76 Stowarzyszenie Votum, Proponujemy MS rozwiązanie kwestii sędziów powołanych w latach 2018-2024.

77 A. Bodnar, Poland After Elections in 2023: Transition 2.0 in the Judiciary in: M. Bobek, A. Bodnar, A. von Bogdandy, P. Sonnevend (eds.), Transition 2.0. Re-establishing Constitutional Democracy in EU Member States.

78 However, the proposed categories do not include persons appointed as judges in district courts outside the group of associate judges.

He points out that the procedure for vetting the appointments of persons in the last two categories should be exhaustive. Bodnar also emphasises that in order to be effective, such a procedure should take place over a sufficiently long period of time. It must also not lead to paralysis of the judicial system.

A thorough analysis of the problem is carried out by Paweł Filipek[79], who enumerates the disadvantages of the extreme solutions associated with either the complete recognition or the complete abolition of judicial appointments. He points out that the final answer to the question of authorising judicial appointments should be a balanced answer that represents a compromise between conflicting interests and values. Furthermore, referring to the Icelandic experience with the enforcement of the *Ástráðsson* judgment, the author points out that it cannot simply be transferred to Poland. He criticises the possibility of relieving all judges of their judicial duties or repeating all flawed selection procedures, pointing out that the latter solution should only apply to the judges of the courts of appeal, the Supreme Court and the Supreme Administrative Court. Filipek argues that the mechanism of authorisation of judges must be laid down in a law that designates a catalogue of persons subject to authorisation, describes the relevant procedure and defines the criteria for the authorisation. He also emphasises the need to provide for legal remedies for persons who have been refused authorisation.

Also noteworthy are the voices of Barbara Grabowska-Moroz and Małgorzata Szuleka[80], who argue in favour of a carefully crafted authorisation mechanism which could take the form of a veto or re-recognition of all appointments made with the participation of the "new" NCJ.

Marcin Szwed[81] takes a similar view, pointing out that the national authorities have a certain margin of appreciation in regulating the status of persons appointed in breach of the law. In the author's opinion, however, the limits of this margin of discretion are determined by the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 of the Convention is of crucial importance in this respect, as it guarantees invalidly appointed persons the right to a tribunal concerning their dismissal from office or transfer to another post. This provision also requires the fulfilment of the requirements of legality and necessity of state interference with the right to privacy in a democratic state, which implies the need to assess the proportionality of the solutions used by the legislator.

Jakub Jaraczewski and Laurent Pech[82], on the other hand, formulate a stricter position, formally advocating the cancellation of judicial appointments and obliging judges to undergo a new competition procedure conducted by the properly constituted National Council of the Judiciary. In this context, however, they recommend a number of measures that considerably individualise such a procedure. According to these authors, judges should not be withdrawn from conducting assigned cases, which would allow avoiding negative consequences for the litigants. Moreover, the solutions adopted should allow a judge to independently initiate the review of their judicial appointment. Otherwise, the judge concerned should be immediately suspended from hearing cases. Jaraczewski and Pech also argue that any person appointed to a higher judicial position with the involvement of the "new" NCJ should be subject to reconsideration before the properly constituted NCJ. If it is found that these judges do not fulfil the criteria for appointment or have committed acts unworthy of a judge, they should be removed from office. In the case of persons appointed to senior judicial positions, the assumption that their promotion is related to a political conspiracy or activity unworthy of a judge should lead to the cancellation of that appointment and the competent authorities should initiate proceedings. However, the authors recommend that the NCJ's decision regarding the judge in question should always be subject to judicial review.

79 A. Filipek, Defective Judicial Appointments and their Rectification under European Standards in: Bobek et al., Transition....

80 B. Grabowska-Moroz, M. Szuleka, Judicial Transitology.

81 M. Szwed, Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR, Hague Journal on the Rule of Law 2023 (15), Issue 2, pp. 353–384.

82 J. Jaraczewski, L. Pech, Systemic threat to the rule of law in Poland: updated and new Article 7(1) TEU recommendations.

6.4. Status of persons appointed to judicial offices with the participation of the "new" NCJ: the assessment of the HFHR

According to the HFHR, persons appointed to judicial offices upon the motion of the "new" NCJ have acquired the status of a judge, but due to the shortcomings of the appointment process resulting from the composition of the NCJ, they must undergo an authorisation procedure leading to one of the following two outcomes: authorisation or dismissal from office (alternatively: transfer to an office previously held). However, since they are judges, such a procedure should fulfil the requirements of Article 180 (2) of the Constitution, i.e. guarantee that the decision to dismiss or transfer a judge is taken by the court. In our view, this assertion is supported by an analysis of the case law of the courts to date, as well as the interpretation of the Constitution and the norms of international law.

6.4.1. Status of judges appointed at the request of the new NCJ in the light of the case law of the CJEU and the ECtHR

In recent years, the ECtHR and the CJEU have issued several important rulings on the crisis surrounding the legality of judicial appointments in Poland. Both courts agree that the changes to the rules for the election of judges to the National Council of the Judiciary and the associated politicisation of this body pose a serious threat to the exercise of the right to an independent and impartial tribunal established by law. To date, neither the ECtHR nor the CJEU has ruled that the persons appointed after 2018 upon the motion of the NCJ are not judges.

The case-law of the CJEU

In the *A.K.* judgment of 19 November 2019 (case C-585/18 and other), the Court of Justice of the European Union recalled that EU law requires that disputes concerning EU law be decided by a body constituting an independent and impartial tribunal within the meaning of EU law. The assessment of the independence and impartiality of a court may be influenced, inter alia, by "objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed". Such circumstances, characteristics and means "are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive, and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law". Referring to the situation in Poland, the CJEU emphasised that the mere fact that a judge has been appointed by the President, i.e. an executive authority, is not sufficient to call his independence into question. An appointment process structured in this way can be protected from excessive politicisation if a judicial council is involved, provided that it is itself independent and not dominated by political appointees. In this context, the CJEU identified a number of circumstances that could justify the conclusion that the Polish NCJ is no longer an independent body, although it left the final assessment of this question to the court that had referred the question to it for a preliminary ruling. The Court also referred to other factors that may be relevant in assessing the independence of a court, such as the admissibility of judicial review of NCJ resolutions on appointment, the circumstances in which a particular court (in this case, the Disciplinary Chamber) was appointed, the jurisdiction of the court and its excessive organisational autonomy.

It follows from the *A.K.* judgment that the independence and impartiality of a court should be assessed in the light of a number of relevant circumstances and not only the course of the appointment procedure. In this judgment, not only did the Court not rule that the persons appointed at the request of the new NCJ are not judges (this was not its role in the proceedings initiated by a question referred for a preliminary

ruling), but it also did not refer, for example, to the right to a court established by law and did not consider the significance of possible violations of the law in the procedure for appointing judges. This complex approach to assessing the independence and impartiality of courts composed of newly appointed judges was also presented by the CJEU in its later judgments.

In this context, the judgment of 15 July 2021 (C-791/19), for example, in which the CJEU referred to the Disciplinary Chamber and the principles of disciplinary liability of judges in Poland, should be mentioned. When examining the status of the Disciplinary Chamber, the CJEU again took into account a number of circumstances, such as the context in which it was created, the exceptionally high degree of its organisational autonomy, the privileged position of its judges in financial terms or the fact that only judges appointed at the request of the new NCJ sit on it. Again, the CJEU did not express the idea that a court composed of newly appointed judges can never be considered an independent and impartial court within the meaning of EU law, but opted for a more individualised approach to the issue.

It is also worth recalling the judgement of the CJEU of 6 October 2021 in the case *W.Ż.* (C-487/19), in which the Court dealt not only with the independence and impartiality of judges (in this case, a judge of the Extraordinary Review and Public Affairs Chamber of the Supreme Court), but also with the legality of the appointment of judges. The proceedings concerned a case in which a single judge, who had been appointed at the request of the NCJ after 2018, had dismissed the appeal of another judge against the decision to transfer him to another division of a court. In this case, a composition of the Civil Chamber of the Supreme Court referred to the CJEU for a preliminary ruling the question of whether the composition of the Extraordinary Review and Public Affairs Chamber of the Supreme Court (ERPAC) consisting of only one judge, can be considered an independent and impartial court on a statutory basis, since the judge who was part of it was appointed by the President on the basis of a resolution of the NCJ, the enforceability of which was suspended by the Supreme Administrative Court in connection with other preliminary ruling proceedings pending before the CJEU. However, the Court of Justice came to the conclusion that the referring court in fact attempted to establish whether it was justified in disregarding the order issued by a judge of ERPAC "and, consequently, required to examine the application for recusal submitted to him as part of the case in the main proceedings, or whether it must declare that there is no need to adjudicate on that application, on the ground that that order terminated the dispute in the main proceedings by declaring the appeal brought by W.Ż. before the Supreme Court against the resolution at issue to be inadmissible".[83]

In answering the question formulated in this way, the CJEU first noted the doubts as to whether the standard of independence, impartiality and establishment of the court by law had been respected. Referring to the case law of the ECtHR, the CJEU noted that "an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the requirement that a tribunal be established by law particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system".[84]

The Court found that such a serious breach of law could be the fact that a judge was appointed even though the Supreme Administrative Court had suspended the enforceability of the NCJ's resolution in connection with the preliminary ruling proceedings pending before the CJEU. The Court also recalled the conclusions of its previous case law on the examination of the independence of the NCJ and noted that all

83 Judgment of 6 October 2021 (Grand Chamber), Case C-487/19, para. 69.

84 Ibid., para. 130.

these circumstances considered together "are, subject to the final assessments to be made, in that regard, by the referring court, such as to lead, on the one hand, to the conclusion that the appointment of the judge concerned took place in clear disregard of the fundamental procedural rules for the appointment of judges to the Supreme Court forming an integral part of the establishment and functioning of that judicial system concerned".[85] On the other hand, the CJEU noted that similar arguments could lead the court to conclude that the ERPAC judge does not fulfil the EU requirements of impartiality and independence. The Court went on to state that if the referring court concludes that the circumstances in which the ERPAC judge was appointed show that the judge does not fulfil the requirements of an independent and impartial court under the law, it should declare the relevant order to be null and void "where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law".[86] At the same time, the CJEU emphasised that "no consideration relating to the principle of legal certainty or the alleged finality of a decision can, in the present case, be successfully relied on in order to prevent a court such as [the Civil Chamber of the Supreme Court], sitting as a panel of three judges, from declaring such an order to be null and void".[87]

This *W.Ż.* judgment will not apply to all cases heard by judges appointed upon the motion of the NCJ after 2018. First of all, the CJEU did not find that all judges appointed at the request of the new NCJ do not fulfil the requirements of EU law. In the discussed case, the Court pointed to the fact that the judge was appointed by the President in disregard of the suspension of the enforceability of the NCJ's resolution: Such a situation will, after all, not occur every time a judge is appointed. Moreover, it does not follow from the *W.Ż* judgment that every judgment of the newly appointed judge is without legal force and should be disregarded. The necessity to disregard will arise only when it is "essential in view of the procedural situation at issue in order to ensure the primacy of EU law". The *W.Ż.* case involved the disregard of an order made by a one-judge composition that prevented the substantive review of the case by a properly constituted panel of the Supreme Court. However, it does not follow from the *W.Ż.* judgment that it would be equally easy to disregard, for example, a final judgment of a composition of a circuit court that includes a judge appointed at the request of the new NCJ.[88]

The most recent ruling, in which the CJEU referred to irregularities around the appointment of judges of the Polish Supreme Court, was the judgment of 21 December 2023 (Case C-718/21). In this ruling, the CJEU declared inadmissible the question referred for a preliminary ruling by the Extraordinary Review and Public Affairs Chamber of the Supreme Court. The Court found that such a body is not a "court or tribunal" within the meaning of EU law and therefore does not have the right to refer a question for a preliminary ruling. In its reasoning, the CJEU referred, inter alia, to the judgment of the ECtHR in the case *Dolińska-Ficek and Ozimek v. Poland* (see below), in which the Strasbourg Court found that the ERPAC judges had been appointed in flagrant breach of national law and that their issuance of judgments could therefore lead to a violation of the right to a tribunal established by law, protected by Article 6 ECHR. The CJEU also took into account its own *W.Ż.* judgment. As in its previous judgments, the CJEU pointed out that "the fact that a body, such as a national council of the judiciary, which is involved in the procedure for the appointment of judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that procedure. However, according to that case-law, the situation is different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads

85 Ibid., para. 152.

86 Ibid., para. 161.

87 Ibid., para. 160.

88 Cf. Z. Nowicka, "Status sędziego powołanego z rażącym naruszeniem prawa – glosa do wyroku TSUE z 6.10.2021 r., C-487/19, Postępowanie zainicjowane przez W.Ż.", Europejski Przegląd Sądowy 2022 (3), pp. 45–47.

to such doubts being raised".[89] Such additional circumstances occurred in the case of ERPAC judges, the CJEU found. The Court pointed out the following aspects: the circumstances under which the new chamber was established, the fact that it was composed exclusively of newly appointed judges, the fact that the ERPAC had been given jurisdiction over particularly important cases, e.g. such as those related to elections, the fact that the appeal procedure against the NCJ's decisions was declared ineffective, the fact that the appointments were made by the President despite the Supreme Administrative Court's decision to suspend the enforceability of the NCJ's resolutions, and the fact that the Supreme Administrative Court had cancelled the NCJ's resolutions which resulted in candidates being submitted to the President for appointment to the ERPAC. According to the CJEU, all these circumstances, taken together, may "give rise to reasonable doubts in the minds of individuals as to the imperviousness of the persons concerned and the panel in which they sit with regard to external factors, in particular the direct or indirect influence of the national legislature and executive and their neutrality with respect to the interests before them".[90] According to the CJEU, the ERPAC therefore does not fulfil the conditions of independence, impartiality and establishment by law, on which it depends whether a particular body can be considered a "court or tribunal" within the meaning of EU law.

However, none of the rulings described above directly concerned the question of the status of the newly appointed judges. It should be noted that questions concerning this issue (more precisely, the jurisdiction of the national court to determine the absence of a service relationship of an improperly appointed judge) were referred to the CJEU for a preliminary ruling. However, in a judgment of 22 March 2022 (Case C-508/19) and in an order of 22 December 2022 (Joined Cases C-491/20 to C-496/20, C-506/20, C-509/20 and C-511/20), the Court declared these questions inadmissible. The CJEU found that "an action such as that in the main proceedings seeks, in essence, to obtain a form of erga omnes invalidation of the appointment of the defendant in the main proceedings to the office of judge of the Supreme Court, even though national law does not authorise, and has never authorised, all subjects of the law to challenge the appointment of judges by means of a direct action for annulment or invalidation of such an appointment".[91] Interestingly, Advocate General E. Tanchev argued in favour of the admissibility of the question in case C-508/19. He argued, inter alia, that "[e]ven though the principle of the primacy of EU law mainly applies to national general and abstract norms, it is also applicable to individual and specific administrative acts. In view of the fact that the review of the validity of J.M. (the defendant judge)'s appointment cannot be carried out in any other national procedure and that the only possibility to examine that status as judge is in the context of a disciplinary procedure exposing M.F. (the applicant judge) to sanctions which is not compliant with the requirements of the principle of effective judicial protection, the referring court should be able to rule that that appointment did not exist in law even where national law does not authorise it to do so".[92]

To summarise, it can be said that the CJEU's jurisprudence does not indicate unequivocally that all persons appointed at the request of the new NCJ do not have judicial status.. Nor does it follow from this case law that these persons could be dismissed ex officio without any judicial review. Of course, the existing case law cannot be interpreted as a clear confirmation that these persons are entitled to the status of a judge and the protection against irremovability. It appears that, from the perspective of EU law, it is of the utmost importance that cases concerning the application and interpretation of EU law are not decided by judges who do not fulfil the standards of independence, impartiality and legal establishment, which must be assessed in the light of all relevant circumstances. However, in order to achieve this objective, it is not absolutely necessary for the legislator to remove all newly appointed judges, which is why it is difficult to derive such an obligation from EU law.

89 Judgment of 21 December 2023, L.G. v Krajowa Rada Sądownictwa, Case C-718/21, para. 64.

90 Ibid., para. 77.

91 Judgment of 22 March 2022 (Grand Chamber), M.F. v J.M., Case C-508/19, para. 80.

92 Opinion of Advocate General Tanchev, Case C-508/19, para. 53.

The case law of the ECtHR

To date, the ECtHR has issued six judgments in cases concerning irregularities in the appointment of judges to the Polish Supreme Court. However, no decision has yet been made on the appointment of judges to other courts – the proceedings on this issue are still pending[93].

In all of these cases, the ECtHR applied the test developed in the *Ástráðsson v. Iceland* Grand Chamber judgement. In applying this test, the Court assesses whether the irregularities in the procedure for appointing a particular judge were serious enough to justify an allegation of a violation of the right to a court established by law.[94] The test consists of three steps. The first one is an examination of whether there has been a "manifest" breach of the law in the appointment procedure in a particular case. In the second step, the Court examines whether the violated norms were of fundamental importance for the entire appointment process. In the third step, the ECtHR considers whether the national courts have properly investigated and remedied the violations that occurred during the phase of appointing a judge.

In the first of these cases, *Reczkowicz v. Poland*[95], the ECtHR found that the judges of the Disciplinary Chamber of the Supreme Court hearing a case had been appointed in a manifest breach of the norms fundamental to the appointment process. Significantly, the ECtHR based its conclusion in this regard solely on the fact that the judges were appointed at the request of the new NCJ and found that there is no need to separately examine the issue of the lack of countersignature on the President's notice of vacancies in the Supreme Court. Relying largely on the Joint Chambers Resolution, the court found that the Constitutional Court's jurisprudence legitimising the changes in the NCJ[96] and declaring the Supreme Court's resolution unconstitutional[97] was arbitrary. According to the ECtHR, the manifest breach of law concerned norms of fundamental importance, as the improper composition of the NCJ gave the legislative and executive branches the opportunity to directly or indirectly influence the procedure for appointing judges and they indeed exercised this opportunity. The third step of the *Ástráðsson* test is of little relevance in the case at hand, as the applicant did not have access to any judicial procedure for investigating irregularities in the appointment of the persons adjudicating in the Disciplinary Chamber.

The ECtHR continued the line of case law started in *Reczkowicz* in subsequent judgments, i.e. *Dolińska-Ficek and Ozimek v. Poland*[98], *Advance Pharma sp. z o.o. v. Poland*[99], *Juszczyszyn v. Poland*[100], *Tuleya v. Poland*[101] and *Wałęsa v. Poland*[102]. The first and second of the above judgments concern, respectively, the Extraordinary Review and Public Affairs Chamber and the Civil Chamber of the Supreme Court, while the *Juszczyszyn* and *Tuleya* cases concern the Disciplinary Chamber of the Supreme Court. *Wałęsa*, in turn, is a pilot judgment concerning the ERPAC, in which the ECtHR obliged Poland to eliminate the systemic problem that was the source of violations of the ECHR in cases of improper appointments to the Supreme Court.

It is worth noting that in *Dolińska*, *Advance Pharma* and *Wałęsa*, the Court also took into account circumstances other than the formation of the NCJ itself when assessing whether there was a manifest breach of fundamental norms of the appointment procedure. This was because the ECtHR found that the

93 See D.C. v. Poland, no. 41335/21; Zielińska and Others v. Poland, no. 48534/20 et al.; Brodowiak v. Poland, no. 28122/20; Dżus v. Poland, no. 48599/20.

94 Ástráðsson v. Iceland, no. 26374/18, 1 December 2020, paras. 243–290.

95 Reczkowicz v. Poland, no. 43447/19, 22 July 2021.

96 Judgment of the Constitutional Court of 25 March 2019., K 12/18, OTK-A 2019, item 17.

97 Judgment of the Constitutional Court of 20 April 2020, U 2/20, OTK-A 2020, item 61.

98 Dolińska-Ficek and Ozimek v. Poland, nos. 49868/19 and 57511/19, 8 November 2021.

99 Advance Pharma sp. z o.o. v. Poland, no. 1469/20, 3 February 2022.

100 Juszczyszyn v. Poland, no. 35599/20, 6 October 2022.

101 Tuleya v. Poland, nos. 21181/19 and 51751/20, 6 July 2023.

102 Wałęsa v. Poland, no. 50849/21, 23 November 2023.

appointments by the President, which were made in disregard of the suspension of the enforceability of the NCJ's resolutions ordered by the Supreme Administrative Court, also constituted a breach of the law. However, it is clear from the judgments to date that it was the irregularities in the composition of the NCJ that were of paramount importance from the perspective of Article 6 ECHR.

It seems that in the arguments put forward in the judgments on the incorrect appointments to the Supreme Court in the *Dolińska-Ficek and Ozimek*, *Advance Pharma* and *Wałęsa* cases, the Court clearly suggested that it recognises that the problems related to the incorrect composition are by no means limited to the judges of the Supreme Court.[103] On the other hand, in all these judgments, the ECtHR relied largely on the Joint Chambers Resolution, which differentiates the consequences of defects in the appointment of judges to individual courts.

The question may also arise as to whether, in all cases of appointment of judges to common courts, irregularities related to the composition of the NCJ can actually be regarded as relating to norms of fundamental importance for the entire appointment process. According to some legal scholars irregularities in the composition of the NCJ cannot play a role in the appointments to associate judge positions and appointments to first positions after the completion of the associate judgeship, as the special nature of this procedure considerably limits the NCJ's freedom of decision in the nomination process, which consequently also reduces the negative effects of politicisation of this body[104]. However, in relation to all other groups of judges, the existing case law of the ECtHR does not provide sufficient grounds for distinguishing their situation from that of Supreme Court judges. These persons were therefore appointed in flagrant violation of the norms that are fundamental to the appointment process. However, it seems that even in such a situation, a violation of Article 6 of the ECHR in the third stage of the *Ástráðsson* test can be avoided by a proper investigation and remediation of the effects of violations in the judicial appointment procedure by the domestic courts. The Court's case law to date has not clearly explained what an "investigation and remediation" would consist of. Indeed, in none of the cases discussed above relating to the incorrect appointment of judges of the Supreme Court has there been any attempt to examine the consequences of adjudication by improperly appointed judges. However, in the HFHR's view, it cannot be ruled out that a proper application of the test set out in the Joint Chambers Resolution and a convincing justification as to why a ruling of an improperly appointed judge should be upheld could protect against a violation of the right to a court established by law.

Irrespective of the above considerations on the direction of future case law in relation to Poland, it is clear that the ECtHR's approach in cases concerning the appointment of judges differs from that of the CJEU. While the latter relies primarily on the standard of an independent and impartial court, which is based on a comprehensive and individualised assessment of each judge, the ECtHR applies the aforementioned three-step test, which focuses on examining the legality of a judge's appointment without taking into account other circumstances that may affect the perception of a judge as independent or impartial. However, although the case law of the ECtHR appears to be more far-reaching and less flexible than that of the CJEU, even the ECtHR does not expressly state that improperly appointed persons do not have the status of a judge at all. In *Ástráðsson*, the ECtHR clearly indicated that the finding of a violation of the right to a tribunal established by law is not depend on whether the defects in the appointment process are serious enough to invalidate the act of appointment itself.[105] Therefore, a judgment of the ECtHR finding a violation of the right to a tribunal established by law cannot be interpreted as confirming the lack of judicial status of the group of persons appointed as judges.

103 See, Dolińska-Ficek, para. 368; Advance Pharma, para. 364; Wałęsa, paras. 321 and 324.

104 See J. Roszkiewicz, "Indywidualny test niezawisłości jędzigo powołanego z naruszeniem prawa – uwagi na tle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, Europejski Trybunału Praw Człowieka, Sąd Najwyższy i Naczelnego Sądu Administracyjny", Przegląd Sądowy 2022 (11–12), p. 89.

105 Ástráðsson, para. 280.

It is also difficult to argue that in order to implement the judgments of the ECtHR, it is absolutely necessary to remove defectively appointed judges from their positions. It is difficult to find any such suggestion in the above-mentioned rulings and the Committee of Ministers, which oversees their implementation, does not make such far-reaching recommendations. In a decision of 7 June 2023, the Committee merely referred to the need to regulate the status of improperly appointed judges and the rulings issued by them[106], while a note prepared by the Secretariat of the Committee of Ministers pointed out that such a regulation does not necessarily imply the automatic removal of all improperly appointed persons, but may be based on a mechanism for reviewing appointments[107]. No such recommendations were made in the pilot judgment in the *Wałęsa* case, either. It is worth noting that, following the *Ástráðsson* judgment, the Icelandic authorities did not remove the incorrectly appointed judges at all, but allowed the incorrectly appointed persons to re-enter the competitions, while one of them, who refused to participate in the competition, remained in the office of judge but was not involved in deciding cases.[108] The Committee of Ministers has already closed the procedure for supervising the implementation of this ruling, as it considers the measures taken by the Icelandic authorities to be sufficient.[109] Therefore, it seems that for the proper implementation of the ECtHR's judgments, it is necessary, first of all, to restore the independence of the NCJ and eliminate the systemic problem of cases being decided by judges who are not properly appointed. Invalidating appointments that have been made incorrectly would solve this problem, but could create new problems. For example, there is a significant risk that the judges appointed at the request of the new NCJ whose appointment was positively assessed in a procedure based on the Joint Chambers Resolution or in the manner proposed by the President of the Republic of Poland, may appeal to the European Court of Human Rights.

At the same time, the revocation or invalidation of judicial appointments is not the only and least intrusive measure that can be used to achieve the aforementioned goal. If a more individualised authorisation process were implemented, ending either with the judge's removal from office or with the authorisation of their appointment by a properly constituted NCJ, the systemic problem related to the presence of improperly appointed judges in the Polish judiciary could also be solved.

6.4.2. Status of judges appointed at the request of the new NCJ in the light of the case law of Polish courts

Neither the Supreme Court nor the common courts have resolved the status of judges appointed at the request of the NCJ after 2018. In the case law to date, the courts have focused on the impact that judges appointed in this way have on the validity of the proceedings.

The case law of the Supreme Court

This issue under discussion was certainly not determined by the Three Joint Chambers Resolution of 23 January 2020. In the reasons for this resolution, the Supreme Court directly pointed out that, when adopting the resolution, it "was guided by the assumption that persons appointed to office following the proceedings shaped by the Act of 8 December 2017 amending the Act on the National Council of the Judiciary had formally obtained the status of judges", although at the same time it pointed out that this assumption may be negatively verified in the future case law of the Supreme Court guided by the case law

106 Decision of the Committee of Ministers of the Council of Europe, 7 June 2023 (CM/Del/Dec(2023)1468/H46-18), para. 9, https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2023)1468/H46-18E.

107 Notes on the Agenda of the Secretariat of the Committee of Ministers, 7 June 2023, (CM/Notes/1468/H46-18), https://hudoc.exec.coe.int/eng?i=CM/Notes/1468/H46-18E.

108 Communication from Iceland concerning the case of Guthmundur Andri Astrathsson v. Iceland, DH-DD(2021)700, 7 July 2021, https://hudoc.exec.coe.int/eng?i=DH-DD(2021)700E.

109 Resolution No. CM/ResDH(2022)48 of the Council of Europe's Committee of Ministers, 9 March 2022, https://hudoc.exec.coe.int/eng?i=001-216610.

of the CJEU. The fact that the Supreme Court accepts that the judges appointed at the request of the new NCJ are formally judges has affected the wording of the operative part of the resolution. This is because it shows that while proceedings before the Supreme Court with incorrectly appointed persons are always defective (inadequate composition of the court within the meaning of the Code of Criminal Procedure or incompatibility of the composition of the court with the law within the meaning of the Code of Civil Procedure), in the common courts and military courts the effect depends on whether the defectiveness of the procedure for appointing a judge in concrete circumstances leads to a breach of constitutional, EU and conventional standards of independence and impartiality. If the defective appointees had not been judges at all, such an individualised approach to assessing their independence and impartiality would certainly have not been necessary. Moreover, with regard to rulings handed down by persons who are not judges, it would be appropriate to use the category of non-existence of rulings instead of nullity of proceedings, which presupposes that the ruling remains in force until it is removed by appropriate means of appeal.

Of course, it can be argued that the Joint Chambers Resolution was issued in early 2020, long before the first rulings of the ECtHR in Polish cases. Nevertheless, the Supreme Court has not yet departed from the interpretation presented in it. For example, in a resolution of 2 June 2022[110], the Supreme Court ruled that although the current NCJ "is not identical to the constitutional body whose composition and manner of appointment is regulated by the Constitution of the Republic of Poland", "there is no reason to assume a priori that any common court judge who received their nomination as a result of taking part in a competition before the National Council of the Judiciary after 17 January 2018 does not meet the minimum standard of impartiality and each time a court with their participation is improperly staffed within the meaning of Article 439 § 1 (2) of the Code of Criminal Proceedings. Such a situation occurs only in relation to judges of the Supreme Court who received appointments under such conditions." In its reasoning, the Supreme Court stated that the assumption that all newly appointed judges of common courts are incapable of adjudicating would be too far-reaching a solution. The effects would be most problematic for "'young' judges who would have nowhere to 'step back' and who often started their training in a different systemic reality, i.e. before 2018. However, the above-described difficult situation of judges affected by this 'radical' solution is nothing compared to the situation of citizens who, at that time, obtained thousands of court rulings issued with the participation of judges, who would have now to be considered (collectively and a priori) as having sat in courts who were improperly composed. This would lead to a situation that resembles the anarchy of the state and, above all, would be detrimental to the citizens who participate in the jurisprudence thus created without having any influence or choice over it."[111]

The case law of the Supreme Administrative Court

Also, it does not follow from the case law of the Supreme Administrative Court that the persons appointed at the request of the new NCJ are not judges. In this context, it should be noted that in a series of rulings issued in 2021[112], the Supreme Administrative Court overturned the resolutions of the new NCJ, pointing out, among other things, irregularities in the formation of the Council which led to it being deprived of its independence. However, the Court stated in those rulings that their effects "do not relate to the systemic validity and effectiveness of the presidential acts of appointment to the office of a judge of the Supreme Court, which were made on the basis of the recommendations submitted by the NCJ in the reviewed resolution. Under current law, these acts are not subject to judicial review and are not revocable". When considering requests to recuse judges appointed at the request of the new NCJ, the Supreme Administrative Court points out the "need for an individual approach to rulings issued by judges

110 Resolution of the Supreme Court of 2 June 2022, I KZP 2/22, OSNK 2022, no. 6, item 22.

111 Ibid.

112 See the judgments of the Supreme Administrative Court of: 6 May 2021, case file no. II GOK 2/18; 6 May 2021, II GOK 3/18; 6 May 2021, GOK 5/18; 6 May 2021, II GOK 6/18; 6 May 2021, II GOK 7/18; 13 May 2021, II GOK 4/18.

appointed to common or administrative courts and to issues related to their recusal" and emphasises that irregularities in the procedure for appointing a judge do not constitute an independent condition for their recusal – "there must also be a special circumstance leading to a breach of the standard of independence and impartiality".[113] According to the Supreme Administrative Court, "it would be unacceptable to interpret that a judge appointed at the request of the new NCJ does not possess the quality of impartiality required to decide any case concerning the status of an administrative court judge".[114]

6.4.3. A statutory determination of the non-existence of appointments versus constitutional and Convention standards

The HFHR does not intend to assess at this point whether the approach of the courts discussed above is correct and fully compliant with the Convention and EU standards. However, neither the case law of the Supreme Court nor (all the more) that of the Supreme Administrative Court indicates that the persons appointed at the request of the new NCJ are *not* judges. On the contrary, the brief analysis of the rulings of both courts presented here seems to provide more arguments in favour of the thesis that these persons are nevertheless formally entitled to the status of judge.

According to the HFHR, there are also no theoretical arguments in favour of recognising the appointment of all judges sworn in at the request of the "new" NCJ as non-existent by law.[115] The concept of non-existent acts has so far been developed primarily on the basis of civil law (e.g. the question of the non-existence of corporate resolutions)[116], civil procedure (non-existence of judicial decisions)[117] or administrative law (non-existence of administrative acts)[118]. However, this theory has rarely been discussed in the context of constitutional law. The problem of the non-existence of normative acts has been discussed in the literature, but the problem of the grounds of the non-existence of individual acts issued by central constitutional bodies of the state remains unsolved.[119] Undoubtedly, however, the effect of non-existence should only be reserved for the most serious, immediately obvious violations of the law.[120] It seems, however, that in the case of appointments made at the request of the "new" NCJ, it is difficult to speak of so severe defects. The law regulating the composition of the National Council of the Judiciary was passed and published in the Journal of Laws and is still in force. It is difficult to argue that this law does not exist in the legal sense and therefore the actions of the National Council of the Judiciary are non-existent. In this context, it should be noted that even the declaration of unconstitutionality of a legal act by the Constitutional Court does not automatically mean the non-existence of acts applying the law adopted on its basis, but merely opens up the possibility of these acts being challenged in legal proceedings.

In the absence of sufficiently strong and undisputed arguments in favour of the thesis of the non-existence of appointments made at the request of the new NCJ, a statutory provision declaring all such appointments invalid and restoring ex lege the state before they are made could violate constitutional and Convention standards.

113 Order of the Supreme Administrative Court of 10 August 2022, case no. I GSK 2156/18.

114 Order of the Supreme Administrative Court of 1 December 2022, case no. I GSK 1639/22.

115 See also: Szwed, Fixing the problem..., pp. 363–365.

116 See, e.g., M. Kruszyński, "Uchwały nieistniejące", Przegląd Prawa Handlowego 2008 (7), pp. 44–51.

117 See e.g. E. Gapska, Ewolucja koncepcji orzeczeń prawnie nieistniejących w postępowania cywilnym, in: H. Dolecki, K. Flaga-Gieruszyńska (eds.), Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych. Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego Szczecin-Niechorze 28-30 września 2007, Warszawa 2009, pp. 351–364; order of the Supreme Court of 17 November 2005, case no. I CK 298/05.

118 See, e.g., A. Górnicz-Mulcahy, Stosunek pracy osób pełniących funkcji centralnych organ administracji rządowej, Warszawa 2018, pp. 273–274.

119 J. Podkowik, "Czy „istnieją" akty normatywne „nieistniejące" (nieakty)?", Przegląd Legislacyjny 2010 (4), pp. 11–28.

120 See the order of the Constitutional Court of 7 January 2016., U 8/15, OTK-A 2016, item 1. See also the interesting considerations by Ziółkowski in: M. Ziółkowski, "Konstytucyjna kompetencja sądu do ochrony własnej niezależności (uwagi na marginesie uchwały SN z 23.01.2020 r.)", Państwo i Prawo 2020 (10), pp. 77–80.

According to Article 180 (2) of the Constitution, "Recall of a judge from office, suspension from office, transfer to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute". Two aspects must be taken into account in the interpretation of this provision. First, this provision expressly refers only to judges and should therefore not be applied to persons who are not judges. Thus, assuming that the persons appointed at the request of the new NCJ are not judges, this provision would not prevent them from being dismissed from office without a court decision.[121] The problem, however, is that, as already indicated above, the lack of judicial status of the group of persons discussed is not obvious enough to justify the exclusion of the applicability of the safeguard clause discussed, which is, after all, an important guarantee of judicial independence. Second, it could be argued that these persons, even if formally appointed as judges, should not be so strongly protected against removal from office in view of the violations committed in the course of the appointment procedure. In the HFHR's view, this argument is partially correct. Since the violations of law are undisputed and confirmed in the case law of Polish and international courts, the Foundation believes that it is permissible to deviate from the principle of irremovability by introducing a review procedure that may lead to the removal of a judge from office by the court. It is worth noting that the Constitution explicitly allows for the "recall" of a judge from office based on a court decision, but does not indicate that such a measure can only be applied if the judge has committed a disciplinary offence. Arguably, fundamental deficiencies in the appointment procedure that result in a judge being unable to fulfil his or her duties related to adjudication in an impartial and independent court may also justify the dismissal of a judge. This is because the guarantees of irremovability must be interpreted in the light of Article 45 of the Constitution, which grants everyone the right to have a case heard by an independent and impartial court. However, in the opinion of the HFHR, dismissal due to deficiencies in the appointment also requires a decision by the court after a fair hearing.

A further issue could be whether a statutory declaration of the non-existence of appointments with the consequence that the effects of such appointments are automatically cancelled (i.e. the dismissal of persons who did not hold judicial office before the defective appointment and, in the case of other persons, the compulsory transfer to previously held posts) would be compatible with Article 6 ECHR.[122] The application of this provision to cases involving disputes relating to the status of judges follows from the test developed in *Vilho Eskelinen and Others v. Finland*[123]. It assumes that cases concerning different types of labour disputes involving civil servants fall in principle within the scope of Article 6 ECHR, unless national law excludes judicial proceedings in this respect and, at the same time, such exclusion is objectively justified by the public interest. The ECtHR has repeatedly applied this test in cases involving judges. The most significant judgment in this respect is probably the Grand Chamber's judgment in *Baka v. Hungary*[124], in which the Court ruled against the premature termination of the term of office of the President of the Supreme Court of Hungary, arguing that the decision was not subject to judicial review. The criteria adopted in the *Vilho Eskelinen* were also applied to issues relating to the appointment of judges[125], the promotion of judges to higher judicial offices[126], the transfer of judges[127] and the removal of judges from office[128]. Some reminiscences of this approach were also the judgments of the ECtHR issued in cases of applications brought against Poland: *Grzęda v. Poland*[129], *Żurek v. Poland*[130] and *Broda and Bojara v. Poland*[131].

121 Cf. K. Grajewski, P. Uziębło, "Podstawowe założenia projektu ustawy o zmiany ustawy o Krajowej Rady Sądownictwa oraz niektórych innych ustawy z 2020", Państwo i Prawo 2021 (6), p. 50.

122 See Szwed, Fixing the problem..., pp. 363–365.

123 Vilho Eskelinen and Others v. Finland, no. 63235/00, 19 April 2007.

124 Baka v. Hungary, no. 20261/12, 23 June 2017.

125 Juričić v. Croatia, no. 58222/09, 26 July 2011.

126 Dzhidzheva-Trendafilova v. Bulgaria, no. 12628/09, 9 October 2012 (decision).

127 Ohneberg v. Austria, no. 10781/08, 18 September 2012, § 25.

128 Olujic v. Croatia, no. 22330/05, 5 February 2009.

129 Grzęda v. Poland, no. 43572/18, 15 March 2022.

130 Żurek v. Poland, no. 39650/18, 16 June 2022.

131 Broda and Bojara v. Poland, no. 26691/18, 29 June 2021, 27367/18.

When examining the admissibility of the application of Article 6 ECHR in cases involving the removal from office of a defectively appointed judge, the ECtHR would probably have started from the determination of whether the dismissed judge had any rights in the case at hand on domestic grounds. As we have argued above, there are no sufficiently cogent arguments to conclude that the group of appointees under discussion does not have the status of judges at all. On the contrary, the jurisprudence of the Supreme Court and the Supreme Administrative Court, as well as the fact that these persons are treated as judges by the state authorities (they receive a salary, their decisions are reviewed in the appellate instance and enforced, etc.) may indicate that they do indeed have such status. It should be noted that the declaration of the applicability of Article 6 of the ECHR does not presuppose a clear finding that a particular person is entitled to a specific right of a civil nature – the said provision may also apply in cases concerning the general existence of a particular right or its scope.[132] Next, the ECtHR would likely rely on the test developed in *Vilho Eskelinen v Finland*[133], which has been further developed in its subsequent case law.

According to this test, Article 6 ECHR applies in cases involving the careers of civil servants, including judges, unless national law excludes recourse to the courts and this exclusion is objectively justified by the interests of the state, which may be the case if the subject-matter of the dispute relates to the exercise of state authority or if a "special bond of trust and loyalty" is at stake between the civil servant and the state as his or her employer. It is doubtful whether the exclusion of recourse to the courts can be considered effective in the case of improperly appointed judges, as Article 180 (2) of the Constitution clearly states that a judicial decision is required for the removal of a judge from office. Furthermore, it is clear from the judgments of the ECtHR in cases concerning duly appointed judges that the interest of the state can never in principle justify denying a judge access to a court.[134] In assessing this question, one should also refer to the role of the courts in a democratic state ruled by law, including their participation in the human rights protection system.

Nevertheless, the status of judges who are not properly appointed is indeed different. However, this dissimilarity does not allow to exclude the recourse to the courts. For in such a case, we would still not be dealing with an official who has a "special bond of trust and loyalty" to the state, and the justification of the exercise of state authority has never in principle been applied to judges in the case law of the ECtHR. A possible exclusion of the recourse to the courts could be defended by invoking the thesis appearing in ECtHR case law according to which Article 6 ECHR cannot be used as a basis for a guarantee of access to a court for the purpose of challenging the legality of a legislative act (and thus any legal consequences arising from it by law).[135] However, in the recent Grand Chamber judgment *Grzęda v. Poland*, the ECtHR did find a violation of Article 6 ECHR in relation to the lack of a legal remedy against the shortening of the term of office of judicial members of the NCJ, an effect that had in fact occurred by law.[136] Moreover, it would be very dangerous to conclude that the removal of a judge by law does not fall within the scope of Article 6 ECHR. Such a conclusion, above all else, would allow the execution of judicial purges bypassing the jurisdiction of the ECtHR.

At the same time, it must be emphasised that the extension of protection under Article 6 ECHR or Article 180 of the Constitution to defectively appointed judges is not tantamount to a ban on their removal or transfer to previous positions. Such measures are admissible, but only after a fair trial.

132 See, e.g., Regner v. Czech Republic [GC], no. 35289/11, 19 September 2017, para. 99; Grzęda v. Poland [GC], no. 43572/18, 15 March 2022, para. 268.

133 See Vilho Eskelinen and Others v. Finland, no. 63235/00, 19 April 2007, para. 62.

134 See, e.g., M. Leloup, "Not Just a Simple Civil Servant: the Right of Access to a Court of Judges in the Recent Case Law of the ECtHR", European Convention on Human Rights Law Review 2023 (4) issue 1, p. 25; M. Szwed, "Problematyka nieusuwalności sędziów w orzecznictwie Europejskiej Trybunału Praw Człowieka", Przegląd Konstytucyjny 2021 (3), p. 152.

135 See, e.g., Posti and Rahko v. Finland, no. 27824/95, 24 September 2002, para. 52.

136 M. Leloup, D. Kosař, "Sometimes even easy rule of Law cases make bad Law. ECtHR (GC) 15 March 2022, No. 43572/18, Grzęda v Poland", European Constitutional Law Review 2022 (18) issue 4, pp. 776–778; Szwed, Fixing the problem..., pp. 372–374.

6.4.4. Consequences of considering appointments made on the motion of the new NCJ as non-existent

Considering appointments made on the motion of the new NCJ as non-existent could also have very far-reaching consequences.[137]

First, one would have to assume that all appointments made by the President on the motion of the NCJ are tainted with the defect of non-existence. However, despite the significant differences between the procedure for appointing associate judges to their first judgeship and the procedure applicable to the appointment of other types of judges, the Constitution ultimately states that the appointment of a judge always requires a motion from the NCJ. It seems illogical to believe that a body considered under this approach as a de facto usurper acting on the basis of non-existent provisions would make resolutions that do not exist in relation to one category of judges but are in full force and effect in relation to another category. The view that all appointments made on the motion of the "new" NCJ are non-existent could in turn have a negative impact on the efficiency of the Polish judiciary. According to the data collected by the HFHR[138], as many as 2,447 judges were appointed upon the motion of the "new" NCJ. In 796 cases, the persons appointed were persons who had not held the office of judge or associate judge before their appointment and therefore, assuming that there were no appointments, were never judges at all. Such an approach by the legislator would have a direct impact on the efficiency of proceedings before the district courts, particularly in smaller towns. HFHR data shows that such an action would affect a significant group of judges in some district courts. For example, 60% of judges at the Lidzbark Warmiński District Court, 50% of judges at the Jastrzębie-Zdrój District Court, 63% of judges at the Opoczno District Court, 37% of judges at the Gniezno District Court and 43% of judges at the Głogów District Court would be affected.[139]

Moreover, the finding that the NCJ does not exist as an authority could have even more far-reaching effects, as it could also result in the non-existence of resolutions adopted in cases other than the presentation of candidates for judicial appointments (e.g. those regarding the retirement of judges).

Second, the assumption that judicial appointments are non-existent could affect the legal force of the judgments handed down by the judges in question. In the case of judges who served in another court before their improper appointment, one could speak of the invalidity of the proceedings due to the improper composition of the court. On the other hand, any rulings issued by defectively appointed persons who did not serve as judges at all prior to their appointment would have to be considered non-existent – at least in cases where the entire panel consisted of persons so appointed. According to the HFHR, it is very doubtful whether the legislator could mitigate these consequences by stipulating in a law that the judicial decisions issued by defectively appointed persons should remain in force. Giving the legislature the power to decide what is and what is not a judicial decision, and give legal force to a decision issued by someone who has no jurisdiction at all (and never had jurisdiction), seems incompatible with the principle of separation of powers and could set a dangerous precedent. This could also violate the individual's right to be heard before a court.

At this point, it should be noted this the situation that would be created by the finding of the non-existence of judicial appointments would differ significantly from the effects of the finding of the unconstitutionality of the institution of the associate judge by the Constitutional Court in 2007.[140] The Constitutional Court did not find that the provisions on the status and jurisdiction of the associate judges did not exist, but were "merely" unconstitutional and postponed the loss of their validity for 18 months. As a rule, judgments

137 Szwed, Fixing the problem..., pp. 365–366.

138 Data as of 20 October 2023. See also: M. Szuleka, M. Szwed, M. Wolny, Powołania sędziów w latach 2018-2023 na wniosek tzw. „nowej" Krajowej Rady Sądownictwa. Analiza statystyczna, Helsińska Fundacja Praw Człowieka, Warszawa 2023, https://hfhr.pl/upload/2023/10/raport_powolania_sedziow_przez_nowa_krs.pdf.

139 Findings made by the HFHR as of 1 September 2023.

140 Judgment of the Constitutional Court of 24 October 2007, SK 7/06, OTK-A of 2007, No. 9, item 108.

by the Constitutional Court that declare legal norms unconstitutional do not automatically mean that all decisions made on the basis of such norms no longer exist, but merely allow the relevant proceedings to be reopened. With regard to the latter, however, the Constitutional Court made it clear in the operative part of the judgment that the activities of the associate judges may not be challenged under Article 190 (4) of the Constitution. In the case of the newly appointed judges, however, it would not be so much that the Constitutional Court would declare the provisions under which they were appointed unconstitutional, but that the legislature would assume that neither the NCJ nor the appointments made on its motion ever existed in the legal sense.

It also appears that the manner in which the legal effects of the decisions of the judges appointed on the motion of the new NCJ are regulated should be consistent with the norms applicable to the decisions of the Constitutional Court made with the participation of persons not authorised to adjudicate as that Court's judges. It is worth noting that a proposal prepared by the Team of Legal Experts of the Stefan Batory Foundation contains a provision providing for the cancellation of defective decisions of the Constitutional Court and the repetition of procedural steps taken in the proceedings concluded with their issuance.

6.4.5. Rejection of the view of the non-existence of judicial appointments and the thesis on the curative effect of the President's order

Rejecting by the HFHR's the contention that there are no judicial appointments on the motion of the new NCJ is not tantamount to assuming that the fact that a judge has been appointed by the President cures all irregularities that occurred in the previous stages of the appointment process.

Such a view goes way too far and cannot be reconciled with the principle of legalism, the foundation of the rule of law. In a state governed by law, no authority may be exempted from complying with the constitution. The view that excludes any examination of the status of a judge on the ground that judges are appointed in the exercise of the President's prerogative is also unfounded. If a particular power is categorised as a prerogative, it merely means that such power can be exercised by the President to issue official acts without the necessity to obtain a countersignature of the Prime Minister. However, this does not mean that the President is exempt from the law when exercising these powers.[141]

The Foundation therefore considers, first, that the courts may examine, in the course of proceedings pending before them, the impact of irregularities in the appointment of a judge on the safeguarding of the individual's right to a court (in particular their right to be heard by a court established by law) and, secondly, that it is permissible to introduce an authorisation procedure the purpose of which is to determine the status of defectively appointed judges with erga omnes effect. In other words, the HFHR believes that the issue in question should be resolved in a fair procedure pending before independent authorities and not by a decision of the legislator. The latter could be perceived as politically motivated and arbitrary.

141 See, e.g., M. Zubik, Prawo konstytucyjne współczesnej Polski, Warszawa 2022, pp. 268–269.

7. AUTHORISATION MECHANISM

7.1. The system of authorisation of judicial appointments made by the National Council of the Judiciary

The proposal of the Helsinki Foundation for Human Rights concerning measures relating to persons appointed to judicial positions on the motion of the new National Council of the Judiciary coincides in some respects with the final form of the bill submitted by the Senate to the Sejm.

In particular, as already discussed in detail, the HFHR is of the opinion that the persons appointed to the office of judge by the "new" NCJ have assumed this office. This assumption implies the need to respect the constitutional principles relating to the office of judge, including the provision of a legal remedy for these persons in any case where their status is challenged in any way.

On the other hand, the Foundation accepts that the fact that a judge was appointed with the participation of the new National Council of the Judiciary is relevant to his or her status. The defectiveness of their appointment permanently affects the correctness of composition of the courts in which these judges serve, leading to uncertainties regarding the legality of their rulings. The current law gives the litigants several possibilities to challenge the composition of the court in incidental proceedings and by means of appeal. Finally, the existing case law of the ECtHR and the communication by this Court of subsequent cases concerning the incorrect composition of the court appointed with the participation of the new NCJ make plausible the risk of applications to the ECtHR by litigants dissatisfied with the judicial decisions received. Consequently, no one can rule out the possibility that a particular judge may be subject to a mechanism for evaluating his or her appointment through the prism of independence and impartiality.

For these reasons, it is necessary to take corrective action. These measures should assume a universal dimension. In other words, they must extend to all persons appointed to judicial office on the motion of the new NCJ, including associate judges. Only such measures will, in practice, avoid allegations regarding the selective nature of the authorization mechanism and the manual control of who should go through it and who should not.

However, this assumption does not mean that the same measures, the same procedure and the same assessment standards apply to each of these persons.

The authorisation mechanism should be contingent and offer the possibility of quickly remedying the defectiveness of the appointment of a person whose appointment to a judicial post poses no questions related to its merits. This group should primarily include graduates of the National School of Judiciary and Public Prosecution, whose suitability for office is verified by passing the judges' examination.

As for the other judicial appointees, the authorisation mechanism should approach the problem of their judicial appointment with caution, without sudden movements that may affect the situation of the judiciary and especially the litigants. For this reason, the process of eliminating deficiencies in the appointment of judges should have a precise, gradual character and extend over a longer period.

Nor can it be established a priori that there were malicious intentions behind every judicial appointment or that each of the appointees sought to take advantage of the changes in the NCJ to be promoted to a higher court. For this reason, the authorisation mechanism must be based on an individualised examination, respect the rules of a democratic state governed by law and avoid generalisations.

The National Council of the Judiciary should play a key role in this regard.[142] Indeed, since the current NCJ is the main cause of concern about the status of judges, it can be assumed that the rectification of this situation requires the authorisation of a National Council of the Judiciary that fulfils the constitutional criteria. To do so, it must be characterised by independence. For this condition to be met, the term of office of the current Council must be terminated and the procedure for electing its judicial members must be changed.

At the same time, as far as the election of the new judicial members of the NCJ is concerned, there is a risk that some of the persons elected to the National Council of the Judiciary will also be appointed to judicial positions with the participation of the "new" NCJ. It seems that the top-down exclusion of the right to stand for election for this group is not justified by the content of the constitution, by judgments of international courts or by soft law standards. Such a solution was also called into question by the Venice Commission's opinion about the draft law amending the law on the NCJ, currently under consideration by the Polish parliament.

However, these members of the NCJ, if elected, should not participate in the authorisation procedure and resolve doubts about other judges until they have received a favourable authorisation decision. In other words, this group should be excluded by law from participating in the discussed function of the NCJ in order to avoid situations in which one is a judge in one's own case or in a similar case.

At the same time, if the NCJ is to be given responsibility for authorising judicial appointments, it should be provided with adequate financial and human resources. It also seems reasonable to reformulate the functioning of the Council, including moving away from the situation in which the members of the National Council of the Judiciary are members of teams dealing with substantive issues. A better solution could be to appoint interdisciplinary teams of specialists, made up of judges (e.g. retired judges), other legal practitioners, representatives of local communities and social organisations, to make non-binding recommendations to the Council to take certain decisions regarding judges. In such a system, the National Council of the Judiciary could decide not to follow the team's recommendations, but it would have to provide convincing arguments to do so.

Against the background of the authorisation procedure, there may also appear a doubt as to whether a person's candidacy for a judicial position should not be resubmitted to the President of the Republic. The HFHR does not consider this necessary, assuming that the President has already expressed his (positive) opinion on the appointment of these persons to judicial positions.

7.2. Framework structure of the authorisation procedure

The HFHR's proposal assumes that the National Council of the Judiciary has the power to authorise or refuse to authorise persons appointed to a judicial position with the participation of the National Council of the Judiciary composed in the manner set out in the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts. As mentioned above, all persons appointed to judicial positions by the "new" NCJ are to be subject to such authorisation, with one fundamental exception – for persons willing to return to their previous position.

142 Similar concepts developed by the Civic Development Forum also point to the possibility of placing the Supreme Court at the centre of the authorisation procedure. According to the HFHR, this solution should also be considered in the course of the public discussion on the conditions of the authorisation mechanism.

7.2.1. Return to the previous position

The HFHR assumes that the legislator should allow judges appointed on the motion of the "new" NCJ to return to the positions they held before March 2018. This option should be open in the short term.

A return to the positions previously held by judges would deprive the NCJ of the opportunity to assess the legitimacy of the appointment in the manner described. Under these conditions, the status of a particular judge could no longer be questioned simply because he or she was appointed to a judgeship with the participation of the "new" NCJ.

However, this would not mean that the circumstances of the judge's appointment or his or her behaviour after the appointment could not be examined in the course of ancillary proceedings, e.g. in the case of a judge's recusal or in an appellate review assessing the validity of a plea of nullity of proceedings or the existence of an absolute ground for appeal. The retention of such a possibility is necessary in order to take full account of the case law of the CJEU and the ECtHR and the resulting need to give the judge room for the direct application of EU law and the Convention for the Protection of Human Rights and Fundamental Freedoms.

The return to a previous judicial office should not in itself constitute an obstacle to the conduct of disciplinary proceedings in connection with the commission of certain disciplinary offences.

The HFHR assumes that the solution of returning to the previous position is an option for those judges who do not wish to undergo the procedure for re-evaluation of their qualifications or independence by the NCJ in its constitutional composition. At the same time, it would be an instrument to reduce the number of people subject to the authorisation procedure, which would have a positive impact on the effectiveness of the authorisation mechanism.

7.2.2. Initiation of the authorisation proceedings or simplified authorisation

The remaining judges would generally be subject to the authorization procedure. However, according to the HFHR, different treatment of judges from district courts, whose judicial position was transformed from the position of associate judge, would be permissible. The situation of this group of individuals is specific. They were, in a way, „forced" by the legislator's initiative to take up the associate judge position under the sanction of having to refund the scholarship due to being a student of the National School of Judiciary and Public Prosecution. Moreover, in their case, the decision of the National Council of the Judiciary to appoint them as associate judges is automatic and strongly linked to the way graduates of the National School of Judiciary and Public Prosecution are positioned on the ranking list. Also, the transformation of the associate judge position into a judicial position is practically certain.

Keeping this in mind, it would be justified to apply a simplified procedure to this group of judges. Within this framework, the NCJ would generally issue a decision on authorization without conducting detailed evidentiary proceedings. Refusal of authorization would be permissible only in exceptional cases, for example, if the appointment occurred as a result of a crime or if a person who does not meet the formal requirements for taking up the associate judge or judge position was appointed. Adopting such a solution could be justified by the specific situation of associate judges, who were compelled to take up the position due to statutory solutions. Such regulation of the issue of judicial assessors would lead to a quick resolution of doubts regarding the legality of their appointment to judicial positions. It would have the advantage that the authorization of a given judge would be determined by the legally acting NCJ, not top-down by the legislator. Finally, the decision on this matter could be made quickly, stabilizing the situation of a large group of individuals appointed by the so-called new NCJ, which would be of significant importance for the efficiency of the justice system.

The question also remains open as to whether similar principles should apply to individuals appointed to the position of judges in administrative courts as a result of the transformation of the position of associate judge in administrative courts into a judicial position. However, it is worth emphasising that the manner of appointing the latter differs from the appointment of graduates of the National School of Judiciary and Public Prosecution to the position of associate judge. They are not appointed based on a ranking list prepared in terms of the results of the final exam in judicial training, but in a much more discretionary manner. On the other hand, a limitation to the risks associated with politicizing their appointment is the requirement to initiate the appropriate proceedings by the President of the Supreme Administrative Court. This argument should be taken into account when designing the authorization mechanism.

Consideration is also required as to whether the simplified authorization procedure discussed above should apply only to individuals whose associate judge positions have been transformed into judicial positions or whether it should apply to all individuals appointed to judicial positions from the group of former judicial registrars and judges' assistants, or even to all individuals appointed for the first time to the position of judge of the district court. The potential simplified procedure for authorizing the status of these individuals would correspond to the recommendations of the Venice Commission, which suggest using authorization procedures only for those judges for whom there are fundamental doubts about meeting the appropriate standards. At the same time, such a procedure would reduce the scope of activities required by the NCJ, which would likely result in expediting the entire procedure and faster stabilization of the legal system. On the other hand, it is impossible to ignore the fact that the discussed group of individuals includes, however, persons about whom there may be justified doubts regarding the correctness of their appointment.

The list of exceptions protecting against the initiation of an authorization procedure should not be too broad to avoid the accusation of automatic, statutory authorization of individuals appointed to judicial positions. This issue should be subject to a thorough assessment by the legislator. However, it should be emphasising that even if the authorization procedure were to be limited only, for example, to judges appointed to higher-instance courts, in any case, the NCJ should be able to decide to deviate from the simplified authorization and conduct a detailed assessment of the independence and impartiality of a given judge.

7.2.3. Authorisation proceedings

Judicial appointments should be authorised through written proceedings. However, a direct taking of evidence or even a hearing should also be possible. The procedure itself should be regulated in its basic form by a law that defines the authorisation mechanism and refers only subsidiarily to the provisions of the Code of Civil Procedure or the Code of Criminal Procedure. In addition, the proceedings before the Council should have an inquisitorial character. The inquisitorial model is likely to be more conducive to clarifying all the circumstances surrounding the appointment of a judge. Any shortcomings that may arise would be mitigated by the inclusion of judicial review in the authorisation mechanism.

The judge subject to the authorisation procedure should have the right to be heard, to present arguments in his defence and to explain the reasons for his conduct. He or she should also have the right to request a taking of evidence and the right to receive legal aid.

It should also be important to introduce solutions to protect whistle-blowers, i.e. judges who wish to disclose the background to their appointment to judicial office.

Civil society organisations, including organisations of judges, should play an important role in the course of the authorisation proceedings by submitting, as amici curiae, information and views which they believe the Council should take into account when considering the case of a particular judge. The proceedings

itself should be transparent and open to the public. This means that the documents on which the Council's authorisation decision is based are made available for public inspection (e.g. online) and that the deliberations of individual panels and the Council itself are broadcast on the internet. The Council's activities should end with the preparation of a report summarising the findings obtained in the course of the authorisation proceedings.

The legislator should set an indicative (as opposed to a strict) time limit for the completion of the individual authorisation proceedings. This period should not be too short in order to avoid criticism that cases are examined only superficially without taking into account all the evidence gathered.

First and foremost, the authorisation procedure should extend to the judges of the Supreme Court and the Supreme Administrative Court who have been appointed with the participation of the "new" NCJ. At the same time, the Council should gradually take decisions on the initiation of the authorisation proceedings or simplified authorisation in relation to other categories of judges.

7.2.4. Suspension of a judge from judicial duties

The model of the authorisation proceedings presented above makes the initiation of this procedure dependent on the existence of circumstances that demonstrate the lack of independence and impartiality of a particular judge. The consequence of this assumption is that the HFHR does not propose the automatic suspension from office of all persons appointed by the "new" NCJ.

However, the authorisation mechanism should provide for the possibility to take measures during the authorisation proceedings that allow for the suspension of judges from office. The application of such measures should in principle depend on substantiation of the circumstances demonstrating the lack of independence or impartiality of a particular judge. The legislator should decide whether the initiation of authorisation proceedings should constitute an independent basis for requesting the suspension of a judge from the court or whether the existence of additional circumstances is required (e.g. a high probability that circumstances indicating a lack of impartiality and independence will be established), taking into account the possible impact of this construction on the efficiency of the functioning of the judiciary.

7.2.5. Criteria used in the authorisation proceedings

A law setting out the framework for the authorisation mechanism should also set out detailed criteria that the NCJ would follow when authorising judges. Such a regime ensures that the persons covered by the relevant legal norms are able to predict the results of the authorisation process. It will also ensure that the process does not become discretionary and based on ambiguous grounds. Moreover, the lack of standardised authorisation criteria in practice could lead to individual decisions in the authorisation procedure being inconsistent.

These criteria must be correlated with the objective of establishing the mechanism itself, which should be to determine whether a particular person provides guarantees of independence and impartiality to the extent necessary for the exercise of judicial activity, given the course of a particular appointment procedure. At the same time, the starting point for verifying the correctness of judicial appointments should be the criterion for the substantive selection of candidates for the position. This view is directly rooted in the case law of the European Court of Human Rights, which points out that "it is inherent in the very notion of a 'tribunal' that it be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law"[143].

143 Ástráðsson v. Iceland [GC], no. 26374/18, 1 December 2020, § 220.

The establishment of statutory authorisation criteria is also necessary to ensure effective judicial review of the NCJ's decisions. Only the description of the purpose of authorisation measures in a law, including the reasons for their implementation, and the specification of the substantive law constituting the basis of the authorisation decisions, enables effective control of the Council's activities in this area.

This leaves open the question of how much discretion the legislator should grant the Council in the authorisation proceedings. One should reject both extreme scenarios in which the legislator would either significantly restrict the NCJ's freedom to authorise judicial positions or excessively loosen the Council's powers in this area by giving it unrestricted competence and authorising it to freely define the authorisation criteria and apply them in practice.

On the other hand, the legislator should take into account the fact that the adopted criteria of the authorisation mechanism must not be overly specific, which would favour their automatic and superficial application in the course of proceedings before the National Council of the Judiciary. Any contrary rule imposing strict authorisation criteria on the Council would effectively diminish the central role of the National Council of the Judiciary in the authorisation mechanism and degrade it to an ornament intended only to speak in place of the legislature.

In the HFHR's view, these criteria must take into account the independence and impartiality of judicial candidates as much as possible and pay attention to an assessment of their merit-based qualifications for the office.

When determining the criteria for the authorisation of persons appointed to judicial positions with the participation of the "new" National Council of the Judiciary, the existing case law of the Supreme Court should be taken into account first and foremost, based on the Joint Chambers resolution of the Supreme Court chambers. In that resolution, the Supreme Court assumed that the court is improperly composed if it includes a person appointed to a judicial position on the motion of the NCJ formed in accordance with the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary, and the defectiveness of the appointment process leads, in specific circumstances, to a breach of the standard of independence and impartiality adopted by the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The reasoning behind the Supreme Court's decision points out, among other things, that candidates for judicial office must possess substantive, character and emotional skills and fulfil ethical requirements. At the same time, the Supreme Court emphasised that these requirements should be reliably verified, whereby the same criteria should apply to all persons applying for a particular judicial position. Furthermore, the Supreme Court clearly emphasised that the nomination process is not intended to examine the political views or worldviews of the candidate and the extent to which he or she is willing to fulfil political expectations.

The Supreme Court also emphasised that the standard of independence and impartiality requires consideration of all circumstances that may influence a judge's conduct. According to the Supreme Court, this may include connections between the judge and the parties to the dispute, indicate the judge's dependence on certain external bodies, state institutions or political parties. It pointed out that "how a judge receives certain benefits or promotions" may be important in assessing the judge's independence and impartiality.[144]

144 Ibid.

At the same time, the Supreme Court pointed out the problem of conducting appointment procedures despite challenging the resolutions of the National Council of the Judiciary in court, as well as the problem of appointing judges on the basis of not final nominations despite the decisions of the competent courts to suspend the enforceability of the relevant resolutions of the National Council of the Judiciary. According to the Supreme Court, the failure to take into account the fact that some of the participants in the competitions had lodged appeals meant that the judicial posts in question were not correctly filled "and the question of the candidate's best suitability for the post was not in fact verified".[145]

Referring to the particular circumstances to be taken into account when applying the test set out in the Joint Chambers resolution of the Supreme Court chambers, the Supreme Court pointed to a number of factors, including the following:

a) the fact that, immediately prior to his appointment, the judge was involved with organisational units reporting to the Minister of Justice, other executive bodies or the National Council of the Judiciary;

b) the judge's attitude towards the changes made, which he publicly expressed during the selection process and later, especially in relation to the acceptance of unconstitutional acts of the executive branch towards the courts and the Supreme Court, as well as the fact that the candidate accepted the fact that the National Council of the Judiciary had lost its independence;

c) defectiveness of the nomination process:

- the failure to exclude individual members of the NCJ from proceedings concerning persons associated with them;
- the receiving of nominations by persons obtaining administrative promotions within the structure of the judiciary through arbitrary decisions of the Minister of Justice;
- the lack of transparency of competition procedures resulting from the fact that some of the deliberations of the National Council of the Judiciary or its teams have been classified;
- no access to information on the course of the competition;
- the fact that the members of the Council voted in full session without any particular justification, contrary to the opinion of the teams appointed by the NCJ;
- the fact of being shortlisted as a candidate for a judicial post in the absence of the opinion of the judicial self-governing bodies;
- the fact of being nominated for a judgeship despite a clearly unfavourable opinion of the judicial self-governing body, especially in a situation where another candidate received the majority of votes;
- the fact that a person with obviously lower competencies than other participants in a particular competition procedure was selected;

d) a dubious nature of promotion, which applies in particular to the promotion of lower-level judges directly to the highest courts and not to mid-level courts;

e) receiving a judicial appointment after the candidate has previously obtained a delegation to a higher court on the basis of an arbitrary decision of the Minister of Justice, which has no rational substantive justification related to the quality of the work of the judge in question;

f) the fact that a judge has won the competition for the judicial post despite the poor quality of his or her work.

145 Ibid.

The Joint Chambers Resolution has led to the practical application of these criteria on several occasions in the proceedings to assess the correctness of judicial appointments based on this resolution.

In its judgment in the case of the appellate judge Jerzy Daniluk[146], the Supreme Court found that the appointment of the judge as vice-president of a court was arbitrary and without taking into account the opinion of the other judges. The Supreme Court also emphasised the circumstances of the judge's apparent transfer to another court, which enabled him to collect a lodging allowance in a situation where he might not have been entitled to the allowance. The Supreme Court further noted the fact that Judge Daniluk supported another judge who was seeking election to the National Council of the Judiciary, as well as the fact that the latter judge, having obtained membership on the Council, did not recuse himself from voting on Judge Daniluk's candidacy. The Supreme Court's doubts were also raised by the content of the opinion of the inspecting judges who assessed the candidate's judicial performance. Apparently, the opinion did not sufficiently take into account the reasons for the judge's rulings being overturned on appeal. It also did not address the question of whether he had submitted his reasons in a timely manner. The Supreme Court also referred to a negative opinion on the candidate by the court's governing board and general assembly of judges. With regard to the course of the judge's nomination process before the NCJ, the Supreme Court pointed out that the members of the Council were misrepresented by a member of the team referring individual candidates. The Supreme Court also noted the fact that the judge concerned was given the position of election commissioner.

In another case[147] concerning the examination of the independence and impartiality of the appellate judge Piotr Schab, the Supreme Court pointed to the fact that he was appointed as Disciplinary Officer for Common Courts Judges, which was "at the discretion of political power", participation in the work of bodies associated to political power, performance of certain tasks or functions on the basis of arbitrary decisions of political power, including secondments to higher courts. In addition, the court also noted the judge's public activity and statements that go beyond the permissible participation in public debate guaranteed by the Constitution and at the same time indicate participation in the implementation of certain political objectives of the executive. In the grounds for the judgment, the Supreme Court also emphasised that the personal decisions made by the political authorities encompassed the Warsaw courts, "before which, due to territorial jurisdiction, cases are often heard in which politically committed persons are parties".[148] At the same time, the Supreme Court recalled that it is the Circuit Court in Warsaw that issues authorisations for operational measures of the secret services. The Supreme Court was not unaware of Judge Schab's extrajudicial activities, in particular his performance as president of the court and the Disciplinary Officer for Common Courts Judges. The Supreme Court highlighted the fact that the judge transferred three judges to another department who refused to hear cases in panels with persons appointed as judges by the "new" NCJ, as well as his expressed approval of the initiation of disciplinary proceedings against judges applying EU law. The Supreme Court found that these actions were fully in line with the expectations of political decision-makers. Furthermore, the Supreme Court critically assessed the procedural aspect of the appointment of the judge in question to the post, pointing out that his candidacy was not evaluated at all by the assembly of judges of the Court of Appeal and that he was the only person who had applied for the competition for the post in question. The Supreme Court pointed out that "the politically dominated National Council of the Judiciary was determined to carry out the competition process despite the absence of the documents required by law, which in the eyes of the public can be interpreted as this body expressing a special interest in the appointment of the judge in question to a judicial position"[149].

146 Judgment of the Supreme Court of 26 July 2022, III KK 404/21, OSNK 2023, No. 5–6, item 22.

147 Judgment of the Supreme Court of 19 October 2022., II KS 32/21, OSNK 2023, No. 5–6, item 24.

148 Ibid.

149 Ibid.

Similarly, the examination of independence and impartiality in relation to the Deputy Disciplinary Officer for Common Court Judges, the appellate judge Przemysław Radzik, was conducted by the Supreme Court in April 2023[150]. In this case, the Supreme Court referred to the promotion of the above-mentioned judge to a higher court in connection with the fact that the judge was quickly and discretionarily assigned a number of non-judicial roles. The Supreme Court emphasised that the evaluation of the judge's work did not reveal any results that could be considered exceptional. In doing so, the court referred to the fact that the judge had been promoted directly from a district court to a court of appeal, with a brief stopover in the form of a secondment to a circuit court. In addition, the Supreme Court noted the close ties of the judge in question to the executive branch, including the fact that he was appointed to a number of offices. The Court negatively assessed Judge Radzik's activity as Deputy Disciplinary Officer, pointing out that he wanted to create a "chilling effect" among judges and discourage them from engaging in behaviour perceived as negative by the political authority. The Supreme Court also pointed to the judge's actions, which it said were intended to shield judges who submitted to the will of the executive from disciplinary liability.

Similar conclusions regarding evaluation criteria can be drawn from the case of the appellate judge Z. Drożdżejko[151] whose independence was negatively scrutinised by the Kraków Court of Appeal. Circumstances that demonstrate the lack of impartiality and independence of this judge include his involvement with political power, the expression of his views in accepting unconstitutional changes in the judiciary or the lack of a free and transparent competition process prior to his appointment to a judicial position. The Court of Appeal also highlighted, among other things, that the criteria for the promotion of a judge were detached from substantive and ethical considerations, as well as the fact that he had supported a candidate for a member of the National Council of the Judiciary. The last circumstance that the Court of Appeal took into account was the recognition of Z. Drożdżejko as a beneficiary of unconstitutional changes in the judiciary related to the filling of certain function posts.

In the case of the Supreme Court Judge Małgorzata Bednarek, the Supreme Court, for its part, pointed out the need to take into account the case law of the ECtHR and CJEU on the right to a court. The Court found that the appointment of the judge as a Supreme Court judge at the request of the new NCJ was a factor justifying the recusal of Judge Bednarek from hearing a case.[152] In this regard, the Supreme Court referred to the wording of the Joint Chambers Resolution, which lists the consequences of the appointment of a Supreme Court judge by the new NCJ. In its view, it was not necessary to address the other elements mentioned in the request, in particular those relating to the judge's conduct after her appointment, as the circumstances surrounding the judge's appointment were themselves sufficient grounds for recusal.

Based on the Supreme Court and Court of Appeal judgments discussed above, as potential authorization criteria should be considered the circumstances surrounding the relationships between judges and participants in the appointment process as well as with executive authorities, public advocacy of unconstitutional changes in the judicial system, the course and outcome of the appointment process itself (in terms of the qualifications of a particular candidate and the appointed court's place in the judicial system), and the fact and manner of the performance of non-judicial functions by individual judges.

Within the framework of the circumstances surrounding the relations of judges, a special evaluation through the prism of the principle of impartiality and independence should be subjected to the relations of judges with members of the National Council of the Judiciary, the Ministry of Justice and politicians of the ruling majority. This criterion would therefore largely apply to former employees of the Ministry of

150 Judgment of the Supreme Court of 6 April 2023., II KK 119/22, LEX No. 3526941.

151 Judgment of the Court of Appeal in Kraków of 19 April 2023., I ACa 518/21, LEX no. 3550292.

152 See also the order of the Supreme Court of 6 September 2022., II KK 44/21, LEX No. 3416465.

Justice who were appointed as judges and later seconded to the Ministry, to persons supporting candidates for the NCJ, to relatives, partners and parents-in-law of members of the NCJ and to the members of the Council themselves.

In examining the circumstances under which individual judges were appointed, the NCJ could consider whether the judge in question met the formal criteria for entry into judicial service, assess the candidate and his or her fellow candidates on their merits, consider the opinions expressed about the candidate by the court's governing board or its general assembly of judges, and review how the selection process was conducted, in particular whether candidates were asked about their attitudes to political and ideological issues and their acceptance of the so-called "reform of the judiciary".

It should also be examined whether the decision of the National Council of the Judiciary was subject to judicial review during the nomination process and with what effect. In this context, the cases in which the enforceability of a resolution requesting the appointment of a specific person to a judicial position is suspended by a court must also be considered.

The timing of the submission of an application for appointment to a judicial position should also be examined, in particular whether the appointment was made after international courts had issued judgments indicating the impact of the involvement of a judge appointed with the participation of the "new" National Council of the Judiciary on the exercise of the individual's right to have his or her case heard by an independent and properly constituted court.

An important element of the examination must also be a review of the substantive preparation of the judge concerned for service on the court to which he or she has been appointed. The National Council of the Judiciary should assess the judge's professional and judicial background prior to appointment and the soft skills he or she has Circumstances that have a negative impact on the assessment of the candidate can include the judge's hasty promotion, the failure to take into account his previous positions in a higher court, and the fact that he was promoted to a court two levels away or directly from a district or circuit court to the Supreme Court. Rapid promotions from the level of the common courts to the Supreme Administrative Court should be assessed in a similar way. Exceptions to the above rule may (though not always) be the possession of a doctorate in law or the title of professor.

The last point to be examined is the extrajudicial activity of the judge in question. This means, in particular, the judge's involvement in supporting measures that restrict the independence of the judiciary, his involvement in the disciplinary system for judges and, in particular, his role as a disciplinary officer or judge of a disciplinary court in cases where the disciplinary system has been used as a means of pressure on the court's decisions or to stigmatise judicial activism in defence of the independence of the judiciary. This group of circumstances could also include participation in the management of the courts by appointment of the Minister of Justice without the involvement of the judicial self-governing bodies.

Doubts may also arise about a judge's jurisprudence as an authorisation criterion. This question was raised in the proceedings to assess the independence and impartiality of Supreme Court Judge Bednarek[153]. The party requesting the recusal of Judge Bednarek demanded an examination of the judge's decisions, arguing that they were evidence that the judge had not complied with the law, which she was obliged to observe. The Supreme Court ruled that the invocation of the judge's jurisdiction on formal grounds is admissible as a means for a party to prove circumstances relating to the judge's "post-appointment behaviour".

The requirement to consider circumstances subsequent to a judge's appointment leads to the temptation to also consider judgments made by judges in the courts to which they have been appointed. This is especially true in the context of media reports on controversial decisions made by some of the judges that directly

153 Decision of the Supreme Court of 27 February 2023, II KB 10/22, OSNK 2023, No. 5-6, item 28.

interfere with civil rights and liberties and the independence of the judiciary, ignore the case law of the CJEU and the ECtHR or serve only to self-legitimise their status. Nevertheless, such an examination could constitute a significant interference with the independence of the judiciary, particularly with regard to the decisions taken between the adoption of the relevant provisions and the examination of the situation of the judge concerned. Therefore, the authorisation mechanism should exclude the possibility of examining a judge's decisions in the context of the "post-appointment circumstances", which would be examined in the course of the proceedings. The only exception in this respect could be the requirement to take into account, in the context of such proceedings, the fact that a judge is penalised with a disciplinary sanction for having taken a decision that constitutes an obvious and blatant violation of the law.

The Council should also take into account, ex officio, the outcome of the previous tests of the independence and impartiality of the judge carried out on the basis of the Joint Chambers resolution of the Supreme Court chambers and the so-called "presidential test of judicial independence".

The NCJ should be guided in its assessment of these issues by the assumption that the existence of one or even two of the circumstances indicating a judge's lack of independence or impartiality does not automatically lead to negating the status of a particular judge and referring to a court a request for his or her transfer to another post or dismissal from office. The mechanism should be based on the assumption that only the concurrence of several individual factors that have a negative impact on the perception of the independence or impartiality of a particular judge, and thus a specific exceeding of a critical mass in this respect, should lead to the adoption of a resolution refusing the authorisation of the judge.

At the same time, the National Council of the Judiciary should take into account the circumstances in favour of a particular judge in the authorisation proceedings. These circumstances may include participation in the defence of the independence of the judiciary or positive opinions given to the candidate by judicial self-government bodies during the nomination process.

7.2.6. Procedure following the adoption of a resolution refusing to authorise a judge

The refusal resolution would have the most severe consequences for the judges concerned. An automatic consequence of the decision of the National Council of the Judiciary to refuse the authorisation of a judge should be a request from the NCJ to the court to remove the judge concerned from office, to transfer him or her to a previously filled post or to assign him to another post. The possibility of removing a judge from office arises from the assumption that in some cases the substantive shortcomings of the candidate or the established lack of his or her impartiality or independence do not allow a particular judge to continue to hold a judicial office.

In the context of the proceedings initiated, the court should not only examine the legitimacy of the request for the removal or transfer of a judge to another office, but should also examine of its own motion the legality of the Council's resolution to refuse to authorise a judge, taking into account any objections raised by the judge concerned in this regard.

The requirement of an automatic review of the Council's decisions by the court and the transfer of decisions on the effects of the Council's resolution concerning a particular judge to the court is directly related to the assumption that the persons appointed by the "new" NCJ are judges within the meaning of the Constitution. The consequence of this fact is the need to maintain the procedure indicated in Article 180 of the Constitution to make changes to their official status or to remove them from office.

This solution, which involves removing a judge from office or transferring them to another post, also follows from the case law of the ECtHR on Articles 6 and 8 of the Convention, according to which the Strasbourg Court requires the guarantee that the judges have a judicial remedy in cases in which their status is being decided. This issue has already been analysed in detail.

The fulfilment of the constitutional standard of the irremovability of a judge presupposes that an appeal against a decision of a court of first instance to a court of second instance is guaranteed. Therefore, the designed solution should guarantee the two-tier nature of the court proceedings.

The Supreme Court is a natural candidate for reviewing appeals against decisions of the NCJ in relation to judges of the Supreme Court, common courts and military courts. In the case of administrative courts, it should be considered whether this jurisdiction should not be transferred to the Supreme Administrative Court. In both cases, persons appointed to a judicial position by the "new" NCJ should be excluded from the examination of judicial complaints unless they have previously been authorized in the procedure in question.

7.2.7. Status of rulings issued by persons who have been refused authorisation by the NCJ

This publication is not intended to address the status of judgments handed down by persons who would have been subsequently refused authorisation by the NCJ to hold office in a court at a particular level or in the judiciary in general.

This question would first require an analysis of the number and nature of such decisions and an estimate of the potential number of persons in respect of whom the National Council of the Judiciary could issue a decision refusing authorisation. Such an estimate is beyond the scope of this work.

However, with regard to rulings by persons who are not authorised, four possible scenarios could theoretically be considered. The first scenario would involve a statutory determination that a decision not to authorise a particular judge has prospective effect only and does not overturn previous rulings of the judge. The second scenario would be to guarantee the possibility of reopening a case if the panel of judges included a judge who did not fulfil the criteria of independence or impartiality. The third scenario could be a variant of the second scenario and would only allow the reopening if the court's defective composition had an impact on the outcome of the proceedings. This solution would therefore be narrower than the current absolute grounds for appeal or grounds for invalidity of the proceedings. The last possible route would be to create a procedure indicating that the ruling was made in breach of the right to a court, which could result in the State Treasury being liable for damages.

The way in which this issue is addressed would, as mentioned above, require an examination of the potential scale of the organisational and financial impact of the measures adopted, as well as an individualised approach to individual categories of rulings. Undoubtedly, it would also be necessary to balance the constitutional values of legal certainty on the one hand and the individual's right to an independent and impartial court on the other.

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