Defective Judicial Appointments and their Rectification under European Standards

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I. Introduction

This paper is dedicated to analysing the defectiveness of judicial appointments in Poland since 2018 from the perspective of European standards, as well as the rationale, the determining factors and the methods of rectifying the existing deficiencies, and bringing the situation into line with the re-

quirements of the rule of law.[1] It is argued that the rectification of irregular appointments is a necessary part of the process of restoring the rule of law and fully guarantee the effective judicial protection.

The loss of the guarantee of objectivity in the procedure for the selection of candidates, made the process of appointing judges in Poland irregular and incompatible with national law and thus also with the requirements of the ECHR and Union law. Indeed, the procedure does not guarantee that competitions for judicial positions are won by persons who best meet the requirements of professional competence and moral integrity, as the outcome of the nomination process may depend on the undue influence of political authorities. This in turn jeopardises the guarantee of the independence of judges (and courts) which is essential for a meaningful access to justice.

Currently, three persons in the Constitutional Tribunal, more than half of those adjudicating at the Supreme Court, more than a quarter at the Supreme Administrative Court and about a quarter in ordinary courts hold positions based on appointments made in breach of law. The numbers are gradually climbing. Except for the appointment to the Constitutional Tribunal, which is made directly by the Sejm,[2] the defectiveness of appointments results, in particular, from the unconstitutional nature of the National Council of the Judiciary (NCJ). The changes in the NCJ in 2018 were part of a planned strategy by the government to take control of the process of appointing judges and, by so doing, influence the content of judicial decisions.

As a result, the NCJ lost independence from the legislature and the executive. Its nomination requests to the President of the Republic[3] are thus compromised, and so are the Presidential appointment acts based on them. In consequence, the status of persons appointed in this way is questionable under national and international law. They may not meet the necessary

1 It does not, however, discuss the legal value of judicial decisions made by defectively appointed persons. In this regard, see the contribution by Maciej Taborowski.

2 Art. 194(1) Constitution of Poland. The Constitutional Tribunal is left out of discussion in this text, since while it is a 'court' in the substantive sense denoting the exercise of a judicial function, yet, the special mode of appointing its members, the scope of its jurisdiction, its constitutional role and the nature of its judgments merit a separate discussion. On issues related to the Constitutional Tribunal see the contribution by Mirosław Wyrzykowski, for a more general review of necessary reforms in the Polish judicial and legal system see the paper of Adam Bodnar.

3 Art. 179 Constitution.

requirements of the constitutionally guaranteed right to a fair trial, or to rule on Union law,[4] or to offer adequate protection under the European Convention on Human Rights. Since such persons were appointed in violation of the rule of law – their acting as judges reduces the very value, expands legal uncertainty and contributes to further legal chaos.

Now addressing deficiencies in judicial appointments comes as a necessity for fully restoring the rule of law, ensuring the ability of courts to resolve disputes in a democratic society and guaranteeing the right of individuals to a fair trial. Various scenarios of dealing with irregular appointments are possible, from extreme to moderate. The former result in consequences that are difficult to accept. The latter, on the other hand, weigh values and interests, and propose balanced arrangements that ensure the continuity of the judicial system and redress the growing legal uncertainty about the finality of court decisions. On this point, it is argued that the method of handling defective appointments should, in principle, be held to the same minimum standards as the judicial appointment procedure itself.

This paper outlines such minimum standards for the judicial appointment procedure under the ECHR and EU law, as well as the methodology adopted by the ECtHR and the ECJ for assessing infringements of this procedure (Section II). Against this background, an evaluation of the Polish practice of judicial nominations since 2018 is made, pointing out its fundamental flaws (Section III). The next section then examines the reasons why action is needed to heal irregular appointments (Section IV), to be followed by a review of determinants of the rectification process (Section V). The paper concludes with a discussion of possible corrective measures for defective appointments (Section VI).

4 Though, in principle. they may refer questions for a preliminary ruling to the ECJ, unless their unlawful appointment has already been decided in a final decision by a domestic or international court (here, in particular, the ECtHR); cf. ECJ, *Getin Noble Bank*, judgment of 29 March 2022, case no. C-132/20, ECLI:EU:C:2022:235, para. 69.

II. European Standards on the Appointment of Judges

1. National v. European competence to regulate the process of appointing judges

The competence to regulate the procedure for the appointment of judges rests with States, yet in exercising it, they must comply with international obligations they have voluntarily accepted.[5] Judges appointed under the national law of an EU Member State, adjudicate in a multicentric legal system. They rule not only within the scope of the national legal order, they may also rule on Union law and enforce the protection guaranteed by the ECHR. Accordingly, they must meet the requirements of all the decision-making centres of that system, i.e. of national law, of the ECHR and of the EU. In view of the breadth and depth of Union integration, the obligations of Member States in this regard assume special weight. For in each national system, the principle of effective judicial protection must be respected so as to give full effect to Union law (*effet utile*) and the rights of individuals derived from it.[6]

Most importantly, **the process of appointing judges cannot be carried out in an arbitrary manner**. When regulating the procedure, designating the bodies involved, setting the conditions and criteria for selecting candidates for judicial positions, States are bound by the requirements of the ECHR and the EU, which are identical in their basic terms, for they are geared toward guaranteeing effective judicial protection, that is, the right to a fair trial before an 'independent and impartial court established by law'. In addition, when making changes to the judicial system, States should not

5 Cf. ECtHR (Grand Chamber), *Grzęda v. Poland*, judgment of 15 March 2022, case no. 43572/18, para. 340; ECtHR, *Juszczyszn v. Poland*, judgment of 6 October 2022, case no. 35599/20, para. 208.

6 In successive judgments in Polish cases, the ECJ has consistently rejected the government's argument of exclusive State competence in the organisation of the judiciary: see *Commission v. Poland (Indpendence of the Supreme Court)*, judgment of 24 June 2019, case no. C-619/18, ECLI:EU:C:2019:531, para. 52; *Commission v. Poland (Independence of the ordinary courts)*, judgment of 5 November 2019, case no. C-192/18, ECLI:EU:C:2019:924, para. 102; *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, judgment of 19 November 2019, case nos. C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 75; *A.B. and Others v. Krajowa Rada Sądownictwa (Appointment of judges to the Supreme Court – Actions)*, judgment of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153, para. 68; *Commission v. Poland (Disciplinary regime for judges)*, judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:591; para. 56.

result in undermining the independence of the judiciary or its governing bodies,[7] and bring about a reduction in the protection of the value of the rule of law (principle of non-regression).[8]

There is nevertheless a nuanced difference in the attribution of competence of the ECtHR and the ECJ to rule on the issues of the organisation of the judiciary and judicial independence, including the guarantee of a sound procedure for the appointment of judges. While the jurisdiction of the ECtHR covers any interference with rights guaranteed by the Convention (Article 32 ECHR),[9] thus also the right to an 'independent and impartial tribunal established by law' (Article 6(1) ECHR), then the EU principle of effective judicial protection extends to 'the fields covered by Union law' (Article 19(1)(2) TEU) and we needed to have waited for its constitutionalisation in the Lisbon Treaty and for the explicit jurisprudential stance of the ECJ in the *Portuguese judges*' case that judicial independence is indivisible and is covered by EU law at all times if only the court *may* (even potentially) rule on questions concerning the application or interpretation of EU law.[10]

Both European Courts, the ECtHR in the *Ástráðsson* case and the ECJ in the *Simpson* ruling, have explicitly confirmed that the right to an independent court established by law also covers the process of appointing judges.[11] Still, there is no single European model for the appointment of judges.[12] Neither the Union law nor the ECHR imposes any concrete procedure.[13] The procedure is determined by States themselves, thus, there may be very different arrangements in place in various countries. However, States cannot design a model that does not guarantee an effective right to a

7 ECtHR, *Grzęda* (n. 5) para. 323.

8 ECJ, *Repubblika v. Il-Prim Ministru*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:231, para. 63.

9 See also Lech Garlicki, 'Polish Judicial Crisis and the European Court of Human Rights (a few Observations in the Ástráðsson case)' in: Jakub Urbanik and Adam Bodnar (eds), *Law in a Time of Constitutional Crisis. Studies Offered to Mirosław Wyrzykowski* (Warszawa: C.H.Beck 2021), 169–182 (170–171).

10 ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, judgment of 27 February 2018, case no. C-64/16, ECLI:EU:C: 2018:117, para. 40.

11 ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, case no. 26374/18, paras. 227 and 234; ECJ, *Review Simpson and HG v Council and Commission*, judgment of 26 March 2020, C-542/18 RX-II and C-543/18 RX-II, ECLI:EU:C:2020:232, paras 74–75.

12 See e.g., ECtHR, *Ástráðsson* (n. 11), para. 207.

13 See e.g., ECJ, *A.K. and Others* (n. 6), para. 130.

fair trial before a properly constituted, independent and impartial court.[14] Eventually, the ECHR and the EU law indicate only minimum conditions of appointment models, so that the arrangements adopted do not nullify the essence of effective judicial protection, and those appointed therein are vested with the mandate to, accordingly, offer the protection required under the ECHR and rule on Union law.

2. Minimum European conditions of the procedure for appointing judges

The process of appointing judges is meant to result in the appointment of persons and bodies that provide a guarantee of independence from all actors who are outside the adjudicating bench: the legislature, the executive, the organs of the courts, other judges, the parties to the proceeding, or the public opinion. In line with that, the requirements of the Convention right to a fair trial and the Union principle of effective judicial protection, as interpreted in the consolidated case law of the ECtHR and the ECJ, permit to identify the essential conditions of the procedure for the appointment of judges. These include: (1) the statutory nature of the rules on the appointment of judges; (2) the objective criteria of merit for candidates for judicial positions; (3) a fair procedure for the selection of judges; and, (4) in principle, the judicial review of the appointment procedure.

1. Statutory regulation — National procedure for the selection and appointment of judges should be regulated by a statutory act, that is, in accordance with the will of the legislature. This guarantees the **accessibility** and **foreseeability** of the rules governing the appointment of judges. Thus, the procedure and criteria for the nomination of judges should be known beforehand and formulated in unequivocal terms as much as possible, so as to prevent any arbitrary interference in the appointment process.[15]

14 See also Marek Safjan, 'Prawo do skutecznej ochrony sądowej – refleksje dotyczące wyroku TSUE z 19.11.2019 r. w sprawach połączonych C-585/18, C-624/18, C-625/18', Palestra LXV (2020), 5–29 (8).

15 ECtHR, *Ástráðsson* (n. 11), para. 229–230; ECtHR, *Reczkowicz v. Poland*, judgment of 22 July 2021, case no. 43447/19, para. 219; ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, judgment of 8 November 2021, case nos. 49868/19 and 57511/19, para. 275; ECtHR, *Advance Pharma v. Poland*, judgment of 3 February 2022, case no. 1469/20, para. 297.

The requirement is intended to provide the court (judge) with the **legitimacy** to resolve legal disputes in a democratic society.[16] Furthermore, it is to guarantee a necessary level of the separation of powers and ensure that the appointment procedure is not left to the discretion of the executive.[17] This is to protect the judiciary from undue external influence, in particular from the very executive.[18]

It is inherent in the requirement of statutory regulation that it can only be considered met if the statutory provisions remain consistent with the State's Constitution and with its international obligations, including the ECHR and Union law. Therefore, to assess compliance of this requirement includes not only checking if the process of appointing judges is carried out in accordance with the statutory law, but also whether this law itself adheres to constitutional, Convention and EU standards.

2. Merit-based selection — The selection of judges should be based on **objective** criteria of merit to verify that candidates meet the requirements of **technical (professional) competence** and **moral integrity** (impeccability).[19] They are intended to exclude political considerations for judicial appointments. Instead, the deciding factors for the nomination of judges should be their qualifications, integrity, ability and efficiency.[20] In addition,

16 ECtHR, *Ástráðsson* (n. 11), para. 211. Whilst the ECJ has not articulated this requirement expressly, it is implied and follows from a number of observations by the ECJ to the form and scope of national rules on the appointment of judges. In addition, the ECHR standard constitutes a minimum Union standard, as in line with Article 52(3) of the Charter of Fundamental Rights, the ECJ ensures that its interpretation of Article 47(2) of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6 of the ECHR, as interpreted by the ECtHR, see ECJ, *A.K. and Others* (n. 6), para. 118; ECJ, *Disciplinary regime for judges* (n. 6), para. 165.

17 ECtHR, *Ástráðsson* (n. 11), paras 214–215; ECtHR, *Reczkowicz* (n. 15), para. 216; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 272; ECJ, *Simpson* (n. 11), para. 73; ECJ, *W.Ż.*, judgment of 6 October 2021, case no. C-487/19, ECLI: EU:C:2021:798, para. 129.

18 ECtHR, *Ástráðsson* (n. 11) para. 226; ECtHR, *Reczkowicz* (n. 15), para. 218; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 274.

19 ECtHR, *Ástráðsson* (n. 11), para. 220; ECtHR, *Xero Flor v. Poland*, judgment of 7 May 2021, case no. 4907/18, para. 244; ECtHR, *Reczkowicz* (n. 15), para. 217; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 273; ECtHR, *Advance Pharma* (n. 15), para. 295; Cf. ECJ, *A.K. and Others* (n. 6), para. 134; ECJ, *A.B. and Others* (n. 6), para. 123; ECJ, *Disciplinary regime for judges* (n. 6), para. 98; ECJ, *W.Ż.* (n. 17), para. 148.

20 See ECtHR, *Ástráðsson* (n. 11), para. 221, and the Consultative Council of European Judges (CCJE), *On standards concerning the independence of the judiciary and the irremovability of judges*, Opinion no. 1 (2001) of 23 November 2001, paras. 17 and 25.

the criteria for candidates should increase with the successive, higher levels of the judiciary to which they aspire.[21]

3. Fair procedure — The selection of candidates should be made under fair procedural rules of domestic law in effect at the time,[22] and these rules must indeed be strictly adhered to.[23] European standards do not resolve which State authorities should select and appoint judges.[24] Nevertheless, they indicate that bodies selecting judges should ensure the objectivity of the procedure, no matter if it is a judicial council, an evaluation committee or any other body entrusted with such a task. The fulfilment by the candidates of the merit requirements should be truly verified and the assessment criteria should be the same for all candidates applying for the position. This necessarily involves the obligation to justify the choice made, in particular by referring to these substantive criteria, which then prompts for the reviewability of the nomination process.[25] Eventually, while the mere participation of political bodies (Parliaments, Heads of States, governments or ministers) in the procedure, e.g., the approval or appointment of judges by such bodies – is acceptable,[26] it should nonetheless be confined to a formal, ceremonial dimension.

Indeed, the substantive conditions and procedural rules should be formulated in such a way that the appointments do not give rise to reasonable doubts as to the independence and impartiality of the judges appointed.[27] They are meant to eliminate the risk of undue influence and/or unfettered

21 '[T]he higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be', see ECtHR, *Ástráðsson*, (n. 11) para. 222; ECtHR, *Xero Flor* (n. 19), para. 244; ECtHR, *Reczkowicz* (n. 15), para. 217; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 273; ECtHR, *Advance Pharma* (n. 15), para. 295.

22 ECtHR, *Ástráðsson* (n. 11), para. 247.

23 ECtHR, *Ilatowskiy v. Russia*, judgment of 9 July 2009, paras 40–41.

24 Cf. ECtHR, *Grzęda* (n. 5), para. 307.

25 Cf. Sacha Prechal, 'Effective Judicial Protection: some recent developments – moving to the essence', Review of European Administrative Law 13 (2020), 175–190 (186).

26 Cf. ECJ, *A.K. and Others* (n. 6), para. 133; ECJ, *A.B. and Others* (n. 6), para. 122; ECJ, *Repubblika* (n. 8), para. 56; ECJ, *Disciplinary regime for judges* (n. 6), para. 97. See also Matteo Mastracci, 'Judiciary Saga in Poland: An Affair Torn between European Standards and ECtHR Criteria', Polish Review of International and European Law 9 (2020), 39–79 (57) and ECtHR's case law reported therein.

27 See ECJ, *A.K. and Others* (n. 6), para. 134; ECJ, *Simpson* (n. 11), para. 71; ECJ, *A.B. and others* (n. 6), para. 123; ECJ, *Disciplinary regime for judges* (n. 6), para. 98; ECJ, *W.Ż.* (n. 17), para. 148.

discretion of the other State powers in the process[28] and ensure its appropriately high standard, so as to appoint to judicial positions the most qualified candidates (the **'best candidate' standard**). This ensures the technical ability of judicial bodies to serve justice, lays the foundation for public confidence in the judiciary, and further strengthens the personal independence of the appointee.[29]

4. Judicial review — The judicial review of the appointment process secures the above requirements of a lawful, objective and fair procedure for the selection of judges based on criteria of merit. Neither the ECHR nor Union law expressly requires such judicial review, as it may not be provided in some Member States.

Nonetheless, since the Convention guarantees a self-standing right to a court established by law and a right to an independent court, national law should provide an effective remedy at least to the extent covered by the right to a fair trial guaranteed by Article 6(1) ECHR ('civil rights and obligations' or 'criminal charges'). Additionally, national judicial review of the appointment process was incorporated by the ECtHR into the *Ástráðsson* test as its third criterion (see below Section II.3). The absence of such a remedy means that allegations of a breach of law in the judicial appointment process – as far as they interfere with effective judicial protection afforded by Article 6 ECHR – can be directly examined by the ECtHR. If, however, there was a national remedy, the examination of breaches in the appointment process should be carried out in line with the balancing methodology and criteria indicated by the ECtHR.[30]

Similarly, the Union law also does not impose a general requirement of a judicial review of the appointment process, and possible lack of remedy may not be a problem in some cases.[31] Nevertheless, in the cases of appointments to the Polish Supreme Court, the ECJ recognised the necessity of such review. First, since the decisions of the President of the Republic on the appointment of judges cannot, in principle, be subject to judicial review, this requirement should be implemented at the stage of the preparatory act, i.e. the NCJ's recommendation for appointment.[32] Secondly, since

28 ECtHR, *Ástráðsson* (n. 11) para. 234.
29 See ECtHR, *Ástráðsson* (n. 11) para. 222.
30 ECtHR, *Ástráðsson* (n. 11), para. 251; ECtHR, *Reczkowicz* (n. 15), para. 230; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 286; ECtHR, *Advance Pharma* (n. 15), para. 309.
31 ECJ, *A.B. and Others* (n. 6), para. 156.
32 ECJ, *A.K. and Others* (n. 6), para. 145.

the NCJ no longer offers sufficient guarantees of independence, a remedy against its resolutions refusing a recommendation is necessary to shield the appointment process from undue influence and to prevent doubts as to the independence of judges selected in it.[33] Thirdly, the State should not reduce the legal protection of candidates for judicial posts that had existed before,[34] in particular by making arrangements that reduce the intensity of judicial review or entirely undermine its effectiveness.[35]

In addition, when recognising the need for judicial review of appointments, the ECJ also indicated its minimum scope covering the examination of whether there was (a) no *ultra vires* or (b) improper exercise of authority, (c) error of law or (d) manifest error of assessment.[36]

3. Methodology for assessing the procedure for the appointment of judges: Ástráðsson, Simpson and A.K.

Not every irregularity in the process of appointing judges will lead to the conclusion that they do not meet the requirements of being established by law, independent and impartial.[37] It is the **gravity** of the breach of the appointment procedure that is decisive. Both European Courts have introduced such a threshold.

The ECtHR in its *Ástráðsson* ruling adopted a **three-stage test** for assessing whether the irregularities in the judicial appointment process were

33 ECJ, *A.B. ant Others* (n. 6), para. 136.

34 Judicial review of the nomination process is required by the Polish constitutional standard (Arts 45(1) and 77(2) Constitution) as confirmed by the Constitutional Tribunal, see judgment of 27 May 2008, case no. SK 57/06.

35 See ECJ, *A.B. and Others* (n. 6), paras 156 and 159–163. During the process of selecting dozens of Supreme Court judges in the summer of 2018, the Parliament changed statutory rules and introduced a partial finality of the NCJ's recommendations (it was no longer permitted to challenge NCJ's request for appointment of a person to a judicial position in the Supreme Court) as well as limited the effects of judgments granting the appeal (Act of 20 July 2018, Journal of Laws 2018, item 1443). Then, using the pretext of implementing the Constitutional Tribunal's ruling (made itself in a unlawful composition) deeming the possibility of appealing NCJ's resolutions to the Supreme Administrative Court as unconstitutional (ruling of 25 March 2019, case no. K 12/18), the Parliament entirely excluded the possibility of judicial review of NCJ's resolutions on the appointment of Supreme Court Judges and mandated to discontinue *ex lege* the pending appeal proceedings (Act of 26 April 2019, Journal of Laws 2019, item 609).

36 ECJ, *A.K. and Others* (n. 6), para. 145; ECJ, *A.B. and Others* (n. 6), para. 128.

37 Cf ECtHR, *Ástráðsson* (n. 11), para. 236,

serious enough to entail a violation of the right to a court established by law.[38] The test comprises a set of cumulative criteria: (1) there is a breach of domestic law which, in principle, must be manifest – that is, must be objectively and genuinely identified as such;[39] (2) the breach must be serious enough, affect the essence of the right to a court 'established by law' – that is, pertain to a fundamental rule of the procedure for appointing judges, thereby creating a real risk that other state organs could exercise undue discretion in the appointment process;[40] and (3) the breach was not effectively reviewed and remedied by the domestic court.[41] Accordingly, the irregularities in the process of appointing judges that reach the threshold of a manifest breach of essential rules governing the judicial appointment procedure shielding it from undue discretion, constitute a violation of Article 6(1) ECHR and disqualify the judge (court) under the European standard, insofar as they could not have been effectively examined in domestic judicial remedies.

For its part, in the *Simpson* ruling, the ECJ adopted, in principle, an equivalent formula to verify whether the irregularity in the appointment procedure concerns fundamental rules forming an integral part of the establishment and functioning of the judicial system and 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.[42]

The key elements of the two formulas are the same: the assessment concerns the nature and gravity of the irregularity (criterion 1 of a '**manifest breach**'); the irregularity itself must relate to fundamental rules of the ap-

38 ECtHR, *Ástráðsson* (n. 11), para. 243 et seq.

39 ECtHR, *Ástráðsson* (n. 11), para. 244, although, the ECtHR has left the door open to considering that the appointment of judges is defective also in the case of irregularities that do not reach the rank of a 'manifest breach'; the ECtHR stated that 'the absence of a manifest breach of the domestic rules on judicial appointments does not as such rule out the possibility of a violation of the right to a tribunal established by law. There may indeed be circumstances where a judicial appointment procedure that is seemingly in compliance with the relevant domestic rules nevertheless produces results that are incompatible with the object and purpose of that Convention right.' (para. 245).

40 ECtHR, *Ástráðsson* (n. 11), paras 246–247.

41 ECtHR, *Ástráðsson* (n. 11), para. 248.

42 Cf, ECJ, *Simpson* (n. 11), para. 75; ECJ, *W.Ż.* (n. 17), para. 130.

pointment procedure; and it creates a (real) risk of undue influence of other State authorities on the appointment (criterion 2 of '**undue discretion**'). Yet, the *Ástráðsson* test further embraces criterion 3 of **effective judicial review** (that is fully understandable in the light of Articles 6 and 13 ECHR, as well as the subsidiary nature of Convention protection)[43], which is not present in the *Simpson* formula.

Then, the *Simpson* formula points to a further element: the undermining of the **integrity of the outcome** of the appointment process, which gives rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge. It is not clear whether the ECJ has been pointing here to the obvious consequence of a breach that has already fulfilled the criteria of a 'manifest breach' and 'undue discretion', or whether it is yet another criterion of the test that – cumulatively – must also be met in addition to criteria 1 and 2.

In the first case, it would be seen as an automatic corollary of the breach that was found to satisfy the first two criteria; while in the second case, a court making an assessment would have to address the 'integrity' criterion separately and check whether it is met as well. The first interpretation is supported by a joint reading of the *Ástráðsson* and *Simpson* judgments. The ECtHR included the element of 'integrity' in its test, yet, linking it to the criterion of 'undue discretion'.[44] This means that a breach once qualified as an exercise of 'undue discretion', at the same time undermines the integrity of the outcome of the appointment process and forms ground for doubts about the judge's independence. However, the reading of ECJ's ruling in *Żurek's* case, may suggest the separation of the two elements. The ECJ held that its guidance relates to such appointment process 'that (i) that appointment took place in clear breach of fundamental rules (...), and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt (...)'.[45] Such a split remains inconsistent with the original drafting of Simpson's formula, actually repeated verbatim in the *W.Ż.* reasoning.[46] Nonetheless, it cannot be ruled out that splitting the criteria may in the future serve the ECJ to loosen the requirements of a 'court established by law' by accepting that, although the national arrangements

43 See ECtHR, *Ástráðsson* (n. 11), para. 250.
44 See ECtHR, *Ástráðsson* (n. 11), para. 247.
45 ECJ, *W.Ż.* (n. 17), para. 161 and the subsequent conclusion.
46 ECJ, *W.Ż.* (n. 17), para. 130.

posed a real risk of undue discretion, they did not, in the specific situation, lead to undermining the integrity of judge's appointment.

The *Ástráðsson* test and the *Simpson* formula are designed to assess compliance with the requirement that a court be established by law. It was relied upon by the ECtHR in cases of appointments to the Polish Supreme Court (so called *'Reczkowicz group'*)[47]. Meanwhile, the *Simpson* formula has been used less frequently in ECJ jurisprudence, e.g., in the *W.Ż.* case. The ECJ, while procedurally constrained by the scope and formulation of infringement actions or preliminary references,[48] more frequently relies on a cumulative method for assessing the independence of courts which was developed in the *A.K.* judgment.[49] It differs from the *Ástráðsson* formula as it represents a broader concept of independence.

The 'establishment by law' is the very first, most preliminary stand-alone requirement for a 'court',[50] it logically precedes the independence requirement. The question of a court's independence only makes sense once it has been confirmed that the body indeed has been established as a 'court'. If there is no lawful 'establishment', there is no 'court' and the question of its independence is devoid of purpose. Still, the two requirements are closely related, both are rooted in and aimed at protecting the principle of the rule of law and the separation of powers, and both are necessary for public confidence in the judiciary.[51] They both may involve the same elements, which is precisely the case of guarantees of the judicial appointment process. A breach of the rules of judicial appointment can thus lead to both the violation of the establishment and the violation of the independence requirements. In the cases on the Polish Supreme Court, the ECtHR in fact assumed an automatic coexistent violation of the guarantee of independ-

47 ECtHR, *Reczkowicz* (n. 15); ECtHR, *Dolińska-Ficek and Ozimek* (n. 15); ECtHR, *Advance Pharma* (n. 15).

48 See Ben Smulders, 'Increasing Convergence between the European Court of Human Rights and the Court of Justice of the European Union in their Recent Case Law on Judicial Independence: The Case of Irregular Judicial Appointments', CMLRev 59 (2022), 105–128 (116–117).

49 ECJ, *A.K. and Others* (n. 6).

50 See ECtHR, *Ástráðsson* (n. 11), para. 231. The connection between the test of establishment and the assessment of independence and impartiality of the court was also pointed to by the ECJ in *Simpson*, see (n. 15), paras 75 and 79.

51 Cf. ECtHR, *Ástráðsson* (n. 11), para. 233.

ence where the guarantee of establishment is violated due to an irregular procedure for the appointment of a judge.[52]

The **standard of judicial independence** means both maintaining independence – i.e. the judge/court *'is'* independent; and also presenting an appearance of independence – i.e. the judge/court *'is seen as'* independent.[53] Thus, a breach of the standard is not only when there is an actual (accomplished) breach of judicial independence, but already when there are reasonable doubts as to that independence, i.e. the impression that the judge/court lacks independence. In the appointment process, the breach occurs not only when there indeed comes to a discretionary appointment to a judicial position, but already when there is a *real risk* of undue discretion in the procedure,[54] for it may give rise to reasonable doubts as to the independence of the appointee.[55]

Accordingly, the independence test in *A.K.* offers a broader concept in which it is a **cumulative consideration of all relevant conditions and circumstances** that is decisive for assessing judicial independence. It was originally construed for assessing an entire body (the Disciplinary Chamber) and not only its individual members. While the procedure for appointing persons to the body falls within the scope of that assessment, yet it is not confined to it but involves other considerations, e.g., the nature of the body, its place in the judicial system, the circumstances and purposes of its creation, its powers, etc.[56]

52 See ECtHR, *Reczkowicz* (n. 15), para. 284; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 357; ECtHR, *Advance Pharma* (n. 15), para. 353. The ECtHR recognised even a parallel violation of the third requirement, that of impartiality, though it did not elaborate on this issue any further. Robert Spano maintains that once a judge is appointed in violation of the 'establishment by law' standard, it creates an unrebuttable presumption of unfairness of the proceedings in which the judge took part, and there is no need for a separate analysis of the actual *in concreto*, fairness of the trial; Robert Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', ELJ 27 (2021), 211–227 (217).

53 ECJ, *A.K. and Others* (n. 6), paras. 127–128; ECJ, *Disciplinary regime for judges* (n. 6), para. 60; ECJ, *W.Ż.* (n. 17), para. 153. More on 'power of appearance' see esp. Michał Krajewski, Michał Ziółkowski, 'EU judicial independence decentralized: *A.K.*', CMLRev 57 (2020), 1107–1138 (1109–1110, 1115, 1123–1125).

54 ECJ, *W.Ż.* (n. 17), para. 130.

55 ECJ, *A.K. and Others* (n. 6), paras 123 and 134; ECJ, *Disciplinary regime for judges* (n. 6), paras 59, 86, 110 and 112; ECJ, *W.Ż.* (n. 17), paras 109, 128, 130, 148, 153 and 161.

56 ECJ, *A.K. and Others* (n. 6), paras 143–153.

Both European Courts name the methods they have adopted as *cumulative*. However, the nature of these cumulations is different. In the *Ástráðsson* test, these are **cumulative criteria**, which mean that they are examined in the sequence indicated and that they must be jointly satisfied. Under this concept, a single breach is sufficient to find a violation of the right to a court established by law, if it was serious and demonstrated a risk of undue influence that could not be remedied at the domestic level.

In contrast, the method developed by the ECJ in the *A.K.* case takes together all relevant factors and circumstances to assess their **cumulative effect** on the independence of the court (judge). Under this concept, the factors and circumstances when looked at one by one, might not amount to a breach of the law, yet when the whole picture is considered, they cumulatively may cast doubt on the court's (judge's) independence.[57]

The method of cumulative assessment nullified the Polish Government's argumentation, claiming that the particular arrangements adopted by them exist in other European systems. However, similar solutions in other countries may not pose a threat to judicial independence, because of different legal traditions, established constitutional practices, differing democratic experience or the context in which they operate.[58] Such assessment may also include a verification of the intentions ('true aims' or bad faith) of national authorities behind introducing certain arrangements. Such verification was pointed to by the ECJ in the case of *Independence of the Supreme Court*,[59] and subsequently confirmed in *A.B. and others*.[60] Still, an examination of the intentions of the national authorities may come under the establishment test as well. This was made clear by the ECtHR in its first *Ástráðsson* ruling, adopted in the chamber formation.[61] Though it was not explicitly mentioned in the Grand Chamber judgment of 1 December 2020, it may be implied that the (bad) intentions of the national authorities may form part of the concept of 'undue influence and/or unfettered discretion'.[62] In its Grand Chamber ruling in *Grzęda*, the ECtHR pointed to the premed-

57 Cf. ECJ, *A.K. and others* (n. 6), paras 143 and 153. A reading of the ECJ's ruling in *W.Ż.* may suggest that the ECJ is inclined to apply the cumulative effect method also to the establishment test; see (n. 17), para. 131.

58 See i.a. Safjan (n. 14), 13; Prechal (n. 25), 187.

59 ECJ, *Indpendence of the Supreme Court* (n. 11), paras 82–87.

60 ECJ, *A.B. and others* (n. 6), para. 138.

61 ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 12 March 2019, case no. 26374/18, para. 102.

62 Cf. Garlicki (n. 9), 174.

itation of the national authorities and noted that the whole sequence of events in Poland 'vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence'.[63]

III. Flaws in the Polish Procedure for Appointing Judges

1. General and systemic deficiencies

The loss of the guarantee of objectivity in the procedure for selecting candidates makes the process of appointing judges in Poland irregular and incompatible with national law and thus also with the requirements of the ECHR and Union law. Indeed, the procedure does not guarantee that competitions for judicial positions are won by persons who best meet the requirements of professional competence and moral integrity, as the outcome of the nomination procedure may depend on the undue influence of political authorities.

In respect of the ECtHR case law on defective judicial appointments, the main difference between the *Ástráðsson* case and the *'Reczkowicz group'*[64] is that while in the Icelandic case, the breaches of national procedure affected four nominations to the Court of Appeal, in the Polish cases the breaches, indeed, affect each and every nomination to all courts,[65] because they result from the overall shaping of the procedure of appointing judges in a manner contrary to the law. Thus, in the Icelandic case, the violations were of an individual nature, and were exceptions to an essentially well-formed procedure, whereas in the Polish cases, they are of a general and systemic nature since the very procedure for the nomination of judges as such remains unlawful.[66]

63 ECtHR, *Grzęda* (n. 5), para. 348.

64 See n. 47.

65 This also embraces the promotion of judges, e.g., from a district court to a regional court, as it requires a procedure for evaluating candidates before the NCJ, granting a recommendation and separate acts of appointment by the President of the Republic. The NCJ also participates in the appointment by the President of court assessors (junior judges) who are graduates of judicial training programme and passed the examination for judge.

66 In the *Dolińska-Ficek and Ozimek* and *Advance Pharma* cases, the ECtHR announced that its conclusions on the involvement of NCJ in the appointment of Supreme Court judges 'will have consequences for its assessment of similar complaints in other pending or future cases', as the deficiencies identified 'have already

Furthermore, in the Icelandic case, the breaches occurred in the course of the nomination procedure, whereas in the Polish cases, the manifest breach exists already at the very outset of the procedure, when it is initiated before an unconstitutionally composed body, notwithstanding any further irregularities that may also take place in its course. In other words, every nomination process is already defective from the very beginning. Persons taking part in such procedures are thus aware of the deficiencies. This alone may justify more far-reaching consequences when addressing defective judicial appointments, in particular a denial of protection under the guarantee of irremovability (see below Section V.4).

The irregularities in the appointment process pertain to all four European requirements outlined above (Section II.2), though the number and gravity of violations may vary from case to case. In general, the highest intensity of breaches occurred in the appointments to the Supreme Court.

2. Failure to comply with the requirement of statutory regulation

The requirement for statutory regulation of the process of appointing judges might apparently seem to be met, as the procedure is provided for by legislative acts. It takes place before the NCJ, which organises competitions, analyses documents mostly presented by candidates, interviews them and then decides whom to propose for a given judicial post. Furthermore, there is also a statutory right to judicial review of the NCJ's resolutions that refuse recommendation for appointment.

Nevertheless, the key elements of the statutory regulations are unconstitutional as is the case of the composition of the NCJ since 2018 and the arrangements for judicial review which turn it ineffective.

In 2018 the NCJ was re-composed in breach of the constitutional rules. Firstly, the term of office of the previous NCJ members was prematurely terminated by ordinary law,[67] even though its stability was protected by the Constitution.[68] Secondly, the composition of the new NCJ was determined

adversely affected existing appointments and are capable of systematically affecting the future appointments of judges not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts', see: ECtHR, *Dolińska-Ficek* (n. 15), para 368; ECtHR, *Advance Pharma* (n. 15), para 364.

67 See Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, Journal of Laws 2018, item 3.

68 Art. 186(3) Constitution.

by a political decision, since the political authorities have reserved for themselves a near-monopoly power to designate its members (they are predominantly selected by the Sejm), although constitutional rules pointed to electing the 15 judges-members of the NCJ by the judges themselves,[69] and thus shielded the composition of the judicial council from undue political influence.

The statutory rules that do not comply with the Constitution cannot be considered to satisfy the requirement that the procedure be regulated by an Act of Parliament. Meanwhile, the unconstitutionality of the new arrangements for the NCJ was unequivocally determined by the Supreme Court.[70] Under normal circumstances, such allegations should be examined by the Constitutional Tribunal. However, it abandoned to pursue the core purpose of the Constitutional Courts, that is, to protect the Constitution.[71] It no

69 Art. 187(1) in conjunction with Art. 186(1) Constitution. This was confirmed by the Constitutional Tribunal in its judgment of 18 July 2007, case no. K 25/07, para. III.4. A different view was then presented in the Constitutional Tribunal judgment of 20 June 2017, case no. K 5/17. However, the substantive conclusions of the ruling were arbitrary – cf. ECtHR, *Reczkowicz* (n. 15), paras 237–239; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), paras 293–295. Furthermore, it was made by an irregular panel comprising unauthorized persons, i.e. appointed to the positions previously lawfully taken (so called 'duplicate-judges') – which, in the light of the ECtHR judgment in *Xero Flor*, rendered the Constitutional Tribunal not being 'established by law'; see ECtHR, judgment in *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, case no. 4907/18.

70 It held that '[n]ew members of the National Council for the Judiciary were appointed by the Sejm ..., which stood in conflict with Article 187(1)(2) of the Constitution', and further that the new legislative provisions on NCJ 'are inconsistent with the principle of division and balance of powers (Article 10(1) of the Constitution of the Republic of Poland) and the principle of separation and independence of courts (Article 173 of the Constitution of the Republic of Poland) and independence of judges (Article 178 of the Constitution of the Republic of Poland)', Supreme Court, Resolution of 23 January 2020 of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, case no. BSA I-4110–1/20, para. 32.

71 See e.g., its rulings rejecting the primacy of Union law (cases nos. P 7/20, K 3/21) and ECHR standards (cases nos. K 6/21, K 7/21). Addressing the current Constitutional Tribunal, the ECtHR noted 'the apparent absence of a comprehensive, balanced and objective analysis of the circumstances before it in Convention terms', and for this reason held that its assessment 'must be regarded as arbitrary and as such cannot carry any weight' for the ECtHR's conclusions (ECtHR, *Reczkowicz* (n. 15), para. 262; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 317; ECtHR, *Advance Pharma* (n. 15, para. 318). See also ECtHR judgment in *Xero Flor* (n. 69) on unlawful composition of the Constitutional Tribunal. Moreover, the European Commission decided to bring yet another infringement action against Poland for violations of EU law by the Polish Constitutional Tribunal and its case law, see Commission, Press Release of 15

longer offers a genuine constitutionality review of the law, and instead, it is used to legitimise actions of national authorities which are incompatible with the Constitution.[72]

3. Absence of a guarantee of a merit-based nomination process

Formally, again, the process of appointing judges is based on criteria of merit, that is, the legislation on respective domestic courts indicates such criteria. In fact, however, the significance of the substantive selection of judicial candidates has been reduced. Both the ECtHR and the ECJ are reluctant to give their direct assessment of this aspect of the judicial appointment process. Indeed, this is a more difficult aspect to grasp, therefore problematic in terms of providing evidence, and it would come down to European Courts' evaluating particular nomination decisions made by the NCJ.

In essence, the underlying problem undermining the value of the substantive assessment of candidates is the lack of guarantee of objectivity of the National Council of the Judiciary, a body 'subordinated directly to political authorities'.[73] The changes were made to the NCJ precisely so that the merit criteria would not have a decisive say on judicial nominations. The Supreme Court assessed that 'competitions for judicial positions are very likely to be decided not based on substantive criteria but depending on political loyalties or support for the reform of the judiciary pursued by the parliamentary majority in conflict with the Constitution'.[74] For the same

February 2023, no. IP/23/842, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842.

72 In its rulings in cases nos. K 5/17 (n. 69) and K 12/18 (n. 35), the current Constitutional Tribunal 'legitimised' changes to the NCJ. First, by a ruling of 20 June 2017 in case no. K 5/17, the CT declared unconstitutional the election of judges-members of the NCJ to individual and not joint term of office (e.g., as a result of filling a vacancy that occurred during the term). It also rejected the CT's previous position that the judges-members of the NCJ are to be elected by the judges themselves (expressed in case no. K 25/07, n. 69). This was used as a pretext for interrupting the NCJ's ongoing term of office and appointing it anew (see n. 69). Then, by a ruling of 25 March 2019 in case no. K 12/18 the Constitutional Tribunal confirmed the finding of the case K 5/17. Both rulings were rendered by irregular panels comprising unauthorized persons (see n. 54). These rulings demonstrated a pattern of legitimising one flawed authority by another flawed authority.

73 Supreme Court, Resolution of 23 January 2020 (n. 70) para. 42.

74 Supreme Court, Resolution of 23 January 2020 (n. 70) para. 38.

reason, the participation of the judicial self-government in the nomination procedure was eliminated in 2020, despite the fact that such participation had previously been guaranteed since the very creation of the National Council of the Judiciary in 1989, and was supported by the constitutional standard articulated in the case law of the Constitutional Tribunal.[75]

In evaluating the degree to which the current selection model for judges relies on substantive criteria, one also needs to take other considerations into account, including the continued boycotting the NCJ's nomination proceedings by a significant part of the legal community.[76] Furthermore, the recommendations for judicial positions were regularly granted by the NCJ to many those judges who previously backed the candidacies for the new NCJ's members by signing the lists in their support.[77] In fact, there seems to exist a pattern whereby NCJ members treat appointments to senior judicial positions as a way of rewarding those who first supported their candidatures.

4. Compromised fairness of the procedure

A procedure in which objectivity cannot be guaranteed obviously does not meet the requirement of fairness. It is compromised by the lack of the necessary independence of the NCJ from the legislative and executive branches. In particular, this conclusion is substantiated by: the premature interruption of the four-year term of office of the members of the previous NCJ;[78] the election of 15 judges-members of the NCJ by the Sejm instead

75 See Constitutional Tribunal, judgment of 18 February 2004, case no. K 12/03; see also Constitutional Tribunal, ruling of 9 November 1993, case no. K 11/93.

76 See. i.a. Paweł Filipek, 'The New National Council of the Judiciary and its Impact on the Supreme Court in the light of the Principle of Judicial Independence', Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 16 (2018), 177–196 (187), https://europeistyka.uj.edu.pl/documents/3458728/141910948/P.+Filipek_PWPM2018_pages-177-196.pdf.

77 See i.a. Laurent Pech and Jakub Jaraczewski, 'Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations', DI Working Papers 2 (2023), 61, https://ssrn.com/abstract=4326932; Association of Judges 'Themis', Close to the Point of No Return (newsletter about the situations of the Polish judiciary), updated for 20 February 2020, 4,http://themis-sedziowie.eu/wp-content/uploads/2020/02/Newsletter.pdf.

78 See ECJ, *A.K. and Others* (n. 6), para. 143; ECJ, *A.B. and Others* (n. 6), para. 131; ECJ, *Disciplinary regime for judges* (n. 6), para. 105; ECJ, *W.Ż.* (n. 17), para. 146; ECtHR,

of earlier election by their peers;[79] the irregularities in the process for the appointment of certain members of NCJ;[80] the way in which NCJ exercises its constitutional responsibilities of ensuring the independence of courts and judges;[81] or the existence of special relationships between the members of the NCJ and the executive.[82]

In the cumulative assessment of the independence of the NCJ, what also matters is the context of the changes, including other arrangements implemented alongside the judicial system, such as the attempt to lower the retirement age of Supreme Court judges leading to their premature removal from office in violation of guarantees of irremovability and independence of judges.[83] Taking control over the composition of the NCJ and, at the same time, removing a significant group of judges from the Supreme Court, was designed to pack swiftly and effectively the Supreme Court with persons supported by the government.[84]

Indeed, the largest number of institutional and procedural violations occurred in procedures for appointments to the Supreme Court.[85] They

Grzęda (n. 5), para. 322. See also Supreme Court, Resolution of 23 January 2020 (n. 70), para. 31.

79 See Supreme Court, Resolution of 23 January 2020 (n. 70) para. 31; ECJ, *A.K. and Others* (n. 6), para. 143; ECJ, *A.B. and Others* (n. 6), para. 131; ECJ, *Disciplinary regime for judges* (n. 6), para. 104; ECJ, *W.Ż.* (n. 17), para. 146; ECtHR, *Reczkowicz* (n. 15), paras 234–264; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), paras 290–320; *Advance Pharma* (n. 15), paras 313–321; ECtHR, *Grzęda* (n. 5), paras 310–317 and 322.

80 See Supreme Court, Resolution of 23 January 2020 (n. 70), para. 32; ECJ, *A.K. and Others* (n. 6), para. 143; ECJ, *A.B. and Others* (n. 6), para. 131

81 See ECJ, *A.K. and Others* (n. 6), para. 144; ECJ, *A.B. and Others* (n. 6), para. 131.

82 See ECJ, *A.B. and Others* (n. 6), para. 131. In this context, the Supreme Court noted that the membership of the NCJ 'was determined in such a way as to ensure that it was comprised of persons loyal to the parliamentary majority', see Resolution of 23 January 2020 (n. 70), para. 38.

83 See ECJ, *Independence of the Supreme Court* (n. 11); ECJ, *A.B. and Others* (n. 6), paras 132–135. Over the period between 4 July 2018 and 1 January 2019, i.e. during the culmination of selecting new judges to the Supreme Court, the First President of the Supreme Court was not informed of the NCJ meetings, although she was an *ex officio* member of the body. This is a further cause why the NCJ was then acting in an incorrect composition; see Supreme Court, Resolution of 23 January 2020 (n. 70), para. 33.

84 Cf. ECJ, *A.B. and Others* (n. 6), paras 134 and 163; ECJ, *Disciplinary regime for judges* (n. 6), paras 106–107; ECJ, *W.Ż.* (n. 17), paras 150.

85 See. i.a. Filipek (n. 76), 184–189.

were initiated by an Act of the President of the Republic,[86] issued without the mandatory countersignature of the Prime Minister as required under Article 144(3) of the Constitution,[87] which therefore had never become valid.[88]Furthermore, an unprecedented breach of the law was to disregard binding court decisions (of the Supreme Administrative Court) suspending the execution of the NCJ's resolution recommending candidates.[89] In such cases, judicial appointments to the Supreme Court were made on the basis of appealed (i.e. non-final) and suspended (i.e. non-enforceable) NCJ resolutions. Eventually, the Supreme Administrative Court, while implementing the ECJ's judgment in *A.B. and Others*, in a series of judgments, overturned the NCJ's resolutions on nominations to the Supreme Court in their part containing requests for an appointment.[90] Accordingly, the Presidential acts of appointment are not based on legally effective requests of the NCJ, which are necessary for the judges' appointment in light of Article 179 of the Constitution.

5. Lack of effective judicial review

Judicial review of the nomination process continues failing to meet the requirements of the ECHR and Union law. Currently, appeals against the NCJ resolutions to recommend or to refuse to recommend for a judicial

86 Announcement of the President of the Republic of Poland of 24 May 2018 No. 127.1.2018 on vacant judicial positions in the Supreme Court, Official Journal 'Monitor Polski' 2018, item 633, https://monitorpolski.gov.pl/M2018000063301.pdf.

87 See i.a. Supreme Court, Resolution of 23 January 2020 (n. 70), para. 34. This issue was also noted by the ECtHR, which nonetheless deemed it unnecessary to rule on it additionally in view of the manifest breaches of the law already established, which were sufficient to constitute a violation of the Convention, see ECtHR, *Reczkowicz* (n. 15), para. 265; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 339; ECtHR, *Advance Pharma* (n. 15), para. 335.

88 See Art. 143(2) Constitution.

89 See e.g., Supreme Administrative Court, order of 27 September 2018, case no. II GW 27/18 (recommended nominations to the Civil Chamber). See also Supreme Court, Resolution of 23 January 2020 (n. 70), para. 35, ECtHR, *Dolińska-Ficek and Ozimek* (n. 15); ECtHR, *Advance Pharma* (n. 15).

90 See judgments of 6 May 2021, cases nos. II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18, II GOK 7/18; judgment of 13 May 2021, case no. II GOK 4/18; judgments of 21 September 2021, cases nos. II GOK 8/18, II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, II GOK 4/18, II GOK 3/18; judgments of 11 October 2021, II GOK 9/18, II GOK 15/18, II GOK 16/18, II GOK 17/18, II GOK 18/18, II GOK 19/18, II GOK 20/18.

position are heard by panels of the Chamber of Extraordinary Control and Public Affairs in the Supreme Court.[91] The body, entirely appointed under a procedure involving the new NCJ, itself is not an independent and impartial court[92] established by law, as jurisprudentially stated by the ECtHR in the *Dolińska-Ficek and Ozimek*,[93] as well as by the ECJ in the case of Judge Żurek.[94]A remedy handled by an authority that does not meet the requirements of effective judicial protection cannot itself be considered to meet those requirements.

In addition, the so called 'Muzzle Law', adopted by the Parliament as a negative reaction to the ECJ judgment in the *A.K. case* seeking to render it ineffective domestically, introduced a statutory prohibition on challenging the establishment of courts or assessing the lawfulness of judges' appointments or their powers to exercise judicial functions.[95] The Muzzle Law is a subject of an infringement action brought by the Commission before the ECJ in case C-204/21.[96]Although the ECJ issued interim measure suspending the application of the impugned provisions,[97] in practice the law continues to operate.

As already indicated, the particularly intense violations of the requirement for judicial review of the nomination process occurred in the appointment of Supreme Court Judges in 2018. During the process of selecting candidates for more than 40 vacant positions there, the Parliament changed statutory rules and introduced a partial finality of the NCJ's recommendations – in their 'positive' part, i.e. making a request to the President of the Republic to appoint recommended persons to the Supreme Court. This change alone was considered by the Supreme Administrative Court as aiming 'to nullify the possibility of a competent court to carry out a true review of the competition procedure for a vacancy in the Supreme Court' and 'to prevent any judicial review of appointments to the Supreme

91 Art. 26(1) Act of 8 December 2017 on the Supreme Court, Journal of Laws 2021, item 1904.

92 See i.a. Supreme Court, Resolution of 23 January 2020 (n. 70).

93 See ECtHR, *Dolińska-Ficek and Ozimek* (n. 15).

94 See ECJ, *W.Ż.* (n. 17).

95 Act of 20 December 2019 on amending the Act on the organisation of ordinary courts, the Act on the Supreme Court and certain other acts, Journal of Laws 2020, item 190.

96 ECJ, *Commission v. Poland (Independence and privacy of judges)*, case no. C-204/21.

97 ECJ, *Commission v. Poland (Independence and privacy of judges)*, order of the Vice-President of the Court of 14 July 2021, case no. C-204/21 R, ECLI:EU:C:2021:593.

Court after the re-composition of the NCJ'.[98] In addition, the legislative novelization also limited the effects of judgments granting the appeal, as no opportunity was provided for the appellant to return to the competition proceedings in which the NCJ's resolution was adopted.[99]

Subsequently, by using the pretext of implementing the Constitutional Tribunal's ruling (made itself in an unlawful composition) deeming the possibility of appealing NCJ's resolutions to the Supreme Administrative Court as unconstitutional,[100] the Parliament entirely excluded the possibility of judicial review of NCJ's resolutions on the appointment of Supreme Court judges and mandated to discontinue *ex lege* the pending appeal proceedings.[101] The sequence of actions taken by domestic authorities clearly indicates that they acted with the specific intention of preventing any possibility of judicial review of appointments to the Supreme Court.[102]

Furthermore, as also pointed out above, in the case of certain nominations to the Supreme Court, the acts of appointment were handed out in a situation when the recommendation resolutions of the NCJ were appealed and suspended. This alone hindered effective judicial review of the nomination process.

Ultimately, despite the subsequent annulment by the Supreme Administrative Court of the NCJ's resolutions in their parts containing the recommendation for appointment to the Supreme Court,[103] that did not substantially change the appellants' situation, since the competitions whose results they challenged were not reopened and the posts for which they had applied remain occupied by persons appointed to them in manifest breach of the law. Accordingly, the remedy cannot be considered to be effective since it failed to remedy and redress the appellants' situation.

98 Supreme Administrative Court, judgment of 6 May 2021, case no. II GOK 2/18, para. 7.2.

99 Act of 20 July 2018, Journal of Laws 2018, item 1443; see also ECJ, *A.B. and Others* (n. 6), para. 160.

100 Constitutional Tribunal, case no. K 12/18 (n. 35).

101 Act of 26 April 2019, Journal of Laws 2019, item 609; see also ECJ, *A.B. and Others* (n. 6), para. 137.

102 See also ECJ, *A.B. and Others* (n. 6), para. 138.

103 See above n. 58.

IV. Why Judicial Appointments Need to be Rectified

1. Axiological and systemic objectives

There are compelling reasons to address and regulate in a clear manner the problem of defective judicial appointments. The failure to take remedial action on appointments obtained in manifest breach of the law would be tantamount to tolerating lawlessness. Itself it would undermine the rule of law and the very foundations of the legal system. Since, *ex iniuria ius non oritur*, then the violation of the law must be condemned and accounted for.

The rectification of defective judicial appointments should be seen as part of repairing the judicial system, bringing it back to its rightful place and systemic role. The courts, as the third branch, have a vital role to play vis-à-vis the executive – in controlling the legality and legitimacy of acts of public authority and providing that the government and administration can be held accountable for their actions, as well as vis-à-vis the legislature – in making duly enacted laws enforced. The latter task also extends to ensuring compliance of national laws with the ECHR and the Union law and the effective implementation of the supranational law.

To ensure that those adjudicating as judges have unquestionable authority to do the above, and meet the substantive and ethical criteria for their position, comes as a necessity to restore the proper separation of powers and detach the courts and judges from the undue influence of other branches. Addressing irregular nominations is thus needed since the process of appointing judges in Poland has become dominated by the political authorities from whom judges should stand independent. The government, first, have designed such mechanisms to fill judicial positions, especially those at the highest level, with people they support and, then protected the appointments made in this way by instituting statutory,[104]

104 For example, restricting and then entirely excluding judicial review of NCJ's resolutions refusing recommendations to the Supreme Court (see Section III.5 above), or adopting a series of statutory arrangements to preclude judicial review of complaints over the independence of judges appointed, esp. the 'Muzzle Law' (n. 83).

disciplinary,[105] adjudicatory[106] and other measures.[107] The systemic and institutional goals of transiting back to 'a democratic State ruled by law'[108] cannot be fully achieved without redressing unlawfully obtained judicial status and defective acts issued by irregularly appointed persons as well as holding accountable those who organised or participated in unlawful procedures and benefited from the situation created thereby.

2. Ensuring the capacity of judges to adjudicate

To hold the authority of effectively ruling within a given legal order, judges must meet the conditions which that very legal order sets. This necessarily includes appointing judges in a manner consistent with the rules of that legal order. If, however, judges were appointed in violation of such conditions their legitimacy to adjudicate is compromised, their independence impaired, and the legal force of their rulings is questionable.

Meanwhile, in light of the case law of the ECJ, the ECtHR, and domestic courts, including the Supreme Court and the Supreme Administrative Court, a part of the national judges in Poland has been appointed in manifest breach of the fundamental rules of the procedure for the appointment of judges. This undermines the attributes of them being 'established by law, independent and impartial'. The hearing of cases by courts with their participation may not guarantee the necessary requirements of the right to a fair trial. Then, given that judges appointed under national law adjudicate in a multicentric legal system and may rule on questions concerning the application or interpretation of EU law, they must meet

105 Initiating disciplinary proceedings and applying administrative measures of similar effect (dismissal from delegation to a higher court, suspension from adjudicating, transfer to another judicial division) against judges committed to preserving judicial independence and, in particular, undertaking to assess the independence of judges appointed with the participation of the new NCJ.

106 Proceedings before the Constitutional Tribunal to delegitimize the rulings of the ECJ and ECtHR related to changes in the Polish judicial system, e.g. in cases: Kpt 1/20, U 2/20, P 7/20, K 3/21, K 6/21, K 7/21; as well as certain resolutions passed by the Supreme Court in formations involving defectively appointed persons, e.g., in case I NOZP 3/19.

107 For example, by carrying out media campaigns generally against judges as well as 'individualized' campaigns to attack judges who express critical opinions about changes made to the legal and judicial system.

108 Article 2 of the Polish Constitution proclaims Poland as 'a democratic State ruled by law'.

the requirements essential to effective judicial protection.[109] Thus, for their rulings to have effect under the Union legal order, they must meet the necessary minimum requirements that this legal order indicates. If they fail to meet them, they are not 'European Judges', and their rulings become inapplicable in the sphere of Union law and, accordingly, should be disregarded. Likewise, under the ECHR, persons appointed in a procedure that cannot be reconciled with the requirements of Article 6(1) ECHR, do not warrant the Convention right to a court and a fair trial, thus generally failing to provide adequate protection of individual rights and freedoms. Accordingly, not addressing and regulating defective appointments and their consequences perpetuates the continued violation of Union law, the ECHR and the national Constitution and fails to restore judges' capacity to adjudicate effectively.

Ensuring the ability of judges to adjudicate takes on material and formal aspects that come together. In the material aspect, it is necessary to make sure that the persons irregularly appointed have the technical competence to adjudicate, that is, their knowledge and experience are adequate for the position, while their personal independence cannot be called into question either. In the formal aspect, this means rectifying or corroborating the defective acts of appointment so as their status as judges as such is no longer in dispute and may not be challenged in the course of the proceedings and serve as the basis for appealing their rulings.

3. Reinforcement of the rule of law and judicial independence

The review of unlawful judicial appointments is also motivated by the reinforcement of the rule of law and the guarantee of judicial independence. First of all, it should convey a clear message that judges must not rely in their career on the favour of political actors, nor flatter or associate with them.

Secondly, it should render elementary justice to those judges who behaved decently, boycotted flawed procedures before the NCJ and did not legitimise unconstitutional arrangements. Such judges regularly suffered adverse consequences because of their stance: disciplinary proceedings, suspension from adjudication, forced transfer to another court division which amounted to *de facto* degradation, or defamation campaigns by

109 ECJ, *Associação Sindical dos Juízes Portugueses* (n. 10), para. 40.

the government-controlled media.[110] Now, the failure to reopen, especially senior judicial positions (e.g., in the Supreme Court, the Supreme Administrative Court, or the courts of appeal as well) which are of a limited number, would unduly preserve the current state of affairs for years to come. Indeed, it would be equal to rewarding those who participated in unlawful procedures and were appointed in a blatant violation of the law, while, indeed, sanctioning those who followed the law and stood up for judicial independence.

Thirdly, transitional constitutionalism, one of the main concepts developed in this book,[111] argues that judges can play an important role in re-establishing standards of the rule of law and democracy. Yet can this role, at the domestic level, be entrusted to those appointed to judicial positions in violation of the rule of law? May those who violated standards now restore them? Do they have the legal and ethical mandate for doing so? This is a legal issue, for not only their status, but the legal force of their rulings has been, is, and may continue to be challenged in the future. Without addressing these questions, one way or another, the transition involving these persons will be tainted at its very roots. This is also an ethical dilemma, for the conduct of flawed appointees was held to the detriment of judges defending the rule of law and judicial independence. By participating in unconstitutionally shaped and conducted competitions for judicial positions, they have legitimized changes made in violation of the law. They benefited from doing so and accepted acts of appointment even though they were aware that they were made following a flawed procedure.

V. Determinants for Rectifying Defective Appointments

While appointing judges in an unlawful manner violates the rule of law, the consequences of the measures taken to rectify the situation may interfere with an effective exercise of the right to a court, the preservation of legal

110 See i.a. Jakub Kościerzyński (ed), *Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019* (Warsaw: Polish Judges Association 'Iustitia' 2021), https://www.iustitia.pl/en/activity/opinions/3724-report-justice-under-pressure-years-2015-2019; Association of Judges 'Themis', *From bad to worse – the Polish judiciary in the shadow of the 'muzzle act'. Annual report for 2020*, http://themis-sedziowie.eu/materials-in-english/from-bad-to-worse-polish-judiciary-in-the-shadow-of-the-muzzle-act-report-updated-for-20-november-2020/.

111 See the contribution of Armin von Bogdandy and Luke Dimitrios Spieker.

certainty and the binding force of judicial decisions (*res judicata*), or the guarantee of the irremovability of judges, all of which also form part of the rule of law. To adopt solutions to deal with defective judicial appointments and to determin the consequences of the irregularities that have occurred requires looking at the bigger picture, involving identification and balancing of all relevant factors.

1. Ensuring an effective right to a court

The restoration of the rule of law should re-instate the primacy of the law over the political will, entrust the society's destiny to fully democratic choices, limit the arbitrariness in the actions of public authorities, and bring back the accountability of decision-makers. This necessarily includes reinstating the full guarantee of independence of the courts and judges, which is not an end in itself and is not meant as judges' privilege. It serves to ensure effective legal protection and the right to a fair trial before a court that meets the necessary conditions to be capable of adjudicating without any undue outside influence.

Accordingly, the right to a fair trial, consistent with the requirements of the rule of law and effective judicial protection, should be guaranteed before a body that has the status of a 'court', whose holding is not determined by the mere name given to the body, but by the scope of its tasks and the attributes it enjoys in carrying them out.[112] Among the requirements, the key ones are the establishment of the court by law and the guarantees of its independence and impartiality. They are constitutive in nature, in the sense that when not meeting any of them, the body cannot be properly recognized as a 'court'.

The effective exercise of the right depends on a number of factors: the accessibility of the courts, their adequate staffing in terms of the quality and the number of judges and other personnel, a properly designed judicial procedure, the efficiency and speed of the proceedings, the effective execution of judicial decisions, the access to legal aid, the costs of participating in the proceedings, etc. While remedying flawed judicial appointments is intended to restore the full enjoyment of the right to a court, then the excessive measures could as well lead to an adverse effect, remove part of

112 See Supreme Court, Resolution of 23 January 2020 (n. 70), para. 15.

the judges from adjudicating, delay the processing of cases, disorganise the judiciary and thus significantly impede the exercise of this very right.[113]

2. Interests of the parties to the closed proceedings

The consideration of the rights and interests of the parties to proceedings closed by a final decision while handled by defective appointees supports preserving the legal effects of such decisions to the extent possible. The parties should not suffer additional, excessive consequences of the wrongful situation caused by the State. In general, the parties had no or little influence on the composition of the court deciding their case. Specifically, the motions for the recusal of judges can be an instrument of little use here, especially when the legislature – protecting defective appointments – explicitly prohibited the examination of the legitimacy of judicial appointments, and entrusted consideration of motions in this regard to the newly established court (Chamber of Extraordinary Control and Public Affairs of the Supreme Court),[114] which has been fully composed of new appointees (thereby *de facto* adjudicating, at least indirectly, *in causa sua*).

The considerations indicated above speak against an automatic cancellation of all rulings made by or with the participation of defectively appointed persons. Therefore, in principle, challenging their legal force should not be based solely on the defectiveness of the judge's appointment, but be more individualised and point to additional grounds related to the conduct of the judge and the circumstance of the cases decided by that judge. Accordingly, the parties may be provided with a time-limited right to challenge rulings made by defectively appointed persons.[115]

113 Similarly, see Constitutional Tribunal, judgment of 24 October 2007 concerning court assessors (junior judges), case no. SK 7/06, para. III.6.2.

114 So called "Muzzle Law", i.e. the Act of 20 December 2019 amending the Act on the organisation of ordinary courts, the Act on the Supreme Court and certain other acts, Journal of Laws of 2020, item 190.

115 In the case of Polish court assessors (junior judges), whose independence was challenged due to the discretionary power of the Minister of Justice to dismiss them, the ECtHR held – after the Polish Constitutional Tribunal – that, in principle, court proceedings in which the assessors had ruled should not be reopened; see ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, judgment of 30 November 2010, case no. 23614/08, paras. 56 and 64–66; cf. Constitutional Tribunal, case no. SK 7/06 (n. 113), paras. III.6.4 – 6.6 and III.7.5.

By contrast, when considerations of protecting the interests of the parties do not substantiate upholding the legal force of a defective ruling, the denial of its effects may be direct. In the preliminary ruling in the case of Judge Żurek (C-487/19), the Court of Justice held that an order of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court could be declared null and void, when it was issued by a judge appointed in clear breach of fundamental rules of judicial appointment procedure.[116] The case involved a single-person decision of the Supreme Court finding inadmissible Judge Żurek's appeal against an NCJ resolution which discontinued the action he brought before that body. He challenged the order of the President of the Regional Court to transfer him, against his will, to another court division, which he considered a quasi-disciplinary measure of demotion. The single-judge decision was issued regardless of the appellant's motion for the recusal of all persons appointed to that Chamber, as they were nominated in the unlawful procedure.

3. Legal certainty and *res judicata*

The preservation of legal certainty and stability of judicial decisions (*res judicata*) are fundamental to the functioning of the legal order and the protection of the rights and interests of private parties. Yet, both the right to an independent and impartial court established by law and the preservation of legal certainty are elements and manifestations of the principle of the rule of law.[117] Their weighing becomes a question of maintaining a balance within this fundamental principle. Therefore, neither of them may enjoy absolute protection.

A departure from legal certainty and *res judicata* is justified only when there is a pressing need necessitated by circumstances of a substantial and compelling nature, such as the correction of fundamental defects or a miscarriage of justice.[118] Still, the principle of legal certainty must also give way at times, because maintaining it at all costs, at the expense of the

116 ECJ, *W.Ż.* (n. 17), para. 161. It is being argued that with this case the ECJ has proclaimed the *sententia non existens* doctrine as a new remedy and autonomous concept of EU law, see Przemysław Tacik, 'Sententia non existens: A new remedy under EU law?: Waldemar Żurek (W.Ż.)', CMLRev 59 (2022), 1169–1194 (1182 et subseq.).

117 Cf *Ástráðsson* (n. 11), paras 211, 237–238.

118 ECtHR, *Ástráðsson* (n. 11), paras 238 and 240.

guarantee of an independent and impartial court established by law, can do even more damage to the rule of law and public confidence in the judiciary.

Indeed, it is the criterion of the gravity of a breach of law in the judicial appointment procedure that represents a balanced approach. The more serious the violation in the appointment procedure for judges, the less important will be the consideration of protecting legal certainty, the stability of judicial decisions and the upholding of a judicial position by a defectively appointed person.[119]

In the case initiated by Judge Żurek's appeal against his forced transfer to another judicial division, the Court of Justice pointed out that if a decision was made by a body that does not constitute an independent and impartial tribunal previously established by law, no consideration relating to the principle of legal certainty or the alleged finality of the decision can be successfully relied on in order to prevent a court from declaring such a decision to be null and void.[120] That said, the specific nature of this case, in which there occurred no considerations of protecting the rights and interests other than those of the party initiating the domestic proceedings (Judge Żurek himself), implies that the Court's guidance may not be similarly applicable to other cases, both as far as the lack of legal force of the domestic decision is concerned (declaring it null and void) and the disregard of considerations of legal certainty.

Another specific situation was that of the Disciplinary Chamber of the Supreme Court, established in 2017 and abolished in 2022 (replaced with a new Chamber of Professional Responsibility), which served as the main bogeyman and mechanism of repression of judges in Poland. The Chamber was unanimously denied the attribute of an independent court by the very Supreme Court,[121] the European Court of Human Rights,[122] and the ECJ.[123] Considering the original unconstitutionality of the establishment of the Disciplinary Chamber,[124] it is legitimate to deny the legal force of

119 ECtHR, *Ástráðsson* (n. 11), para. 244 et subseq.
120 ECJ, *W.Ż.* (n. 17), para. 160.
121 Supreme Court, Resolution of 23 January 2020 (n. 70), para. 45.
122 ECtHR, *Reczkowicz* (n. 15).
123 ECJ, *Disciplinary regime for judges* (n. 6), and indeed ECJ, *A.K. and Others* (n. 6).
124 The Supreme Court held that 'the Disciplinary Chamber … structurally fails to fulfil the criteria of an independent court within the meaning of Article 47 of the Charter and Article 45(1) of the Constitution of the Republic of Poland and Article 6(1) ECHR, and that it is an extraordinary court which cannot be established in

the rulings issued by the Chamber.[125] Nonetheless, even here some caution might be recommended. Indeed, some of the Chamber's rulings concerned the disciplinary liability of persons charged with committing an 'ordinary' offence, such as driving under the influence of alcohol. The risk of statutory prescription and the risk of impunity for such disciplinary offences, support a need to carefully balance whether absolute, automatic invalidity of all its rulings is the most appropriate remedy. The lack of impunity of offenders is also a value that merits protection. Perhaps a solution to consider could be a summary procedure in which a dedicated court would, within a specified period of time, have to confirm the legal force of such rulings. Failure to reaffirm them would be tantamount to removing the rulings.

4. Irremovability of judges

The principle of irremovability of judges is one of the fundamental guarantees of their status to protect them from any external intervention or pressure. It is secured by the Polish Constitution (Article 180(1)) and, as a key element for the maintenance of judicial independence, is also – as affirmed in the case law of both European Courts – covered by the guarantees of Article 6(1) of the ECHR[126] and the EU principle of effective judicial protection.[127]

Since the *Wilson* judgment, the ECJ has placed the principle of irremovability on the list of guarantees of judicial independence,[128] although it did invoke it earlier.[129] The *Wilson* formula has traditionally been cited by the ECJ in subsequent rulings on judicial independence, including the

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the times of peace according to Article 175(2) of the Constitution of the Republic of Poland'; see Resolution of 23 January 2020 (n. 70), para. 45.

125 See Supreme Court, Resolution of 23 January 2020 (n. 70), points 1 and 4 of the operative part.

126 See e.g., ECtHR, *Baka v. Hungary*, judgment of 23 June 2016, case no. 20261/12, para. 172; ECtHR, *Ástráðsson* (n. 11), para. 239; see also Spano (n. 52), 220; Marcin Szwed, 'Problematyka nieusuwalności sędziów w orzecznictwie Europejskiego Trybunału Praw Człowieka', Przegląd Konstytucyjny 3 (2021), 145–177.

127 ECJ, *Indpendence of the Supreme Court* (n. 11), para. 75.

128 ECJ, *Graham J. Wilson v. Ordre des avocats du barreau de Louxembourg*, judgment of 19 September 2006, case no. C-506/04, ECLI: EU:C:2006:587, paras. 51 and 53.

129 See ECJ, *Raija-Liisa Jokela i Laura Pitkäranta*, judgement of 22 October 1998, cases nos. C-9/97 and C-118/97, ECLI:EU:C:1998:497, para. 20; ECJ, *Walter Schmid*, judgment of 30 May 2002, case no. C-516/99, ECLI:EU:C:2002:313, para. 41.

Portuguese Judges case,[130] or the independence of Polish Courts.[131] In the *Independence of the Supreme Court* case, the ECJ used it to shield a group of Supreme Court Judges from premature removal from office.[132] In the present context, then, could the guarantee of irremovability prevent removing from office those unlawfully appointed as judges?

The guarantee of the irremovability is not absolute,[133] thus, it would be permissible to deprive of judicial positions those appointed therein in breach of the law, yet under strict conditions of formal and substantive legality as well as proportionality. In principle, the removal of a judge would be thus possible under sufficiently precise statutory provisions, following the appropriate procedure, and proportional to legitimate objectives, that is, on account of legitimate and compelling grounds, e.g., in case of a judge deemed unfit to carry out judicial duties due to incapacity or a serious breach of judge's obligations.[134]

Yet, it should be noted that the Union law (or the ECHR) does not enforce such a measure. Accordingly, the principle of primacy of EU law could not be invoked to overcome a national guarantee of irremovability that has a constitutional rank (Article 180(1) Constitution), if it was deemed that those persons are covered by it. For in light of the European requirements, it is sufficient that defective appointees do not rule on cases to which the requirements apply. The potential mechanism for removing from office those appointed in manifest breach of the law must be decided at the

130 ECJ, *Associação Sindical dos Juízes Portugueses* (n. 10), para. 45.

131 ECJ, *Minister of Justice and Equality (Deficiencies in the system of justice)*, judgment of 25 July 2018, case no. C-216/18 PPU, ECLI:EU:C:2018:586, para. 64; ECJ, *Independence of the Supreme Court* (n. 11), para. 76; ECJ, *Independence of the ordinary courts* (n. 6), para. 113.

132 See i.a. Paweł Filipek, 'Nieusuwalność sędziów i granice kompetencji państwa członkowskiego do regulowania krajowego wymiaru sprawiedliwości – uwagi w świetle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej', Europejski Przegląd Sądowy 2019/12, 4–14 (9–11); Piotr Bogdanowicz, Maciej Taborowski, 'Regulacje dotyczące stanu spoczynku jako narzędzie służące odsunięciu określonej grupy sędziów od pełnienia urzędu na stanowisku sędziego Sądu Najwyższego – uwagi na tle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej', Europejski Przegląd Sądowy 2019/12, 15–25.

133 ECJ, *Independence of the Supreme Court* (n. 11), para. 76; ECtHR, *Ástráðsson* (n. 11), para. 239.

134 ECJ, *Independence of the Supreme Court* (n. 11), paras 76 and 79; cf. ECJ, *Josef Köllensperger GmbH & Co. KG, Atzwanger AG*, judgment of 4 February 1999, case no. C-109/97; ECLI:EU:C:1999:52, paras 21 and 24.

national level. The European requirements, on the one hand – may provide additional legitimacy for it, as the adjudicating of judges who do not meet such requirements undermines the legal protection of the Union law and the ECHR, while on the other hand – can contribute to keeping national arrangements in check by defining the conditions for their use so that they are not excessive (disproportionate) and do not allow for abuse of State power.

Still, we may point to several arguments for the permissibility of removal from office of defective appointees, despite the constitutional guarantee of the irremovability of judges.

Firstly, in view of its unconstitutional nature, the NCJ could not effectively select candidates for judicial positions and could not formulate legally valid requests to the President of the Republic for appointment to judicial positions. As a result, the President – not having the constitutionally mandatory requests – could not effectively make acts of appointment of the persons concerned. Thus, the unlawful acquisition of judicial positions should itself be ineffective.

Secondly, since these persons were appointed as judges in an unconstitutional procedure, then, to the extent of their unconstitutionally gained status, they are not eligible to claim constitutional protection (*ex in iuria ius non oritur*). This conclusion can be, indeed, substantiated irrespective of whether or not they are recognised as judges. If it were considered that they had not been established as judges at all (they are non-judges), their protection against removal from office would not be born in the first place. If, on the other hand, they were considered to have been established as judges, though in a defective manner, the unlawfulness of their status would nevertheless preclude protection under the guarantee of irremovability.

Thirdly, as the ultimate yardstick for permissible removal of a judge, the ECJ, in the context of protecting Supreme Court Judges from premature termination of their functions, pointed to the absence of any 'reasonable doubt in the minds of individuals as to the imperviousness of the court to external factors and its neutrality with respect to the interests before it'.[135] The elimination of the existing reasonable doubts, especially when already confirmed by final international or domestic rulings, and the reinstatement of the court's independence would further legitimize the removal from that court of persons whose appointment therein raised those very doubts. The guarantee of irremovability safeguards the independence of

135 ECJ, *Independence of the Supreme Court* (n. 11), para. 79.

judges; however, if it has already been established that unlawfully appointed persons do not warrant independence due to the nature and gravity of the irregularities in their appointment procedure, then the guarantee of their irremovability becomes devoid of purpose.

Fourthly, an additional argument supporting the denial of constitutional protection to unlawful appointees is their intentionality in participating in a breach of the law by engaging in an unlawful procedure and accepting an act of appointment issued in its wake (bad faith). Since those unlawfully appointed were aware of the flaws of the procedure, yet, they participated in it and accepted the act of nomination – now should not benefit from their own unlawful conduct. Those who applied to the NCJ's selection for judicial positions must have been aware of the underlying constitutional objections to the new procedures for taking up the office of judge, which exposed the undue influence of political authorities on the process of filling judicial positions.[136]

The impact of the proportionality criterion could be demonstrated in differentiating the situation of irregular appointees by the nature and gravity of the irregularities that occurred in the process of their appointment as well as the level of the court to which they were packed. In general, the intensity of breaches in the nomination procedure has been the highest for appointments to the Supreme Court (see Section III.4 and 5 above), so the cumulative effect there, is also the strongest. Likewise, certain 'courts' – in particular the Disciplinary Chamber and the Chamber for Extraordinary Control and Public Affairs of the Supreme Court – have themselves been compromised in their entirety. They were newly created, packed exclusively with new appointees, granted special character and powers so that other State authorities could use them to generally control the content of judicial decisions in Poland. In their case, it is not only the individual intention of the appointees to participate in unlawful procedures and bodies but also the deliberateness of the national authorities to introduce arrangements that cannot be reconciled with the rule of law and judicial independence,[137]

136 The Supreme Court, while referring to those newly appointed to it, stated itself that '[i]n 2018–2019, there was a special "transfer window" in the Polish legal system in which appointments to serve on the Supreme Court were handed out in flagrant and manifest breach of the constitutional standard, and with full awareness of it by all concerned', Supreme Court, decision of 15 July 2020, case no. II PO 16/20, para. 50; see also Supreme Court, Resolution of 23 January 2020 (n. 70), para. 45.

137 See n. 56.

that justify the dismantling of such bodies while denying their members protection against removal from office.

VI. Rectification of Defective Judicial Appointments

Addressing the irregularities of judicial appointments may range from an extreme – either *'doing nothing'*; or '*throwing everyone out'* – to some moderate arrangements. Extreme solutions, briefly discussed in points 2 and 3 below, may produce consequences that are difficult to accept. In their case, the cure may turn out to be as bad as the disease. In contrast, moderate arrangements (points 4 and 5) are supported by the balancing of all relevant factors (see Section V above).

1. A precondition: re-composition of the NCJ

A prerequisite for remedying defective judicial appointments is to address the root cause of their irregularity, that is, the unconstitutional nature of the current National Council of the Judiciary. Without doing so, any subsequent appointments involving the NCJ will equally be flawed. The composition of the NCJ must ensure that it is able to perform its task of objectively selecting candidates for judicial posts in a manner that does not raise doubts as to the legitimacy and independence of that body and, accordingly, the legitimacy and attributes of the persons nominated by it.

It does not need to be a return to exactly the same model as before, but it must still fit within the minimum constitutional parameters. The Constitution resolves that although the NCJ is composed of representatives of all three branches of state power, the judiciary forms a large majority within it, as 17 of the 25 seats are for judges.[138] In line with the NCJ's crucial task of guaranteeing the independence of courts and judges,[139] its 15 judge-members should be selected by their peers (by other judges) and not by political authorities. This was confirmed by the Constitutional Tribunal back in 2007.[140]

138 See Art. 186(2) Constitution.
139 Art. 186(1) Constitution.
140 See n. 69.

2. Recognition of defective appointments

The option of full recognition of defective judicial appointments could be looked into. It is an option of not implementing any corrective measures, and indeed, doing nothing about the irregularities in the establishment of a large group of judges. It would amount to adopting a 'thick line' separating the past from the future and accepting the situation as it is.

However, such recognition does not appear to be a valid solution. It does not resolve acute problems but rather evades them. It still leaves the door open to further challenging irregular appointments and rulings made by defectively appointed persons both domestically and in international procedures. It also rewards those who intentionally infringed the law for personal gains, entrenches the holding of unlawfully obtained positions, and severs judges who stood up for the rule of law and judicial independence. As such, it is deeply unjust. For these reasons, it is inevitable to resolve the problem of defective appointments by expressly addressing the flaws in the appointment procedure identified in international and domestic jurisprudence.

In addition, the acknowledging of irregular appointments would at least require an explicit act of the legislature. Eventually, since the appointments followed a procedure contrary to the Constitution, their confirmation would in principle require approval by an act of a constitutional rank, thus redressing and ending the resulting infringements. Failing a constitutional act – which, because of the 2/3 qualified majority threshold,[141] may be difficult to pass – it might probably be acceptable to confirm appointments by ordinary legislation,[142] if enacted to bring the courts into compliance with constitutional and European requirements, taking into account the applicable case law, including the ECtHR and the ECJ. The enactment of such a law could be preceded by seeking an opinion from the Venice Com-

141 See Art. 235(4) Constitution.

142 It should be kept in mind that national authorities have already tried to statutorily legalize irregular judicial appointments, e.g., by introducing a definition of a 'judge' as a person appointed by the President of the Republic, or prohibiting a review of the legality of the appointment, and introducing new disciplinary offenses for this purpose). They have not fully produced the results expected by the authorities. They have actually reduced challenging irregular judicial appointments, but have not eliminated it, as they are disregarded or contested by some courts. See also, among others, infringement proceeding in case C-204/21 *Independence and privacy of judges* (n. 96).

mission. Still, the ultimate arbiter of the legitimacy of such arrangements would be the jurisprudential stance of national and European Courts.

3. Rejection of defective appointments

The opposite extreme is to reject all appointments made in manifest violation of the law. This 'zero option', relies on cancelling defective appointments and restoring the situation *quo ante*.[143]

Such a solution satisfies the requirement of justice, in the sense of taking away benefits illegitimately and unlawfully obtained. It is, therefore, morally justified. However, it would have serious public implications, especially for the functioning of the judicial system. It would cause a sudden loss of a significant number of judges, delay the handling of cases, increase the inefficiency of the judicial system, and ultimately curtail the right of individuals of access to a court and further erode public confidence in the judiciary. For these reasons, this is not a reasonable solution either. In addition, the annulment of judicial appointments requires consideration of its consistency with the guarantee of the irremovability of judges (see Section V.4 above).

4. Balancing exercise: search for temperate options and a lesson from Ástráðsson

Indeed, the manner of rectifying defective appointments should be balanced and represent a compromise between conflicting interests and values. It should weigh considerations of the full reinstatement of the right to a properly established court offering necessary guarantees, the interests of the parties to court proceedings, the principles of legal certainty and stability

143 For example, the draft act on regulating judicial appointments, drawn up by the Polish Judges Association *'Iustitia'*, provides that resolutions of the defective NCJ recommending judges are null and void *ex lege*, the judicial positions defectively obtained are considered vacant, and the employment relationships of these judges were not established; see Arts 11 and 12 Draft Act amending the Act on the National Council of the Judiciary, the Act on the Supreme Court and certain other acts, https://www.iustitia.pl/dzialalnosc/opinie-i-raporty/4348-naprawimy-fundamenty-sadow-oszczedzimy-miliony-euro-przedstawiamy-pakiet-projektow-ustaw-o-przywroceniu-praworzadnosci. See also Free Courts Initiative (*Wolne Sądy*), 10 Commandments for Restoring the Rule of Law in Poland, Gazeta Wyborcza of 4 October 2021, para. 2, https://wyborcza.pl/7,173236,27646392,10-commandments-for-restoring-the-rule-of-law-in-poland-free.html.

of judicial decisions, while also bearing in mind certain constitutional constraints, e.g., related to the guaranteed irremovability of judges, as well as policy considerations, like the restoration of public confidence in the judiciary, yet also the passage of time.

From the perspective of ECHR standards and Union law, States are left with a considerable margin of appreciation in how they repair the judicial appointment procedure and address defective appointments already made. Neither the EU law nor the ECHR indicates any single method of how this should be done. The limit of the State's discretion here is to comply with the conclusions of the ECtHR's and the ECJ's rulings and restore courts that meet the necessary requirements of the Union law and the ECHR. Ultimately, whether the measures taken by the State meet the minimum European standards may be subject to further assessment by the competent bodies of the European Union and the ECHR, including the ECJ and the ECtHR.

As a result of the *Ástráðsson* ruling, in which the ECtHR found that a judge appointed to the new Icelandic Court of Appeal was not established by law, Iceland suspended the judges concerned and carried out a new procedure to fill vacated positions. First, once the ECtHR's seven-judge chamber had delivered its ruling on 12 March 2019, the Court of Appeal's activity was immediately suspended, and after it was restored, the four defectively appointed judges did not adjudicate in it. They remained in the Court of Appeal as inactive members. Subsequently, new competitions were opened for the vacant positions in that Court. The defectively appointed persons could also apply therein. Indeed, three of the four submitted their candidacies, were accordingly assessed by the Evaluation Committee, then recommended for the positions, and eventually reappointed.[144] Technically, these judges now occupy positions other than those to which they were originally unlawfully appointed and their status is no longer questioned. The fourth of the irregularly appointed judges who did not apply anew, remained inactive in the Court of Appeal not hearing cases and no cases being allocated to him.

144 See Action report of the Government of Iceland of 15 December 2021 to the Committee of Ministers of the Council of Europe, DH-DD (2021) 1360, 5.

The arrangement adopted by Iceland fully implemented the ECtHR judgment,[145] ensured that cases would not be decided by judges affected by the judgment either directly (the judge ruling on the applicant's criminal case) or indirectly (the three other judges appointed in the same defective manner), while at the same time avoided the controversy as to whether the removal from judicial office of persons appointed therein in manifest breach of the law, *per se*, violates the constitutional guarantee of the irremovability of judges.

Interestingly, the applicant did not apply domestically for a reopening of his case. Such an individual measure was not ordered by the ECtHR either.[146] Moreover, the ECtHR expressly indicated that its judgment did not impose on Iceland an obligation to reopen all similar cases that have since become *res judicata*.[147] However, the similar reservation was not made by the ECtHR in the judgments concerning appointments to the Polish Supreme Court. The Court refrained from deciding on both individual and general measures,[148] leaving their choice to the respondent State.[149]

While in light of the *Ástráðsson* judgment, no automatic reopening of all cases decided by the four defectively appointed judges was required, nonetheless, the parties to such cases were at liberty to request a reopening of their case.[150] Furthermore, Iceland established a new Court on the Reopening of Judicial Proceedings which is – upon parties request not subject to any time limit – to decide whether a case should be reopened i.a. on grounds of the submission of new information which is likely to have had a significant impact on the outcome of the case if it had been available

145 This was confirmed by the decision of the Committee of Ministers of the Council of Europe of 9 March 2022 to close the supervision of the case, CM/Del/Dec(2022)1428/H46–16.

146 Responding to the Court's question as to whether he would seek such a remedy, the applicant initially replied that he would not, then changed his mind but, in the Court's view, did not sufficiently explain this change; see ECtHR, *Ástráðsson* (n. 11), para. 313.

147 ECtHR, *Ástráðsson* (n. 11), para. 314.

148 ECtHR, *Dolińska Ficek and Ozimek* (n. 19), para. 368; ECtHR, *Advance Pharma* (n. 15), para. 364.

149 This choice should be guided by 'the conclusions and spirit of the Court's judgment' and subject to the supervision by the Committee of Ministers of the Council of Europe, see ECtHR, *Dolińska Ficek and Ozimek* (n. 15), para. 367; ECtHR, *Advance Pharma* (n. 15), para. 363; cf. ECtHR, *Ástráðsson* (n. 11), para. 312.

150 Action Report of the Government of Iceland, 6.

when the case was first tried. Such category of 'new information' covers also judgements of international courts, including the ECtHR.[151]

The measures adopted by Iceland in the implementation of the *Ástráðsson* judgment may offer a model of how to deal with unlawful appointments and the rulings made by flawed court benches. These include (i) the immediate recusal (suspension) of defectively appointed persons from hearing cases; (ii) the carrying out of new nomination procedures for the defectively filled judicial positions; (iii) leaving it open to the parties to the proceedings to request reopening of their cases on grounds of defective court composition; (iv) the setting up of a specialised court to decide on the reopening of proceedings.

Whereas the Icelandic experience provides a source of inspiration for similar situations, however, not all of their arrangements can be easily followed in other cases involving defective appointments. Given the number of such appointments in Poland, which continue to grow, it does not seem feasible to immediately suspend from hearing cases all judges appointed in breach of the law. Likewise, it does not seem practicable to repeat all the nomination procedures carried out by the new NCJ since 2018. Such mechanisms should be reserved for the highest levels of the judiciary, especially the Supreme Court and the Supreme Administrative Court, as well as for the courts of appeal. The staffing of these courts with unlawful appointees is particularly blatant since, first – they exercise a supervisory role over the lower courts, they issue final rulings and are responsible for the uniformity of national jurisprudence and secondly – these courts should be composed of judges of the highest professional and ethical competence.

A reasonable point of departure for a balanced general measure on final rulings made by defective appointees should be no automatic reopening of cases, instead granting the parties to the proceedings an individual right to request the reopening of their cases. However, for the sake of legal certainty, the right to request reopening of proceedings should not be indefinite. On the other hand, where cases have not yet become *res judicata*, the deficiency in the court composition should be taken into account *ex officio*. It goes without saying that an assessment of the defective court composition in no case can be made by persons who were also defectively appointed.

151 Action Report of the Government of Iceland, 6–7.

5. Verification mechanisms

The extreme options may give rise to legal, ethical and social questions, urging the search for more nuanced procedures weighing up different rationales and values that will ultimately lead to a decision on whether a judge should remain in the irregularly awarded position. Conceivable mechanisms may vary depending on the scope of persons subject to or exempted from verification (all unlawfully appointed individuals, or not all such persons, e.g., exempting junior judges); the way of initiating the procedure (*ex officio*, or at the request of the person concerned, i.e. the irregular judge); the exact scope of the substantive verification (verification criteria); the body undertaking the verification (e.g., the NCJ once its constitutionality is restored, or another body set up for this very purpose); the consequences of a negative verification (the removal from the profession, the return to the previously held position, the reimbursement of unlawfully received salaries, or the eligibility to run in new competitions for judicial positions), etc.[152]

The mechanism for rectifying defective judicial appointments should, in general, meet similar conditions to those of the very procedure for appointing judges, for it may, indeed, lead to a decision on the continuation or termination of the judicial functions of a particular person. Therefore, it should, in the first place, be adopted by an **Act of Parliament** which will: (i) determine who is liable to be verified and who is exempt from verification; (ii) designate the body responsible for carrying out the verification; (iii) specify the verification procedure, including guarantees for the rights of persons subject to verification; and (iv) set out the criteria of the verification decision. Furthermore, the legislature should settle the consequences of a possible change in the status of judges following their negative verification. It should also determine the legal effectiveness of decisions issued by unlawfully appointed judges and possibly provide for a legal remedy to challenge them.

The verification itself should be based on objective substantive **criteria** formulated with as much clarity as possible, to prevent arbitrary decisions.

152 See proposals in i.a. Pech, Jaraczewski (n. 77), 76; Draft Act amending the Act on the National Council of the Judiciary, the Act on the Supreme Court and certain other acts, prepared by the Polish Judges Association *'Iustitia'*, https://www.iustitia.pl/dzialalnosc/opinie-i-raporty/4348-naprawimy-fundamenty-sadow-oszczedzimy-miliony-euro-przedstawiamy-pakiet-projektow-ustaw-o-przywroceniu-praworzadnosci; 10 Commandments for Restoring the Rule of Law in Poland (n. 143).

Such criteria could include: (i) checking whether the nominee met the statutory requirements for appointment to the position for which he or she applied; (ii) whether he or she was nominated whilst another candidate satisfied the criteria of merit to a higher degree; (iii) whether there were any blatant procedural infringements likely to have an effect on the outcome of the competition; (iv) whether there is evidence of undue political influence in obtaining the nomination, etc.

The body carrying out the verification procedure should guarantee the fairness of the proceedings and be independent of other authorities. It is reasonable to entrust such verification to the National Judicial Council after it has healed itself. In principle, a judicial remedy should be available, especially in the case of an unfavourable decision for a judge defectively appointed.

6. Mitigating measures

The verification may cover a significant number of persons whose status varies: junior judges, judges promoted to higher judicial positions, persons appointed to the Supreme Court, including those appointed as judges for the first time and straight to the top judicial positions etc. Accordingly, the type of competition before the NCJ is linked to the resulting level of a person's liability for involvement in an unlawful procedure. With this in mind, as well as the social impact of the verification mechanism, it is legitimate to consider complementing the verification process with some mitigating measures that would reduce its potentially overreaching consequences.

First, the verification would not necessarily cover all judges. In particular, the category of persons who could be relieved from the verification procedure are assessors (junior judges), i.e. the graduates of the National School of Judiciary and Public Prosecution who, after completing their judicial training, passed the judge's examination and accordingly were appointed for the first time to a judicial position in a non-competitive procedure before the NCJ.

Secondly, negative verification would not necessarily amount to complete removal from the judicial profession of the persons concerned. These persons could be eligible to return to a previously held position.[153] They could also apply for the position they held as a result of the unlawful

153 For example, so Article 13(1) Draft Act of the Polish Judges Association *'Iustitia'* (n. 143).

appointment. Yet, the participation in an unconstitutional procedure could then matter in assessing both the candidate's substantive and ethical competence.

Thirdly, the ineffectiveness of the act of appointment would not automatically annihilate judicial decisions made by such a person since the interests of the parties to court proceedings should be protected.[154] Such rulings, in principle, would remain in force, albeit flawed. As flawed, they could for example be revived by filing an appeal, or by reopening the proceedings.

7. Other instruments: disciplinary and criminal responsibility

The verification of judicial appointments is a means of redressing deficiencies in the appointment process. It is not a response to such conduct by certain judges, which itself represented separate, stand-alone breaches of the law. In particular, these are judges failing to implement binding judgments and interim measures issued by the ECtHR and the ECJ; judges acting as disciplinary officers and taking repressive actions against those judges who acted in accordance with the law and were ruling in implementation of ECtHR and ECJ judgments; or judges acting as presidents of courts – and for the same reasons as above – suspending judges from adjudication or transferring them to other judicial divisions. Such judges have assumed the role of the armed arm of a regime that impinges on the rule of law, erodes judicial independence and subordinates the courts to political will.

They should bear disciplinary and criminal responsibility for their actions.[155] Yet, the arrangements involving the individual legal responsibility of selected persons cannot substitute for a verification mechanism. They

154 In this vein, see the Resolution of the Supreme Court of 23 January 2023 (n. 70), which differentiated the legal effects of rulings rendered by defectively composed judicial panels. The most far-reaching consequences were provided for the rulings of the Disciplinary Chamber of the Supreme Court – they were deemed to be made by an unduly appointed or unlawful court composition irrespective of the date of their adoption. The rulings made in other chambers of the Supreme Court – were also deemed to be made by an unduly appointed or unlawful court composition, if they involved a person appointed with the participation of the new NCJ – however, this applied to rulings made after the date of the resolution (23 January 2020). The rulings of common courts made after 23 January 2020 with the participation of persons nominated by the new NCJ were defective only if 'if the defective appointment causes, under specific circumstances, a breach of the standards of independence'; and, again, this applied to rulings made after 23 January 2020.

155 See the contribution of Armin von Bogdandy and Luke Dimitrios Spieker.

are not sufficient, since they do not solve general and systemic problems, and are not capable of achieving some of the remedial goals (see above Section IV). In addition, such proceedings may last for a long time, during which – in view of the presumption of innocence – the defectively appointed persons could continue to adjudicate, generating further irregular and thus challengeable rulings. Indeed, holding people individually responsible should be carried out independently of adopting the necessary systemic solutions. In this way, the former can complement the latter, but not replace them.

VII. Conclusions

The Union law, the ECHR and the jurisprudence of the two European Courts do not answer as to the finality of an act of appointment of a judge made in breach of the law. That answer should be provided by national law and should fit into the limits set by the Constitution. From the perspective of European standards, it is sufficient that the defective appointees do not rule on, respectively, the interpretation and application of Union law and the protection of the rights and freedoms guaranteed by the ECHR. Theoretically, therefore, they can remain 'national judges', yet functionally they are not 'European Judges'.

Addressing unlawful judicial appointments is essential to overhauling the judicial system, reinstating the rule of law, ending the aggravating legal chaos and restoring fully effective legal protection to individuals. Curing defective appointments requires general, systemic arrangements, adequate to the nature and scale of the problem, while based on an Act of the Parliament. Extreme solutions should be avoided, as they can bring too much negative impact. There should bepreferably some arrangements that take account of all axiological, systemic, institutional and social considerations. Indeed, it is a balancing exercise to rectify the legal chaos that has developed, to lay down rules for removing deficiencies in judicial appointments, and to define the legal consequences of rulings made by defective courts. Still, in light of the jurisprudence of the ECJ and the ECtHR, the removal of unlawfully appointed judges would be permissible provided proper enactment, justification and proportionality of the measure.