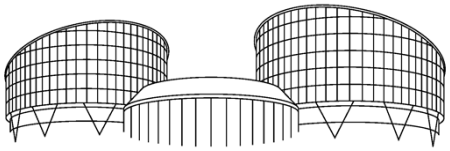

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF GRZĘDA v. POLAND

(Application no. 43572/18)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Lack of judicial review of premature termination *ex lege*, after legislative reform, of a serving Supreme Administrative Court judge's mandate as member of the National Council of the Judiciary • Art 6 applicable • Genuine and serious dispute over "right" under domestic law to serve full term as a NCJ judicial member • First condition of the *Eskelinen* test to be developed so as to cover implicit exclusion in domestic law of access to a court • Second condition of the *Eskelinen* test not met since applicant's exclusion from access to a court was not justified on objective grounds in the State's interest, given the reform's adverse impact on the NCJ's independence • Judicial independence to be understood in an inclusive manner and applied not only to judges' adjudicating role but also to other official judicial functions, such as membership in a judicial council • Necessity to protect independence of a judicial council from the executive and legislative powers so as to safeguard the integrity of the judicial appointment process • Similar procedural safeguards as in cases of judges' dismissal or removal to be available in cases of removal of judicial council members • Successive Polish reforms resulting in the weakening of judicial independence and adherence to rule-of-law standards • Very essence of right of access to court impaired

STRASBOURG

15 March 2022

This judgment is final but it may be subject to editorial revision.

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In the case of Grzęda v. Poland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano, *President,*
Jon Fridrik Kjølbro,
Síofra O'Leary,
Yonko Grozev,
Paul Lemmens,
Krzysztof Wojtyczek,
Valeriu Griţco,
Egidijus Kūris,
Carlo Ranzoni
Alena Poláčková,
Georgios A. Serghides,
Lətif Hüseynov,
Gilberto Felici,
Darian Pavli,
Erik Wennerström,
Raffaele Sabato,
Saadet Yüksel, *judges,*

and Abel Campos, *Deputy Registrar,*

Having deliberated in private on 19 May and 15 December 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns the lack of access to a court for the applicant in connection with the premature and allegedly arbitrary termination of his term of office as a judicial member of the National Council of the Judiciary. He relied on Article 6 § 1 and Article 13 of the Convention.

PROCEDURE

2. The case originated in an application (no. 43572/18) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Jan Grzęda ("the applicant"), on 4 September 2018.

3. The applicant was represented by Mr M. Pietrzak and Ms M. Mączka-Pacholak, lawyers practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 9 July 2019 the Government were given notice of the application.

5. The President of the Section granted leave to submit written comments (Article 36 § 2 of the Convention and Rule 44 § 3) to the European Network of Councils for the Judiciary ("the ENCJ"), Amnesty International jointly with the International Commission of Jurists, the Helsinki Foundation for Human Rights (Poland), the Commissioner for Human Rights of the Republic of Poland and the Polish Judges' Association Iustitia, each of which submitted comments.

6. On 10 November 2020 a Chamber of the First Section informed the parties of its intention to relinquish jurisdiction in favour of the Grand Chamber. On 9 December 2020 the Government filed an objection to the Chamber's proposal. On the same date the applicant consented to relinquishment.

7. On 9 February 2021 a Chamber of that Section, composed of Ksenija Turković, President, Krzysztof Wojtyczek, Linos-Alexandre Sicilianos, Alena Poláčková, Gilberto Felici, Erik Wennerström, Raffaele Sabato, judges, and Renata Degener, Deputy Section Registrar, examined the reasons given by the Government in support of their objection. The Chamber concluded, by a majority, that the objection could not be considered "duly reasoned" and decided that it was unable to accept the Government's objection as valid under the terms of Article 30 of the Convention read in conjunction with Rule 72 §§ 1 and 4[1]. It accordingly relinquished jurisdiction in favour of the Grand Chamber.

8. The composition of the Grand Chamber was decided in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. At the second deliberations, Carlo Ranzoni, substitute judge, replaced Ksenija Turković, who was unable to take part in the further consideration of the case (Rule 24 § 3).

9. The applicant and the Government each filed observations on the admissibility and merits of the application (Rules 71 and 59 § 1).

10. In addition, third-party comments were received from the "Judges for Judges" Foundation (the Netherlands) jointly with Professor L. Pech; the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Mr D. García-Sayán; and the Governments of Denmark and the Kingdom of the Netherlands, all of whom had been given leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rules 71 § 1 and 44 § 3). Additional written comments were submitted by the Commissioner for Human Rights of the Republic of Poland and the Polish Judges' Association Iustitia. The

[1] The reasons for the Chamber's decision were summarised in the press release published on the Court's website on 18 February 2021 at https://hudoc.echr.coe.int/eng-press?i=003-6943268-9336044.

comments submitted to the Chamber by the other third-party interveners were included in the Grand Chamber case file.

11. The Grand Chamber took note of the Chamber's decision to relinquish jurisdiction in favour of the Grand Chamber and of the reasons for its rejection of the Government's objection to relinquishment. The Grand Chamber further noted that the Government had not challenged the Chamber's decision in the proceedings before it. Accordingly, the Grand Chamber took no position on the Chamber's decision to relinquish jurisdiction or the reasons underlying that decision and proceeded with the examination of the case.

12. A hearing, with the use of video-conferencing technology, took place in the Human Rights Building, Strasbourg, on 19 May 2021 (Rules 71 and 59 § 3). The Commissioner for Human Rights of the Republic of Poland, who had been granted leave by the President to participate in the oral proceedings before the Grand Chamber, took part in the hearing.

There appeared before the Court:

(a) *for the Government*
Mr J. SOBCZAK, *Agent*,
Ms A. ROGALSKA-PIECHOTA, *Co-Agent*;

(b) *for the applicant*
Mr M. PIETRZAK,
Ms M. MĄCZKA-PACHOLAK, *Counsel*,
Mr A. PŁOSZKA, *Adviser*,
Mr J. GRZĘDA, *Applicant*;

(c) *for the third-party intervener the Commissioner for Human Rights of the Republic of Poland*
Mr M. TABOROWSKI, Deputy Commissioner,
Mr M. WRÓBLEWSKI, Director, Office of the Commissioner,
Mr P. FILIPEK, Chief Specialist, Office of the Commissioner.

The Court heard addresses by Mr Sobczak, Mr Pietrzak, Ms Mączka-Pacholak and Mr Filipek, as well as their replies to questions put by judges.

THE FACTS

13. The Court considers it essential to the understanding of the nature and context of the applicant's complaint, as well as of the circumstances in which it arose, which are outlined in greater detail in paragraphs 29 et seq. below, to provide the broader domestic background to the present proceedings.

I. BACKGROUND AND CONTEXT OF THE CASE

14. A candidate of the Law and Justice (*Prawo i Sprawiedliwość*) Party won the presidential elections in May 2015 and took office in August 2015. In the general election of 25 October 2015, a coalition led by the same party obtained a majority in the *Sejm* (the lower house of Parliament) and formed a government. It fell short of the majority required to change the Constitution.

15. One of the first actions of the new majority concerned the Constitutional Court. On 8 October 2015 the previous, seventh-term *Sejm* had elected five new judges of the Constitutional Court. Three of these were to replace judges whose terms of office were to come to an end on 6 November 2015, i.e. within the term of the previous *Sejm*, and two were to replace those whose terms of office were due to expire on 2 and 8 December 2015. The President of the Republic declined to swear them in. The new, eighth-term *Sejm* held its first session on 12 November 2015, which marked the beginning of its term. On 25 November 2015 the new *Sejm*, in an unprecedented move, adopted resolutions revoking the election of the five judges by the previous *Sejm*. Then, on 2 December 2015, it elected five judges who were immediately sworn in by the President of the Republic. In its judgment of 3 December 2015 (no. K 34/15), the Constitutional Court held that a judge of that body should be elected by the *Sejm* whose term covered the date on which his or her seat became vacant. It confirmed that finding in four subsequent rulings[2]. In consequence, the seventh-term *Sejm* had had the power to elect three judges, while the eighth-term *Sejm* could validly elect two. The election of three judges (M.M., L.M. and H.C.) in December 2015 to seats that had been already filled in October sparked an intense legal controversy and marked the beginning of what is widely referred to by analysts as the rule of law crisis in the country.

16. A detailed account of the relevant facts relating to the Constitutional Court can be found in the judgment in *Xero Flor w Polsce sp. z o.o. v. Poland* (no. 4907/18, §§ 4-63, 7 May 2021). In that judgment, the Court held that there had been a violation of Article 6 § 1 as regards the right to a "tribunal established by law" on account of the participation in the proceedings before the Constitutional Court of the above-mentioned Judge M.M., whose election it found to have been vitiated by grave irregularities.

17. In January 2017 the Government announced plans to reform the ordinary courts, the National Council of the Judiciary (*Krajowa Rada Sądownictwa*; "the NCJ") and the Supreme Court.

18. With regard to the ordinary courts, the Act of 12 July 2017 amending the Act on the Organisation of Ordinary Courts increased the powers of the Minister of Justice, who is at the same time the Prosecutor General (see

[2] Judgment of 9 December 2015, no. K 35/15; decision of 7 January 2016, no. U 8/15; judgment of 9 March 2016, no. K 47/15; and judgment of 11 August 2016, no. K 39/16.

paragraph 38 below), in relation to the internal organisation of the courts and to the appointment and dismissal of the presidents and vice-presidents of the courts. It also extended his powers in the areas of promotion and discipline. The Act of 12 July 2017 provided that within the six-month period following its adoption, the Minister could dismiss and appoint court presidents and vice-presidents at his discretion. Two court vice-presidents removed from their posts under this legislation lodged their applications with the Court, complaining that their premature removal was not amenable to judicial review. In its judgment in *Broda and Bojara v. Poland* (nos. 26691/18 and 27367/18, 29 June 2021) the Court found that the applicants had been deprived of the right of access to a court, in violation of Article 6 § 1, in relation to the Minister's decisions removing them from their posts before the expiry of their respective terms of office.

19. In July 2017 Parliament also adopted the Act Amending the Act on the NCJ and the Act on the Supreme Court. However, the President of the Republic vetoed them. Subsequently, the President submitted to the *Sejm* his own legislative proposals for the institutions concerned.

20. In December 2017 Parliament adopted the Act Amending the Act on the NCJ ("the 2017 Amending Act"). The 2017 Amending Act transferred the power to elect the fifteen judicial members of the NCJ from respective assemblies of judges to the *Sejm*. It also terminated prematurely the terms of office of those judicial members who, like the applicant, had been elected under the previous regulations (see paragraphs 52 and 54 below).

21. In December 2017 Parliament also adopted the new Act on the Supreme Court. The Act, *inter alia*, modified the organisation of the Supreme Court by creating two new chambers: (1) the Disciplinary Chamber (*Izba Dyscyplinarna*) and (2) the Chamber of Extraordinary Review and Public Affairs (*Izba Kontroli Nadzwyczajnej i Spraw Publicznych*). The judges of these new chambers were appointed by the President of the Republic on the recommendation of the new NCJ. In the *Reczkowicz v. Poland* (no. 43447/19, 22 July 2021) judgment, the Court held that the Disciplinary Chamber of the Supreme Court was not a "tribunal established by law" and found a violation of Article 6 § 1 of the Convention in that regard. This judgment became final on 22 November 2021 when the panel of the Grand Chamber took note of the Government's withdrawal of its request to refer that case to the Grand Chamber. In its judgment in *Dolińska-Ficek and Ozimek v. Poland* (nos. 49868/19 and 57511/19, 8 November 2021, not yet final on the date of adoption of the present judgment) the Court found a similar breach of Article 6 § 1 of the Convention, having concluded that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court was not a "tribunal established by law"[3].

[3] The Court will not refer to *Dolińska-Ficek and Ozimek v. Poland* or to any other of its judgments that were not final at the time of adoption of the present judgment, or to judgments of other courts that were delivered after the adoption of the present judgment.

22. The new Act on the Supreme Court also lowered the retirement age for Supreme Court judges from 70 to 65 years, with the consequence that about one-third of the judges of that court would have to leave their posts prematurely, including the First President of the Supreme Court. The President of the Republic was granted discretion to decide whether to allow the persons concerned to continue in office beyond that age. The European Commission brought an infringement action against Poland in connection with the adoption of the law. The Court of Justice of the European Union ("the CJEU") issued an interim order on 17 December 2018 suspending the application of the relevant provisions of the law (C-619/18 R, EU:C:2018:1021). It then held in its judgment of 24 June 2019 (C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531) that lowering the retirement age in respect of sitting judges failed to fulfil Poland's obligations under EU law. Following the interim order of 17 December 2018, Parliament amended the Act on the Supreme Court. It limited the application of the new retirement age of 65 solely to judges of the Supreme Court who had entered into service after 1 January 2019 and allowed the reinstatement to that court of judges who had entered into service before that date and who had been obliged to retire under the contested legislation.

23. Furthermore, the rules on the disciplinary liability of judges were significantly changed by the Act of 8 December 2017 on the Supreme Court amending the Act on the Organisation of Ordinary Courts. The amended legislation considerably increased the role of the Minister of Justice/Prosecutor General in the area of judicial discipline. According to the Venice Commission, there was "an intensification of the disciplinary procedures against ordinary judges" and "inquiries ... were opened ... in respect of more than forty judges who were vocal in criticising the reform"[4]. In October 2019 the European Commission brought infringement proceedings on the grounds that Poland had failed to fulfil its obligations under EU law by adopting the new disciplinary regime for judges. On 8 April 2020 the CJEU in its interim decision ordered Poland to suspend the application of the provisions on the powers of the Disciplinary Chamber with regard to disciplinary cases concerning judges pending the resolution of the case (C-791/19 R, EU:C:2020:277). Despite the CJEU's interim decision, the Disciplinary Chamber has continued to operate and has decided, for example, to lift immunity from prosecution in cases against judges. In its judgment of 15 July 2021 (C-791/19, *Commission v. Poland (Disciplinary regime for judges)*, EU:C:2021:596), the CJEU held that the disciplinary regime for

[4] See the joint urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Amendments to the Law on the Common Courts, the Law on the Supreme Courts and Some Other Laws of 18 June 2020, CDL-AD(2020)017, § 11. On 1 September 2020 a case of this kind was communicated to the Government: *Tuleya*, no. 21181/19.

judges in Poland was not compatible with EU law (see paragraphs 160-161 below).

24. On 20 December 2017 the European Commission initiated for the first time the procedure under Article 7(1) of the Treaty on European Union (TEU). The Commission submitted a reasoned proposal to the Council of the European Union, inviting it to determine that there was a clear risk of a serious breach of the rule of law by the Republic of Poland. It referred, *inter alia*, to the threats to the independence of the ordinary judiciary. The Commission observed that over a period of two years more than thirteen consecutive laws had been enacted affecting the entire structure of the justice system in Poland. The common pattern in all these legislative changes was that the executive or legislative branches were systematically enabled to interfere significantly with the composition, powers, administration and functioning of those authorities and bodies (see paragraph 163 below).

25. In December 2019 Parliament passed the Act Amending the Act on the Organisation of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts ("the 2019 Amending Act"). The 2019 Amending Act, which entered into force on 14 February 2020, introduced new disciplinary offences and sanctions for judges, including for questioning the lawfulness of judicial appointments made with the participation of the new NCJ. On 31 March 2021 the European Commission commenced infringement proceedings in respect of that law. It considered that the law undermined the independence of Polish judges and was incompatible with the primacy of EU law. Moreover, the law prevented Polish courts, including by using disciplinary proceedings, from directly applying certain provisions of EU law protecting judicial independence, and from making references for preliminary rulings on such questions to the CJEU. The Commission also decided to ask the CJEU to order interim measures until it had given a judgment in the case. On 14 July 2021 the Vice-President of the CJEU issued an interim order in the case (C-204/21 R, EU:C:2021:593). Poland was required to suspend, *inter alia*, the application of several provisions of the Act on the Supreme Court and the Act on the Organisation of Ordinary Courts, as amended by the 2019 Amending Act, relating to the competences of the Disciplinary Chamber of the Supreme Court. On 27 October 2021 the Vice-President of the CJEU ordered Poland to pay to the European Commission a periodic penalty payment of EUR 1,000,000 per day until such time as that Member State complies with the obligations arising from the order of 14 July 2021, or, if it fails to do so, until the date of delivery of the final judgment in the case (C-204/21 R, EU:C:2021:878).

26. On 29 March 2021 the Prime Minister lodged an application with the Constitutional Court asking it to review, *inter alia*, the constitutionality of Article 19(1), second subparagraph, in conjunction with Article 4(3) of the TEU interpreted as meaning that, for the purposes of ensuring effective legal protection, the body applying the law was authorised or obliged to apply legal

provisions in a manner inconsistent with the Constitution. The Prime Minister further challenged the constitutionality of Article 19(1), second subparagraph, in conjunction with Article 2 TEU, interpreted as empowering a court to review the independence of judges appointed by the President of the Republic and to review a resolution of the NCJ concerning a proposal to the President of the Republic for appointment of a judge. In its judgment of 7 October 2021 (no. K 3/21), the Constitutional Court held that the contested provisions of the TEU were incompatible with the Constitution (see paragraphs 96-97 below).

27. On 27 July 2021 the Prosecutor General (on the connection between this office and that of Minister of Justice see paragraph 38 below) lodged an application with the Constitutional Court challenging the constitutionality of Article 6 § 1 of the Convention in connection with the Court's judgment in *Xero Flor w Polsce sp. z o.o. v. Poland* (cited above). He alleged that Article 6 § 1 of the Convention was unconstitutional, in so far as (1) the term "tribunal" used in that provision included the Constitutional Court, (2) it allowed the proceedings before that court to be covered by the requirements ensuing from Article 6 of the Convention, and (3) it encompassed the review by the Court of the legality of the election of Constitutional Court judges in order to determine whether that court was an independent and impartial tribunal established by law. In its judgment of 24 November 2021 (no. K 6/21), the Constitutional Court partly upheld this challenge (see paragraphs 98-99 below).

28. On 9 November 2021 the Prosecutor General lodged an application with the Constitutional Court alleging that Article 6 § 1 of the Convention was incompatible with several constitutional provisions. This application is related to the Court's judgments in the cases of *Broda and Bojara v. Poland* and *Reczkowicz v. Poland* (both cited above). He claimed that Article 6 § 1 of the Convention was unconstitutional, in so far as (1) it authorised the Court to create under domestic law the subjective right of a judge to hold an administrative post in the judiciary, (2) the requirement of a "tribunal established by law" in that provision did not take account of the universally binding provisions of the Polish Constitution and statutes, as well as the final and universally binding judgments of the Polish Constitutional Court, and (3) it allowed domestic or international courts to determine the compatibility of laws concerning the organisation of the judiciary, the jurisdiction of the courts, and the NCJ with the Polish Constitution and the Convention, in order to ascertain whether the requirement of a "tribunal established by law" was fulfilled. The case is pending before the Constitutional Court (no. K 7/21).

II. THE CIRCUMSTANCES OF THE CASE

29. The applicant was born in 1956 and lives in Piła.

30. In 1986 the applicant was appointed as judge of the Trzcianka District Court, and subsequently as judge of the Poznań Regional Court. In April 1999 he was appointed as judge of the Supreme Administrative Court. At the relevant time he was a member of the Gorzów Wielkopolski Regional Administrative Court.

31. On 11 January 2016 the applicant was elected by the General Assembly of Judges of the Supreme Administrative Court with the participation of the Representatives of the General Assemblies of Judges of the Regional Administrative Courts as a member of the National Council of the Judiciary for a four-year term of office, that is until 11 January 2020 (see the relevant constitutional and legislative provisions at paragraphs 66 and 68 below).

32. The NCJ is a constitutional organ tasked with safeguarding the independence of courts and judges (see Article 186 § 1 of the Constitution). One of its principal functions is to evaluate and nominate candidates for appointment to judicial office for every level and type of court. The candidates proposed by the NCJ are submitted to the President of the Republic for appointment.

33. Article 187 § 1 of the Constitution provides that the NCJ is composed as follows: (1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; (2) fifteen judges elected from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts; and (3) four members elected by the *Sejm* from among its deputies and two members elected by the Senate from among its senators (see paragraph 66 below).

34. In January 2017 the government announced plans for a large-scale judicial reform regarding the NCJ, the Supreme Court and the ordinary courts. The Minister of Justice explained that a comprehensive reform was needed in order to, *inter alia*, increase the efficiency of the administration of justice and make the election of NCJ members more democratic.

35. On 14 March 2017 the government introduced in the *Sejm* a bill, drafted by the Ministry of Justice, to amend the 2011 Act on the National Council of the Judiciary. The bill proposed that the judicial members of the NCJ would be elected by the *Sejm* instead of by judicial assemblies and that the term of office of the sitting judicial members would be terminated. Two further bills on the Supreme Court and the Organisation of Ordinary Courts were introduced by the deputies of the majority.

36. The bill amending the Act on the NCJ was critically assessed by the NCJ, the Supreme Administrative Court, the National Bar Association, the Commissioner for Human Rights and the Organization for Security and Cooperation in Europe (OSCE)'s Office for Democratic Institutions and Human Rights (ODIHR) in their respective opinions of 30 and 31 January, 5 and 12 April and 5 May 2017. The opinions stated that the proposed

amendments violated the Constitution in that they allowed the legislature to take control of the NCJ in contradiction with the principle of the separation of powers. According to the same opinions, the amendments would also result in the unconstitutional termination of the constitutionally prescribed four-year term of office of the judicial members of the NCJ.

37. In the framework of the legislative process, the Government appointed a number of constitutional law experts with a view to assessing the constitutionality of the proposed measures concerning the NCJ. Those experts stated that the existing practice of electing judicial members of the NCJ from among judges for an individual term of office – instead of a joint term – was not based on the Constitution. The Government did not produce the opinions of the above-mentioned experts.

38. On 11 April 2017 the Prosecutor General, who is at the same time the Minister of Justice, according to the Act on the Public Prosecutor's Office of 28 January 2016, which merged these two offices, lodged an application with the Constitutional Court, challenging the constitutionality of certain provisions of the Act of 12 May 2011 on the National Council of the Judiciary (*ustawa z 12 maja 2011 r. o Krajowej Radzie Sądownictwa*; "the 2011 Act on the NCJ"). According to the Polish Constitution, the Prosecutor General is entitled to apply to the Constitutional Court (Article 191 § 1(1) of the Constitution). The Prosecutor General alleged that as regards the election of judges to the NCJ the impugned provisions treated different groups of judges unequally depending on the level of jurisdiction, resulting in unequal representation of judges on the NCJ. He further challenged the provisions regulating the term of office of the elected judicial members of the NCJ, claiming that treating their terms of office as individual in nature was contrary to the Constitution.

39. The Constitutional Court gave judgment on 20 June 2017 (no. K 5/17) in a bench composed of judges M.W., G.J., L.M., M.M. (the rapporteur) and J.P.

40. In its general observations, the Constitutional Court noted that the NCJ was a constitutional body tasked with protecting the independence of courts and judges. It also noted that the NCJ was not a judicial authority, and thus the constitutional standards relevant for courts and tribunals were not applicable to the NCJ. Nor should the NCJ be regarded as part of judicial self-governance. The hybrid composition of the Council made it an organ which ensured the balance of and cooperation between the different powers of government.

41. The Constitutional Court held that the provisions governing the procedure for electing members of the NCJ from among judges of the ordinary courts and of administrative courts[5] were incompatible with

[5] Section 11(3) and (4) in conjunction with section 13(1) and (2) as well as section 11(2) in conjunction with section 12(1) of the 2011 Act on the NCJ.

Article 187 § 1 (2) and § 4 in conjunction with Article 32 of the Constitution. The impugned provisions introduced an unjustified differentiation with regard to the election of judges to the NCJ from the respective levels of the ordinary and administrative courts and did not provide equal opportunities to stand for election to the NCJ. The Constitutional Court found that the impugned provisions treated unequally judges of district and regional courts in comparison with judges of courts of appeal, as well as judges of district courts in comparison with judges of the regional courts. The same went for judges of the regional administrative courts in comparison with judges of the Supreme Administrative Court.

42. Secondly, the Constitutional Court held that section 13(3) of the 2011 Act on the NCJ, interpreted in the sense that the term of office of members of the NCJ elected from among judges of ordinary courts was individual in character, was incompatible with Article 187 § 3 of the Constitution. It noted that there had been an established interpretation by the NCJ that the term of office of judges elected as members of the NCJ was to be individually calculated for each of those members. The Constitutional Court disagreed with that interpretation on the ground that it was contrary to the linguistic, systemic and functional interpretation of Article 187 § 3 of the Constitution. It noted that that provision used the phrase "term of office" in the singular and related it to the phrase "elected members of the NCJ" in the plural. Accordingly, this meant that all elected members of the NCJ had one, joint term of office and this applied equally to judges, deputies and senators. Accepting the individual character of the term of office for judicial members of the NCJ would result in an unjustified differentiation in status between judicial members on the one hand, and deputies and senators, on the other, as another category of elected members of the Council. The Constitutional Court found that the proper interpretation of Article 187 § 3 of the Constitution required that the term of office of all elected members of the NCJ be of a joint character.

43. With regard to the election of judicial members of the NCJ, the Constitutional Court held, in so far as relevant:

> "The Constitutional Court in the current composition does not agree with the [Constitutional Court's] position adopted in the judgment [of 18 July 2007,] no. K 25/07 that the Constitution specifies that [judicial] members of the NCJ shall be elected by judges. Article 187 § 1 (2) of the Constitution only stipulates that these persons [judicial members of the NCJ] are elected from among judges. The Constitution did not specify who should elect those judges. Thus, it follows from the Constitution who can be elected as a member of the NCJ, but it is not specified how to elect judicial members of the Council. These matters were delegated to statutory regulation. There is no obstacle to the election of judges to the NCJ by judges. However, one cannot agree with the assertion that the right to elect [judicial members of the NCJ] is vested solely with assemblies of judges. While Article 187 § 1 (3) of the Constitution clearly indicates that deputies are elected to the NCJ by the *Sejm* and senators by the Senate, there are no constitutional guidelines in respect of judicial members of the NCJ. This means that the Constitution does not determine who may elect judges to the NCJ. For this reason, it

should be noted that this question may be differently regulated within the limits of legislative discretion."

44. The Constitutional Court noted with regard to the principle of tenure that an elected judicial member of the NCJ was legally protected from removal; however, that protection was not absolute. It agreed with the position previously expressed by the Constitutional Court (judgment of 18 July 2007, no. K 25/07) that a breach of tenure could only be justified by extraordinary, constitutionally valid reasons. The Constitutional Court found that the Constitution did not lay down the tenure for the NCJ. The fact that the majority of the NCJ's members were elected for a four-year term of office did not result in the Council being a tenured body. The tenure was linked not with the body as such, but with certain categories of members composing it. However, the Constitutional Court noted that the guarantee of a four-year tenure for elected members of the NCJ was not absolute. The Constitution, having regard to Article 187 § 4 thereof, allowed statutory exceptions to the four-year tenure.

45. In July 2017 the adoption by Parliament of the three bills referred to above (see paragraphs 18-19 above) sparked large public protests. On 31 July 2017 the President of the Republic vetoed the Act amending the Act on the NCJ and the Act on the Supreme Court. The Act of 12 July 2017 amending the Act on the Organisation of Ordinary Courts was signed and entered into force.

46. Subsequently, on 26 September 2017 the President of the Republic introduced in the *Sejm* his own bill amending the Act on the NCJ (see paragraph 19 above).

47. In the explanatory report it was noted that the bill granted the public, as well as judges, the right to nominate candidates to sit on the Council. The bill referred to the finding made in the Constitutional Court's judgment of 20 June 2017 (no. K 5/17) that the issue of how judicial members of the NCJ were to be elected was left to statutory regulation. In accordance with the bill, the final election from among the nominated candidates was to be carried out by the *Sejm* by a qualified majority of three-fifths of the votes. If election by qualified majority proved impossible, a supplementary election by means of a roll call vote was to be carried out.

48. One of the aims of the bill was to depart from the principle whereby the members of the Council selected from among judges had individual terms of office. The explanatory report noted that the Constitutional Court had found this approach (individual terms) to be contrary to the Polish Constitution in the judgment of 20 June 2017, no. K 5/17. The bill provided that the judicial members of the NCJ were to be elected for a joint term of office. It further proposed that the terms of office of the NCJ's judicial members elected under the previous provisions be terminated. This was considered by the President to be proportionate to the systemic changes being pursued. The explanatory report noted that the major changes to the method

for electing members of the NCJ were an expression of the "democratisation" of the election process and constituted a development of the principle of the rule of law. This "democratisation" was an important public interest and justified shortening the term of office of the NCJ members currently serving.

49. The President's bill was assessed negatively by the National Bar Association, the Supreme Court, the NCJ, the Commissioner for Human Rights and the National Council of Attorneys at Law in their respective opinions of 17, 23, 31 October and 12 November 2017.

50. The Act of 8 December 2017 Amending the Act on the National Council of the Judiciary (*ustawa z dnia 8 grudnia 2017 o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* – "the 2017 Amending Act") was enacted by the *Sejm* and the Senate on 8 and 15 December 2017 respectively. It was signed by the President of the Republic on 20 December 2017 and entered into force on 17 January 2018.

51. According to the Government, the 2017 Amending Act took into account the Constitutional Court's judgment of 20 June 2017 (no. K 5/17) and introduced a joint term of office for the judicial members of the NCJ (see paragraph 175 below).

52. The 2017 Amending Act transferred to the *Sejm* the competence to elect judicial members of the NCJ (section 9a(1)). It provided in section 9a(3) that the joint term of office of new members of the NCJ was to begin on the day following that of their election (see paragraph 71 below). Section 6 of the 2017 Amending Act provided that the terms of office of the judicial members of the NCJ elected on the basis of the previous provisions would continue until the day preceding the beginning of the term of office of the new members of the NCJ (see paragraph 76 below).

53. Eighteen judges, out of about ten thousand, decided to stand for election to the new NCJ. None of the sitting members decided to stand. A candidate for election to the new NCJ had to be supported either by a group of 2,000 citizens or by 25 fellow judges.

54. On 6 March 2018 the *Sejm* elected, in a single vote, fifteen judges as new members of the NCJ by the three-fifths majority. On the same date, the applicant's term of office as a member of the NCJ was terminated *ex lege* pursuant to section 6 of the 2017 Amending Act. The applicant did not receive any official notification regarding the termination.

55. Thirteen of the new judicial members of the NCJ were district court judges (first level of the ordinary courts), one was a regional court judge (second level of the ordinary courts) and one was a regional administrative court judge. There were no representatives of the courts of appeal, the Supreme Court or the military courts.

56. The applicant claimed that the 2017 Amending Act did not provide for any procedure, judicial or otherwise, with a view to contesting the premature termination of his term of office.

57. The applicant remains in office as a judge of the Supreme Administrative Court.

58. There was some controversy related to the fact that the endorsement lists for candidates to the Council were kept confidential by the Speaker of the *Sejm*, despite allegations that some candidates had not obtained the required number of signatures or that they had been supported by only a handful of judges close to the Government, since the great majority had boycotted these elections (see paragraph 224 below, the submissions of Iustitia, a third-party intervener). At the time of the election of new members of the Council, and for nearly two years after that, the endorsement lists remained confidential. The lists were disclosed on 14 February 2020 after the Supreme Administrative Court had ordered so in its judgment of 28 June 2019 (no. I OSK 4282/18).

59. On 17 September 2018 the General Assembly of the European Network of Councils for the Judiciary ("the ENCJ") suspended the NCJ's membership of the Network. The decision was motivated by the General Assembly's view that the new NCJ was no longer independent from the legislative and executive powers. On 28 October 2021, the General Assembly of the ENCJ expelled the NCJ from the Network. The General Assembly based its decision on the finding that the new NCJ failed to comply with one of the statutory conditions for membership, namely that of being independent from the executive and legislative powers. Furthermore, it considered that the new NCJ was failing to safeguard the independence of the Polish judiciary.

60. On 2 November 2018 the NCJ, in its new composition, lodged an application with the Constitutional Court challenging several provisions of the 2011 Act on the NCJ (as amended in December 2017), *inter alia*, section 9a governing the new manner of electing the judicial members of the Council and the nature of their term of office. On 14 February 2019 a group of senators lodged an identical application. The Constitutional Court decided to examine the two applications jointly as case no. K 12/18. The Commissioner for Human Rights requested that the Constitutional Court discontinue the proceedings as inadmissible since the new NCJ was seeking to confirm the constitutionality of the law.

61. On 25 March 2019 the Constitutional Court gave judgment in the case. The bench was composed of Judges J.P. (the president), G.J., Z.J., J.Pi. (the rapporteur) and A.Z. Judge J.Pi. had been elected as judge of the Constitutional Court following the death of Judge L.M., one of the judges elected in December 2015 to a seat that had already been filled. The judgment was given after hearings held in camera on 14 and 25 March 2019.

62. The Constitutional Court held that section 9a of the 2011 Act on the NCJ (as amended), granting to the *Sejm* the competence to elect judicial members of the NCJ and providing that the joint term of office of new members of the NCJ would begin on the day following the date of their election, was compatible with Articles 187 § 1 (2) and § 4 in conjunction with

Articles 2, 10 § 1 and 173 as well as with Article 186 § 1 of the Constitution. It essentially relied on the reasoning of the Constitutional Court's judgment of 20 June 2017 (no. K 5/17).

63. On 26 March 2019 seven judges of the Constitutional Court made public the following statement:

> "In connection with the speculations that appeared after the hearing of the Constitutional Court on 14 March 2019 concerning the Act on the NCJ we feel obliged to inform public opinion:
>
> On 13 March 2019, the seven judges of the Constitutional Court: [L.K., P.P., M.P-S., S.R., P.T., S.W-J. and M.Z.], sent, by email, their position to the President of the Constitutional Court [J.P.]. They requested that action be taken in order for case no. K 12/18 to be considered by the full bench of the Constitutional Court at a [public] hearing. They pointed out that the examination of the case by a panel of judges once again appointed in disregard of the alphabetical order required by law [i.e. the Act on Organisation and Procedure before the Constitutional Court] deprived the Constitutional Court of transparency and credibility.
>
> In matters concerning the [Constitutional] Court and the Constitution, every constitutional judge has the right and duty to present his or her position also in non-judicial procedures. The communicated position constituted an exercise of that right."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. Constitutional provisions

(a) Constitutional provisions prior to the Constitution of 1997

64. The proposal to establish the NCJ was one of the results of "the round table" negotiations between the communist regime and the democratic opposition in 1989.

65. The Act of 7 April 1989 amending the 1952 Constitution of the Polish People's Republic established the NCJ. In accordance with Article 60 § 1 of the amended 1952 Constitution, judges were to be appointed by the President on the motion of the National Council of the Judiciary. The competences and the composition of the NCJ were to be regulated by statute (Article 60 § 3). The Constitutional Act of 17 October 1992 retained the rule that judges were to be appointed by the President on the motion of the NCJ (Article 42).

(b) The Constitution of the Republic of Poland of 1997

66. The Constitution of the Republic of Poland was adopted by the National Assembly on 2 April 1997 and ratified in a referendum on 25 May

1997. It entered into force on 17 October 1997. The relevant provisions of the Constitution read as follows:

Article 2

"The Republic of Poland shall be a democratic State governed by the rule of law and implementing the principles of social justice."

Article 7

"The organs of public authority shall function on the basis of, and within the limits of, the law."

Article 8

"1. The Constitution shall be the supreme law of the Republic of Poland.

2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise."

Article 10

"1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

2. Legislative power shall be vested in the *Sejm* and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and judicial power shall be vested in courts and tribunals."

Article 60

"Polish citizens enjoying full public rights shall have a right of access to public service based on the principle of equality."

Article 91

"1. After promulgation thereof in the Journal of Laws of the Republic of Poland, a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall take precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and take precedence in the event of a conflict of laws."

Article 173

"The courts and tribunals shall constitute a separate power and shall be independent of other branches of power."

Article 178 § 1

"Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes."

Article 179

"Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary."

Article 186

"1. The National Council of the Judiciary shall safeguard the independence of courts and judges.

2. The National Council of the Judiciary may make application to the Constitutional Court regarding the conformity with the Constitution of normative acts to the extent to which they relate to the independence of courts and judges."

Article 187

"1. The National Council of the Judiciary shall be composed as follows:

(1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;

(2) fifteen judges elected from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts;

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

2. The National Council of the Judiciary shall elect, from among its members, a chairperson and two deputy chairpersons.

3. The term of office of those elected as members of the National Council of the Judiciary shall be four years.

4. The organisational structure, the scope of activity and working procedures of the National Council of the Judiciary, as well as the manner of electing its members, shall be specified by statute."

Article 238 § 1

"The term of office of constitutional organs of public authority and the individuals composing them, whether elected or appointed before the entry into force of the Constitution, shall end with the completion of the period specified in provisions valid before the day on which the Constitution comes into force."

2. The previous Acts on the National Council of the Judiciary

67. The first Act on the NCJ was enacted on 20 December 1989. The second Act on the NCJ was enacted on 27 July 2001. Those two Acts provided that the judicial members of the Council were to be elected by the relevant assemblies of judges, at different levels and from different types of court. The 2001 Act on the NCJ expressly stated that judicial members of the NCJ were to be elected for the term of office.

3. *The Act of 12 May 2011 on the National Council of the Judiciary (*Ustawa o Krajowej *Radzie* Sądownictwa*; – "the 2011 Act on the NCJ")*

68. The relevant provisions of the 2011 Act on the NCJ, as in force until 17 January 2018, read as follows:

Section 3

"1. The competences of the Council include:

(1) examination and evaluation of candidates for posts of Supreme Court judges and posts of judges in ordinary courts, administrative courts and military courts as well as posts of junior judges in administrative courts;

(2) submitting to the President of the Republic of Poland applications for appointment of judges in the Supreme Court, ordinary courts, administrative courts and military courts, and the appointment of junior judges in administrative courts;

...

(3) adopting rules of professional ethics of judges and junior judges and ensuring their observance;

(4) expressing opinions on the condition of the judicial staff;

(5) expressing opinions on matters relating to the judiciary, judges and junior judges submitted to it by the President of the Republic of Poland, other public authorities or bodies of judicial self-government;

(6) issuing opinions on draft normative acts concerning the judiciary, judges and junior judges as well as presenting motions in this regard; ...

2 In addition, the Council performs other tasks specified in statutes, in particular:

(1) adopts resolutions on applications to the Constitutional Court to review the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges;

(2) considers applications to retire a judge;

(3) considers requests of retired judges to return to a judicial post;

(4) elects a disciplinary representative for ordinary court judges and junior judges and a disciplinary representative for military court judges;

(5) expresses an opinion on the dismissal of a president or vice-president of the ordinary court and a president or vice-president of the military court; ..."

Section 11

"1. The general assembly of judges of the Supreme Court elects two members of the Council from among the judges of that court.

2. The general assembly of judges of the Supreme Administrative Court, together with the representatives of general assemblies of regional administrative courts, elects two members of the Council from among the judges of the administrative courts.

3. The meeting of representatives of general assemblies of judges of courts of appeal elects two members of the Council from among judges of the courts of appeal.

4. The meeting of representatives of general assemblies of regional court judges elects eight members of the Council from among their number.

5. The assembly of judges of military courts elects one member of the Council from among its body."

Section 12

"1. General assemblies of judges of regional administrative courts elect two representatives from among their members.

2. Representatives of general assemblies of judges of regional administrative courts are elected at the latest one month before the expiry of the term of office of the Council members, elected from among the judges of the administrative courts. The representatives are elected for a period of four years."

Section 13

"1. General assemblies of judges of courts of appeal elect representatives of general assemblies of judges of courts of appeal from among judges of the courts of appeal in the proportion of one fifth of the number of those judges.

2. General assemblies of regional court judges elect representatives of the general assemblies of regional court judges from among their members in the proportion of one fiftieth of the number of regional court judges.

3. The election of representatives referred to in §§ 1-2 shall be carried out at the latest one month before the expiry of the term of office of the members of the Council, elected from among the judge of ordinary courts. The representatives are elected for a period of four years. ..."

Section 14

"1. The service of an elected member of the Council expires before the end of the term of office in the event of:

(1) death;

(2) resignation from office;

(3) expiry of the term of office as deputy or senator;

(4) appointment of a judge to another judicial post, except for appointment of a district court judge to the post of regional court judge ... or a regional administrative court judge to the post of Supreme Administrative Court judge;

(5) expiry or termination of the judge's official term of office;

(6) taking or being placed on retirement.

2. Resigning from the seat in the Council becomes effective at the time when the Chairman of the Council is informed thereof in writing. The Chairman immediately notifies the body which elected the member [concerned].

3. Election of a new member of the Council should take place within two months of the date of the expiry of the term of office."

69. Section 50 of the 2011 Act on the NCJ provided that the terms of office of members of the NCJ and members of the NCJ's Praesidium elected

on the basis of the previous regulations would last until the end of the period for which they had been elected.

4. The 2017 Amending Act

70. The Act Amending the Act on the National Council of the Judiciary and Certain Other Acts (*Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* – "the 2017 Amending Act") was enacted on 8 December 2017. This Act entered into force on 17 January 2018, except for certain provisions which became effective earlier.

71. Section 9a added by the 2017 Amending Act introduced a new manner of electing judicial members of the NCJ. It reads as follows:

> "1. The *Sejm* shall elect from among judges of the Supreme Court, the ordinary, administrative and military courts, fifteen members of the Council for a joint four-year term of office.
>
> 2. When conducting the election referred to in subsection 1, the *Sejm*, to the extent possible, shall take into account the need for representation of judges of particular types and levels of court in the Council.
>
> 3. The joint term of office of the new members of the Council elected from among the judges shall begin on the day following that on which they were elected. Members of the Council from the previous term shall perform their duties until the first day of the joint term of office of new members of the Council."

72. New sections 11a-11e regulate in detail the procedure of nomination and election of judicial members of the Council under the new regime.

73. Section 11a provides, in so far as relevant:

> "1. The Speaker of the *Sejm*, not earlier than one hundred and twenty days and not later than ninety days before the expiry of the term of office of the members of the Council elected from among the judges, shall announce in the Official Gazette of the Republic of Poland, *Monitor Polski*, the commencement of the procedure for submitting candidatures for election to the Council.
>
> 2. The entities entitled to nominate a candidate for the Council shall be groups of at least;
>
> (1) two thousand citizens of the Republic of Poland who are over eighteen years of age, have full capacity to perform legal acts and enjoy full public rights;
>
> (2) twenty-five judges, excluding retired judges.
>
> 3. One application may concern only one candidate for election to the Council. The entities referred to in subsection 2 may submit more than one application.
>
> 4. Candidates for election to the Council shall be notified to the Speaker of the *Sejm* within thirty days from the date of the announcement referred to in subsection 1."

74. Section 11d provides, in so far as relevant:

> "1. The Speaker of the *Sejm* shall request the parliamentary groups to indicate, within seven days, their candidates for election to the Council.

2. [Each] parliamentary group shall indicate, from among the judges whose candidatures have been put forward under section 11a, no more than nine candidates for election to the Council.

3. If the total number of candidates indicated by the parliamentary groups is less than fifteen, the Presidium of the *Sejm* shall indicate, from among the candidates nominated under the section 11a procedure, the number of candidates that are lacking up to fifteen.

4. The competent committee of the *Sejm* shall establish the list of candidates by selecting, from among the candidates indicated pursuant to the provisions of subsections 2 and 3, fifteen candidates for election to the Council, with the proviso that the list shall include at least one candidate indicated by each parliamentary group which has been active within sixty days from the date of the first sitting of the *Sejm* during the term of office in which the election is to take place, provided that such candidate has been indicated by the group within the framework of the indication referred to in subsection 2.

5. The *Sejm* shall elect the members of the Council, for a joint four-year term of office, at its next sitting, by a three-fifths majority in the presence of at least one half of the statutory number of Deputies, voting on the list of candidates referred to in subsection 4.

6. In the event of failure to elect members of the Council in accordance with the procedure set forth in subsection 5 the *Sejm* shall elect the members of the Council by an absolute majority of votes cast in the presence of at least a half of the statutory number of members, voting on the list of candidates referred to in subsection 4.

7. If, as a result of the procedure referred to in subsections 1-6, fifteen members of the Council are not elected, the provisions of sections 11a-11d shall apply accordingly."

75. Section 11e(1) and (3) provides that should a position of the judicial member of the NCJ become vacant before the expiry of the joint term of office, a new judicial member is to be elected for the remaining duration of the original term of office.

76. Section 6 of the 2017 Amending Act provided for termination of the term of office of the judicial members of the NCJ elected under the previous provisions. It reads as follows:

"The term of office of the members of the NCJ referred to in Article 187 § 1 (2) of the Constitution, elected under the previous provisions, shall continue until the day preceding the term of office of the new members of the NCJ without, however, exceeding 90 days from the date of the entry into force of the present Act, unless their term of office has expired earlier."

B. Domestic practice

1. Case-law of the Constitutional Court

(a) Judgment of 26 May 1998, no. K 17/98

77. A group of deputies of the *Sejm* challenged the constitutionality of section 121a, as added to the Act on Elections to Municipal Councils by the Amending Act of 20 March 1998. The impugned provision stipulated that the date for elections to municipal councils in 1998 would be set on a public

holiday falling within one hundred and twenty days of the expiry of the term of office of previous councils, in connection with the recomposition of the system of local government. The Constitutional Court held that the impugned provision was in conformity with the Constitution.

78. The relevant extract from the judgment concerning the term of office of a public body read as follows:

> "Any changes to the duration of a term of office should have effects *pro futuro*, in relation to bodies that are to be elected in the future ... The principle in question does not preclude the introduction of regulations permitting the term of office of a given body to be shortened. Regulations indicating the rules for the shortening of the term of office of a body should also be adopted before the beginning of the term of office of the body concerned and should not, in principle, be amended with regard to the body currently in office. In specific situations, however, it may be permissible to amend the regulation in force and to shorten the term of office of a body, even though the law did not originally provide for this at all, or specified the conditions for the shortening of the term of office in a more restrictive manner. Such a solution is admissible only if a specific constitutional provision does not prohibit it and on condition that special circumstances militate in favour of it."

(b) Judgment of 23 March 2006, no. K 4/06

79. In this case, the Constitutional Court examined the constitutionality of several provisions of the Act of 29 December 2005 on Transformations and Modifications of the Division of Tasks and Competences of State Bodies Responsible for Communications and Broadcasting. The Commissioner for Human Rights and two groups of deputies challenged, in particular, section 21(1) of the Act which provided for the early termination of the terms of office of the then members of the National Broadcasting Council ("the NBC"). The term of office of the NBC members was regulated by the 1992 Broadcasting Act.

80. The Constitutional Court, sitting as a full bench composed of fifteen judges, unanimously held that section 21(1) was incompatible with Article 2 (the rule of law) and Article 7 (legality) in conjunction with Article 213 § 1 of the Constitution. The Constitutional Court found as follows:

> "3.1. Continuity in the operation of a constitutional body
>
> ... The proper exercise by the NBC of its constitutional functions in relation to such important values as freedom of speech, the right to information and the public interest in broadcasting, requires that the independence of the Council members be ensured. One of the most important guarantees of this independence is stability in office, which means the prohibition of arbitrary dismissal before the expiry of the term of office ... On the assumption that stability is ensured in the election of members of the NBC, which is closely linked to the guarantee of the independence of the entire body, regulations leading to the immediate expiry of the terms of office of members of the NBC, without bearing any relation to the reasons for such expiry stipulated in the existing legislation and without the presence of special circumstances that would justify them, should be regarded as unacceptable. ...

> The Constitutional Court does not discern sufficient and constitutionally valid reasons to explain why the change made to the model of operation of the NBC required the immediate shortening of the existing terms of office of the members of the NBC. ... During the parliamentary work, the adoption of transitional provisions, which would respect the guarantees of independence of the NBC members and the requirement of stability of their office, was not even considered. The allegation that the adopted [legislative] changes were arbitrary is therefore upheld, thus entailing a violation of Article 2 and Article 7 in conjunction with Article 213 § 1 of the Constitution."

81. The Constitutional Court further found that the principle of the protection of vested rights, as derived from the rule of law principle (Article 2 of the Constitution), did not apply to membership of the NBC, and could not therefore serve as a basis upon which to assess the shortening of terms of office of the NBC's members.

(c) Judgment of 18 July 2007, no. K 25/07

82. In this judgment, the Constitutional Court reviewed, on an application from the NCJ, the constitutionality of two provisions added to the 2001 Act on the Ordinary Courts by the Act of 16 March 2007 amending the Act on the NCJ of 2001 which introduced the *incompatibilitas* rule, namely that the position of judicial member of the NCJ would be incompatible with the position of president or vice-president of an ordinary court. The first of the impugned provisions (section 25a) stipulated (1) that a judge elected as member of the NCJ could not be appointed to the post of president or vice-president of a court, and (2) that the appointment to such post would be terminated on election to the NCJ. The second of the impugned provisions (section 5) extended the rule included in section 25a to judicial members of the NCJ during their term of office. The Constitutional Court held (by four votes to one) that both provisions were incompatible with Article 187 § 1 (2) of the Constitution, and that the second of these provisions was also incompatible with Article 2 of the Constitution (rule of law).

83. In that judgment, the Constitutional Court first set out some important principles regarding the constitutional position of the NCJ. It stated that the NCJ was a constitutional collegial State authority and that its functions were related to judicial power as it could be inferred from the Constitution's structure as well as from the NCJ's composition and competences.

84. The Constitutional Court held, in so far as relevant:

> "3. ... In vesting the Council with competences relating to the protection of the independence of courts and judges, the Constitution also introduced a mechanism protecting the independence of the Council. Article 187 § 1 of the Constitution provides that the composition of the Council is hybrid: it connects representatives of the judiciary (with compulsory participation of the Presidents of the Supreme Court and the Supreme Administrative Court) with representatives of the executive (the Minister of Justice and a person appointed by the President of the Republic), together with four deputies and two senators. The [1997] Constitution introduced – in comparison to earlier provisions of constitutional rank – constitutional rules concerning the composition of the Council and specified the term of office of its members and the manner of their appointment or

election. In the composition of the Council the Constitution gave a significant majority to elected judges of the ordinary, administrative and military courts and judges of the Supreme Court. The regulations concerning election of judges to the Council are of constitutional rank and of particular constitutional significance, since their status *de facto* determines the independence of this constitutional organ and the effectiveness of the Council's work... In its judgment of 24 June 1998 (no. K 3/98), the Constitutional Court emphasised that the Council – like no other constitutional State organ – is called to protect the independence of courts and judges.

4. The Constitution regulates directly in Article 187 § 1 (2) the principle of election of judges to the NCJ, determining in that way the personal composition of the NCJ. It expressly provides that judges – elected by judges – may be members of the NCJ, without stipulating other additional conditions that would have to be met for their membership in the NCJ. The election is made from among four groups of judges mentioned in Article 187 § 1 (2) of the Constitution. The Constitution does not provide for their [judicial members of the NCJ] removal [from the NCJ], stipulating their four-year term of office in the NCJ. The election procedure set out in the [2001] Act on the NCJ... falls within the boundaries laid down in Article 187 § 1 (2) of the Constitution, securing the principle of election of judges by judges..."

85. The Constitutional Court further held with respect to the specific provisions challenged, in so far as relevant:

"6. ...The Constitution provides in Article 187 § 3 that the term of office of members of the NCJ is four years. The Act on the NCJ contains an exhaustive list of reasons for terminating the office [of the NCJ member]. The reasons specified in section 10 of the 2001 Act on the NCJ (e.g. death, resignation, ... retirement, appointment to another judicial post) have an important substantive justification related to the objective inability to hold office... This [the new rule of *incompatibilitas*] would result in the termination of office of members of the NCJ specified in section 25a of the Act on Ordinary Courts during their term of office and therefore a partial change in the personal composition of the Council prior to the expiry of their term of office or in the shortening of their term of office as presidents and vice-presidents of courts [while] retaining the office of a member of the NCJ.

Imposing new obligations or restrictions on persons holding office – during their term of office – is not prohibited in principle. The Constitutional Court did not find it unconstitutional to introduce certain restrictions during the term of office aimed at eliminating circumstances favourable to corruption ... or a provision regulating the expiry of a term of office in the event of a conviction for an offence committed intentionally... However, in both cases, there was an important public interest [present]...

However, in the case of imposing new obligations or restrictions, the principle of protecting trust in the State and its laws requires laying down a period of adaptation to new provisions. This is of particular importance for citizens in terms of the rights and obligations of persons discharging their functions or appointed for a specific term of office, as well as in respect of expectations on the part of those who elected them.

... Neither a representative of the *Sejm* nor a representative of the Prosecutor General demonstrated extraordinary, constitutionally justified reasons for the adopted regulation, and only such reasons could possibly justify a breach of tenure...

The challenged law entered into force during the term of office of the elected members of the Council and of the presidents and vice-presidents of the courts, requiring the persons covered by it to fulfil a condition which did not exist either at the time when

their candidatures were submitted or at the time of their election. In the present case, the legislature, during the term of office, introduced a new condition requiring certain persons elected to the Council to resign from their office as members of the Council. ...

In its case-law concerning the principle of proportionality, in its aspect regarding the examination of the usefulness and necessity of the norms under review, the Constitutional Court has consistently indicated that if a given aim is achievable through the application of a different measure imposing lesser restrictions on rights and freedoms, then the application of the more onerous measure by the legislature goes beyond what is necessary, and thus violates the Constitution ...

In this light, the Constitutional Court assesses the [challenged law], subjected to constitutional review, introduced with a 14-day *vacatio legis* during the term of office of the Council members, as a disproportionate interference in the constitutionally determined system of appointment and functioning of the NCJ – a constitutional body based on the tenure of elected members. Such changes [introduced by the impugned law] in the organisation of the Council and in the legal situation of judges – members of the Council – would have to be, in order to respect an appropriate adjustment period and to take account of the principle of the term of office, while respecting the requirement of ensuring trust in the State and its laws, implemented with effect from the beginning of the next term of office of the Council members.

The Constitutional Court finds that section 5 in conjunction with section 6 of the amending Act is incompatible with Article 2 and Article 187 § 1 (2) of the Constitution on account of introducing changes during the term of office of Council members."

(d) Judgment of 20 June 2017, no. K 5/17

86. In this judgment of 20 June 2017, on the application of the Prosecutor General, the Constitutional Court declared unconstitutional certain provisions of the 2011 Act on the NCJ (see paragraphs 38-44 above).

(e) Judgment of 25 March 2019, no. K 12/18

87. In its judgment of 25 March 2019, the Constitutional Court found, *inter alia*, that section 9a of the 2017 Amending Act was compatible with the Constitution (see paragraphs 60-62 above).

(f) Judgment of 20 April 2020, no. U 2/20

88. On 24 February 2020 the Prime Minister lodged an application with the Constitutional Court, alleging that the resolution of the joined Chambers of the Supreme Court of 23 January 2020 (see paragraphs 110-116 below) was incompatible, *inter alia*, with several constitutional provisions, certain provisions of the Treaty on the EU and Article 6 § 1 of the Convention.

89. In its judgment of 20 April 2020, the Constitutional Court, by a majority of eleven to three, first found that it had jurisdiction to review the constitutionality of the Supreme Court's resolution, having considered that it could be regarded as "legal provisions" issued by the central State bodies within the meaning of Article 188 (3) of the Constitution. The Constitutional Court then held that the resolution was incompatible with (a) Articles 179,

144 § 3 (17), 183 § 1, 45 § 1, 8 § 1, 7 and 2 of the Constitution; (b) Articles 2 and 4(3) of the TEU; and (c) Article 6 § 1 of the Convention.

90. The Constitutional Court's judgment was given by a full bench composed of fourteen judges, including Judges M.M. and J.W. The latter was elected judge of the Constitutional Court following the death of Judge H.C., one of the judges elected in December 2015 to a seat that had already been filled.

(g) Decisions of 28 January and 21 April 2020, no. Kpt 1/20

91. On 22 January 2020 the Speaker of the *Sejm* referred a question to the Constitutional Court as to whether there was a "conflict of competence between the *Sejm* and the Supreme Court and between the President of Poland and the Supreme Court". As regards the first aspect, the Speaker inquired whether the Supreme Court was competent, by means of a resolution, to change the normative regulation regarding the organisation of the judiciary or whether such competence was vested solely with the legislature. As regards the second aspect, the Speaker asked, *inter alia*, whether the President of the Republic's competence to appoint judges could be interpreted in such a manner that the Supreme Court had jurisdiction to assess the validity of the President's decisions appointing judges.

92. On 28 January 2020 the Constitutional Court issued an interim decision, whereby it suspended the enforcement of the Supreme Court's resolution of 23 January 2020 (see paragraphs 110-116 below) and suspended the prerogative of the Supreme Court to issue resolutions concerning the compatibility with national or international law or the case-law of international courts of the composition of the NCJ, the procedure for presenting candidates for judicial office to the President of the Republic, the prerogative of the President to appoint judges and the competence to hold judicial office by a person appointed by the President of the Republic upon recommendation of the NCJ.

93. On 21 April 2020 the Constitutional Court gave a decision[6], finally ruling on the matter of the "conflict of competence", sitting as a full bench composed of thirteen judges, which included Judge M.M. The Constitutional Court decided to[7]:

> "1. Resolve the conflict of competence between the Supreme Court and the *Sejm* of the Republic of Poland as follows:
>
> (a) The Supreme Court – also in connection with a ruling of an international court – has no jurisdiction to make a 'law-making interpretation' (*wykładnia prawotwórcza*) of legal provisions, by means of [a resolution] which leads to modification in the legal situation regarding the organisational structure of the judiciary;

[6] The translation is based on the text available on the Constitutional Court's website, edited by the Registry.

[7] Five judges annexed separate opinions to the decision.

(b) pursuant to Article 10, Article 95 § 1, Article 176 § 2, Article 183 § 2 and Article 187 § 4 of the Constitution, the introduction of any modification within the scope specified in point 1(a) shall be within the exclusive competence of the legislature.

2. Resolve the conflict of competence between the Supreme Court and the President of the Republic of Poland as follows:

(a) under Article 179 in conjunction with Article 144 § 3 (17) of the Constitution, an appointment of a judge constitutes the exclusive competence of the President of the Republic of Poland, which he exercises upon the request of the National Council of the Judiciary personally, irrevocably and without any participation or interference of the Supreme Court;

(b) Article 183 of the Constitution does not provide that the Supreme Court has jurisdiction to oversee the President of the Republic of Poland in his exercise of the competence referred to in Article 179 in conjunction with Article 144 § 3 (17) of the Constitution including [the Supreme Court's jurisdiction] to give a binding interpretation of legal provisions to specify prerequisites for the President's effective exercise of the said competence."

(h) Judgment of 14 July 2021, no. P 7/20

94. On 9 April 2020 the Disciplinary Chamber of the Supreme Court referred a legal question to the Constitutional Court on the conformity of certain provisions of the TEU with the Constitution in so far as they concerned the obligation of a member State of the EU to execute interim measures relating to the organisation of the judicial authorities of that State.

95. On 14 July 2021 the Constitutional Court, sitting as a bench of five judges, held a hearing and gave judgment in the case. It held, by majority, as follows:

"The second sentence of Article 4(3) of the TEU, in conjunction with Article 279 of the TFEU, to the extent that the Court of Justice of the European Union imposes *ultra vires* obligations on the Republic of Poland, as a member State of the European Union, by issuing interim measures relating to the organisation and jurisdiction of the Polish courts and the procedure before those courts, is incompatible with Article 2, Article 7, Article 8 § 1 and Article 90 § 1 in conjunction with Article 4 § 1 of the Constitution of the Republic of Poland and to that extent is not subject to the principles of primacy and direct applicability [of a ratified international agreement] set out in Article 91 § 1 to 3 of the Constitution."

(i) Judgment of 7 October 2021, no. K 3/21

96. On 29 March 2021 the Prime Minister lodged an application with the Constitutional Court, alleging that (1) Article 1, first and second paragraphs in conjunction with Article 4(3) of the TEU; (2) Article 19(1), second subparagraph in conjunction with Article 4(3) of the TEU; and (3) Article 19(1), second subparagraph in conjunction with Article 2 of the TEU were incompatible with several provisions of the Constitution.

97. On 7 October 2021 the Constitutional Court delivered its judgment, sitting in a full bench composed of twelve judges, which included Judges

M.M., J.P. and J.W.[8] The operative part of the judgment, which was published in the Journal of Laws on 12 October 2021 (item 1852), reads as follows[9]:

"1. Article 1, first and second paragraphs, in conjunction with Article 4(3) of the TEU ... – in so far as the European Union, established by equal and sovereign States, creates 'an ever closer Union among the peoples of Europe', the integration of whom – brought about on the basis of EU law and through the interpretation of EU law by the Court of Justice of the European Union – enters 'a new stage' in which:

(a) the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties;

(b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application;

(c) the Republic of Poland may not function as a sovereign and democratic State,

– is incompatible with Article 2, Article 8 and Article 90 § 1 of the Constitution.

2. Article 19(1), second subparagraph, of the TEU – in so far as for the purpose of ensuring effective legal protection in the areas covered by EU law – it grants domestic courts (ordinary courts, administrative courts, military courts, and the Supreme Court) the competence to:

(a) bypass the provisions of the Constitution in the course of adjudication, is incompatible with Article 2, Article 7, Article 8 § 1, Article 90 § 1 and Article 178 § 1 of the Constitution;

(b) adjudicate on the basis of provisions which are not binding, having been repealed by the *Sejm* and/or found by the Constitutional Court to be incompatible with the Constitution, is incompatible with Article 2, Article 7, Article 8 § 1, Article 90 § 1, Article 178 § 1 and Article 190 § 1 of the Constitution.

3. Article 19(1), second subparagraph, and Article 2 of the TEU – in so far as for the purpose of ensuring effective legal protection in the areas covered by EU law and of ensuring the independence of judges – they grant domestic courts (ordinary courts, administrative courts, military courts, and the Supreme Court) the competence to:

(a) review the legality of the procedure for appointing a judge, including the review of the legality of the act in which the President of the Republic appoints a judge, are incompatible with Article 2, Article 8 § 1, Article 90 § 1 and Article 179, in conjunction with Article 144 § 3 (17) of the Constitution;

(b) review the legality of the National Council of the Judiciary's resolution to refer a motion to the President of the Republic for the appointment of a judge, are incompatible with Article 2, Article 8 § 1, Article 90 § 1 and Article 186 § 1 of the Constitution;

(c) determine the defectiveness of the process for appointing a judge and, as a result, to refuse to regard a person appointed to judicial office in accordance with Article 179 of the Constitution as a judge, are incompatible with Article 2, Article 8 § 1, Article 90 § 1 and Article 179, in conjunction with Article 144 § 3 (17) of the Constitution."

[8] Two judges annexed separate opinions to the judgment.

[9] The reasons for the Constitutional Court's judgment had not yet been published at the time of adoption of the present judgment.

(j) Judgment of 24 November 2021, no. K 6/21

98. As previously indicated (see paragraph 27 above), this judgment was given on an application by the Prosecutor General, who is at the same time the Minister of Justice, challenging the constitutionality of Article 6 § 1 of the Convention in relation to the Court's judgment in *Xero Flor w Polsce sp. z o.o. v. Poland* (cited above). The Prosecutor General requested the Constitutional Court to hold that:

> "1. Article 6 § 1, first sentence, of the [Convention] in so far as the term 'tribunal' used in that provision includes the Constitutional Court of the Republic of Poland, is incompatible with Article 2, Article 8 § 1, Article 10 § 2, Article 173 and Article 175 § 1 of the Constitution;
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> 2. Article 6 § 1, first sentence, of the [Convention] in so far as it identifies the guarantee arising therefrom to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of one's civil rights and obligations or of any criminal charge against him, with the competence of the Constitutional Court to adjudicate upon the hierarchical conformity of provisions and normative acts stipulated in the Constitution ..., and thereby allows to subject proceedings before the Constitutional Court to the requirements ensuing from Article 6 of the Convention, is incompatible with Article 2, Article 8 § 1, Article 79 § 1, Article 122 §§ 3 and 4, Article 188 (1-3 and 5) and Article 193 of the Constitution;
>
> 3. Article 6 § 1, first sentence, of the [Convention] in so far as it encompasses the review by the European Court of Human Rights of the legality of the process of election of Constitutional Court judges in order to determine whether the Constitutional Court is an independent and impartial tribunal established by law, is incompatible with Article 2, Article 8 § 1, Article 89 § 1 (3) and Article 194 § 1 of the Constitution."

99. On 24 November 2021 the Constitutional Court, sitting as a bench of five judges, held a hearing and gave unanimous judgment in the case. The reasons for that judgment had not been yet published at the time of adoption of the present judgment. The operative part of the Constitutional Court's judgment, which was published in the Journal of Laws on 26 November 2021 (item 2161), reads as follows:

> "1. Article 6 § 1, first sentence, of the [Convention] – in so far as the term 'tribunal' used in that provision comprises the Constitutional Court of the Republic of Poland – is incompatible with Article 173 in conjunction with Article 10 § 2, Article 175 § 1 and Article 8 § 1 of the Constitution of the Republic of Poland;
>
> 2. Article 6 § 1, first sentence, of the Convention referred to in point 1 – in so far as it grants the European Court of Human Rights the jurisdiction to review the legality of the election of judges to the Constitutional Court – is incompatible with Article 194 § 1 in conjunction with Article 8 § 1 of the Constitution."

The Constitutional Court discontinued the proceedings for the remainder.

2. Case-law of the Supreme Court

(a) Judgment of 5 December 2019, no. III PO 7/18

100. On 5 December 2019 the Supreme Court, sitting in a bench of three judges in the Labour and Social Security Chamber, gave judgment in the first of three cases that had been referred for a preliminary ruling to the CJEU, following the latter's judgment of 19 November 2019 (joined cases C-585/18, C-624/18 and C-625/18; see paragraphs 150-152 below). It quashed the negative resolution of the NCJ of 27 July 2018 concerning the continued exercise by A.K. of the office of a judge of the Supreme Administrative Court. The Supreme Court held that the NCJ in its current formation was neither impartial nor independent of the legislature or the executive. It further found that the Disciplinary Chamber did not fulfil the requirements of an independent and impartial tribunal.

101. As regards its jurisdiction to examine the compatibility of domestic laws with EU law, the Supreme Court stated as follows[10]:

> "32. It must be stressed that Article 91 § 3 of the Constitution directly empowers the Supreme Court to examine the compatibility of statutes such as the Act on the Supreme Court and the Act on the NCJ with EU law. That provision directly implies, with no reservation or limitation, that statutes have to be compatible with EU law and the Convention, and not the other way round. The jurisdiction to review the compatibility of statutes with EU law rests, according to the Constitution, not with the Constitutional Court but, as a condition of EU accession, with any Polish court examining a case falling within an area covered by EU law."

102. The Supreme Court made the following observations with regard to the Constitutional Court's judgment of 20 June 2017, no. K 5/17 (see paragraphs 38-44 above):

> "33. The foregoing remarks are all the more important when considering the judgment of the Constitutional Court concerning the existing model of election of members of the NCJ (cf. judgment of 20 June 2017, K 5/17 ...). In that judgment, the Constitutional Court called into question its earlier position taken in the judgment of 18 July 2007, K 25/07 ..., to the effect that NCJ members must be judges elected by other judges. This implies that, in the absence of any amendment to the Constitution, the Constitutional Court not so much changed its position as regards appointment to the NCJ (judgment in K 5/17 vs. judgment in K 25/07) as created a divergence in its case-law regarding systemic issues of fundamental importance to the enforcement of the right to a fair trial enshrined in the national constitution and fundamental obligations of Member States of the European Union as a Union (community) of law. In that context, the two judgments of the Constitutional Court are evidently in conflict with each other. The interpretation offered in K 5/17 is not supported by legal theory, which considers that judgment to be a manifestation of a constitutional crisis, as it was rendered by a formation that included two members appointed to non-vacant positions of judges ... One should also consider information in the public domain, including statements of those members of the Constitutional Court, concerning various cases of dependence on, and informal relations with, politicians, which do not permit the Constitutional Court

[10] The translation is based on the English version of the judgment published on the Supreme Court website, edited by the Registry of the Court.

to be regarded as a court offering guarantees of independence in the exercise of its constitutional powers (Article 195 of the Constitution)."

103. As regards the standards set out in the preliminary ruling of the CJEU, the Supreme Court held:

"35. The CJEU judgment of 19 November 2019 sets a standard which includes a comprehensive assessment of safeguards of the right to a fair trial by an independent and impartial court. Such assessment follows a two-step rule: (a) assessment of the degree of independence enjoyed by the NCJ in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered to ensure the independence of the courts and judges, since the independence of the NCJ will determine whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter of Fundamental Rights (judgment in C-585/18, §§ 139-140); (b) assessment of the circumstances in which the new judges of the Disciplinary Chamber of the Supreme Court were appointed and the role of the Council in that regard (judgment in C-585/18, § 146)...

37. Following the guidance provided in the CJEU judgment of 19 November 2019, C-585/18, one should in the first place consider the circumstances concerning the NCJ. That assessment requires no evidential proceedings; in any case, such proceedings would be beyond the remit of the Supreme Court and consist in the consideration of positions that are publicly known and available to all parties to the proceedings.

38. With respect to the NCJ, the CJEU judgment of 19 November 2019 requires the examination of the following: (-) the objective circumstances in which that body was formed; (-) the means by which its members have been appointed; (-) its characteristics; (-) whether the three aforementioned aspects are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that body to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it."

104. The Supreme Court further underlined its role as an EU court implementing the CJEU judgment:

"39. ... [T]he Supreme Court categorically declares (once again) that, acting as an EU court in the enforcement of the CJEU judgment of 19 November 2019, it does not examine the constitutionality of the provisions of the Act on the NCJ in the wording effective as of 2018 but their compatibility with EU law. The Supreme Court has the jurisdiction to undertake such examination not only in the light of uniform well-established case law (cf. CJEU judgment of 7 September 2006, C-81/05) but also under the unequivocal powers vested in it by the Constitution which require no complex interpretation in the case in question. Article 91 § 3 of the Constitution provides clearly and beyond any doubt: 'If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.' Furthermore, the examination of how the applicable provisions governing the functioning of the Council and its practice in the performance of functions under the Constitution and provisions of national law influence the fulfilment of the requirements of independence and impartiality under EU law by a court formed with the participation of the Council represents a typical judicial examination of certain facts and provisions of law. It should be recalled once again that such examination is completely unrelated to the jurisdiction vested in the Constitutional Court by the Constitution and the Act on the Constitutional Court."

105. With regard to the new NCJ, the Supreme Court held, in so far as relevant:

> "40. With regard to the circumstances in which the [new] NCJ was established, one should bear in mind the shortening of the term of office of the previous NCJ, a constitutional body under Article 187 § 3 of the Constitution. It concerns section 6 of the [2017 Amending Act]. As intended by the legislature, the new provisions were to ensure conformity with the Constitution in connection with the Constitutional Court's judgment of 20 June 2017 (no. K 5/17...), pursuant to which sections 11 §§ 2-4 and 13 § 3 of the Act on the NCJ are incompatible with the Constitution to the extent that they provide for the individual term of office of judicial members of the Council. In this respect, the Supreme Court finds that the afore-mentioned 'judgment' of the Constitutional Court was given with the participation of judges elected in breach of Article 190 § 1 of the Constitution, as ascertained in the Constitutional Court's judgments of 16 December 2015, K 34/15 ..., of 9 March 2016, K 47/15 ... and of 11 August 2016, K 39/16 ... Furthermore, the Constitutional Court's argument concerning the harmonisation of the term of office of members of the NCJ is indefensible on the grounds of Article 194 § 1 of the Constitution. This provision concerns the individual election of the Constitutional Court's judges rather than their individual term of office. While one is the function of the other, the objective of this provision was also to proscribe electing judges [of the Constitutional Court] *en bloc*, which fully justifies its wording, different from that of Article 187 § 3 of the Constitution ... The Constitutional Court understood that the election of the NCJ's members is to be aligned with the term of office of the *Sejm*. This means that Article 187 § 3 of the Constitution aligned the term of office of the NCJ with the term of office of the *Sejm*, by analogy with the State Tribunal (*Trybunał Stanu*). Such a position cannot be reliably justified. Had this been its intended purpose, Article 187 § 3 of the Constitution would have been drafted in analogous terms to those of Article 199 § 1 of the Constitution. Yet, since the two provisions employ different terms ("four years" and "the term of office of the *Sejm*"), their respective meanings ought to be different on the assumption that the law (the Constitution) is rational. There are no arguments to justify such differentiation for other reasons. Consequently, it should be assumed that the systemic interpretation that the Constitutional Court attempted to rely on, contradicts its findings ... The foregoing leads to the conclusion that the terms of office of former members of the NCJ were terminated by the legislature on the basis of the domestic Constitutional Court's judgment delivered by a formation contrary to the constitutional standard arising from the Constitutional Court's case-law.
>
> 41. Secondly, the manner of appointing members of the Council needs to be analysed. ... the analysis should commence with a brief historical note of the model of electing the NCJ's members. The issue of establishing the NCJ was already discussed by legal experts during the "roundtable" talks. The report of the subcommittee on Reform of Law and Courts concluded that judges would be elected to that body [the NCJ] by general assemblies of courts ... The Act of 20 December 1989 on the NCJ ... provided that the *Sejm* elects members of the Council from among its deputies, the Senate – from among senators, and general assemblies of judges of courts of all levels from among judges. Such a mechanism for electing members of the Council was in effect on the date of entry into force of the Constitution of 2 April 1997 ..., which regulated in Article 186 the status of the NCJ as a constitutional body... Decisions made during a session of the Subcommittee for Institutions of Legal Protection and Bodies of Administration of Justice (e.g. that of 7 December 1994 held as part of the Constitutional Committee of the National Assembly) take on special importance, where the model of electing Council members was debated, judges being entrusted with the task of electing some

of those members. The intention of entrusting the election of judicial members of the NCJ exclusively to the judicial community was expressed in particular during a session of the Constitutional Committee of the National Assembly on 13 November 1996 ... and the debate held during the Constitutional Committee's session on 5 September 1995 ... This state of affairs is corroborated by a joint statement of Professors A. Zoll[11] and A. Strzembosz[12], published by [daily] *Rzeczpospolita* on 7 March 2018, indicating that concepts tabled by "Solidarity" during the 1980s have been incorporated into the Constitution. Appointing judicial members of the NCJ by judges seemed obvious since only a majority judicial representation on the Council would safeguard the independence of the judiciary from the legislature and the executive. The authors of the said statement already then emphasised that the current NCJ in its present form – as appointed in its new formation – does not have the characteristics and competencies bestowed upon it pursuant to the Constitution; consequently, its resolutions are invalid by nature...

42. In implementing these constitutional concepts, the Act of 27 July 2001 on the NCJ ... maintained the mechanism of electing judicial members of the Council by judges. The Act of 12 May 2011 on the NCJ also (in its initial version ...) adopted the same mechanism of electing members of the NCJ ... The composition of the Council established in this manner was considered a logical conclusion of the Council being entrusted with the task of safeguarding the independence of courts and judges ...

43. A substantial change in the mechanism for electing the NCJ's members was introduced by the [2017 Amending Act] ... Pursuant to its section 1 (1), the *Sejm* shall elect fifteen members of the Council for a joint four-year term of office from among judges of the Supreme Court, ordinary courts, administrative courts and military courts. When making its choice, the *Sejm* shall – to the extent possible – recognise the need for judges of diverse types and levels of court to be represented on the Council. It should be underlined here that provisions of the Constitution have not been amended as regards the membership of the NCJ and the principles of appointing Council members. This means that a statute could only modify the manner of electing judicial members of the Council by judges, rather than introducing a procedure whereby Council judicial members are elected by the legislature. The aforementioned [2017 Amending Act] adopted jointly with the new Act on the Supreme Court introduced a solution whereby the legislative and the executive – regardless of the long statutory tradition of a part of the Council members being elected by judges themselves, thus reflecting provisions of the Constitution with regard to the Council's status and competences and with regard to the separation of the judiciary from other powers – gained a nearly monopolistic position in determining the NCJ's membership. At present, the legislature elects fifteen judicial members of the NCJ, and additionally six other members are parliamentarians (four elected by the *Sejm* and two elected by the Senate). The new election of fifteen judges to the NCJ has resulted in a situation where both houses of parliament decide about the appointment of twenty-one out of twenty-five members of the Council (i.e. 84% of its composition). Furthermore, the Minister of Justice and a representative of the President of the Republic are *ex officio* members of the NCJ. Thus, twenty-three out of twenty-five members are ultimately appointed by other powers than the judiciary. This is how the separation and balance between the legislative, executive and judicial powers – described in Article 10 of the Constitution and constituting a foundation of a

[11] *Inter alia*, former President of the Constitutional Court and former Commissioner for Human Rights.
[12] *Inter alia*, former First President of the Supreme Court.

democratic State governed by the rule of law (Article 2 of the Constitution) – have been distorted.

44. The Council is a constitutional body; the very fact that it does not have a counterpart in all EU Member States does not translate into the possibility of forming or shaping it arbitrarily as the regulatory framework has been laid out in the Constitution and further restrictions arise from the right to a fair trial as stipulated by European Union standards. The Council does not exercise judicial power, neither is it (in view of its membership) a corporate self-governing body; it is a hybrid authority. Legal scholarship has expressed a position that a literal interpretation of the provision of the Constitution stipulating that the NCJ includes 'fifteen members elected from among the judges' (Article 187 § 2 (2) of the Constitution) would prove counter-constitutional, should it result in concluding that judicial members cannot be elected by judges. This would mean that the process of construing a constitutional norm ignores the Council's tasks as specified in the Constitution, including the safeguarding of the independence of courts and judges ..., and ignores Article 173 [of the Constitution], pursuant to which courts are a power 'independent and separate from other powers'..."

106. With regard to the submission of candidatures, candidate endorsement lists and the non-disclosure of those lists, the Supreme Court held:

"45. The Supreme Court's assessment in acting on the binding legal interpretation expressed in the CJEU's judgment of 19 November 2019 attaches importance to the process of selecting members of the current Council. With regard to this particular matter, the point at issue concerns the endorsement lists that were apparently offered to candidates by judges. To date, it has not been verified whether new Council members were lawfully nominated as candidates, and who endorsed them. Relevant documents have not been disclosed yet, despite the relevant judgment of the Supreme Administrative Court of 28 June 2019, OSK 4282/18... It is common knowledge that the enforcement of the judgment has faced an obstacle in a decision issued by the Chair of the Personal Data Protection Authority on 29 July 2019 on the initiative of one of the members of the new NCJ. Consequently, it has come to pass that a judicial body responsible for a review of administrative authorities has in effect itself fallen under the review of the latter. The failure to implement the Supreme Administrative Court's judgment justifies an assumption that the content of the lists of endorsement for judicial candidates to the NCJ corroborates their dependence on the legislature or on the executive.

46. The Supreme Court further concludes that it is common knowledge that the public has been informed of judicial candidates to the Council having been recommended by presidents of district courts appointed by the Minister of Justice; other judges were recommended by judges dependent on (reporting to) candidates in managerial positions in courts of higher instance; judicial candidates were also recommended by the plenipotentiary of the Institute of the Judiciary at the Ministry of Justice; last but not least, some candidatures were submitted by the next of kin; candidates recommended other candidates; some of the elected members of the future Council were Ministry of Justice employees. All these facts prove that the executive branch – acting through its direct or indirect subordinates – stood behind the majority of recommendations for NCJ judicial member candidatures. Such circumstances accompanying the process of electing current Council members may well raise doubts in the mind of the general public as to the Council's independence from the executive.

47. Furthermore, persons endorsing candidates withdrew their endorsement during the period for submission of candidatures, and at least one member of the new NCJ had endorsed his/her own application...

48. Such circumstances contradict the notion of representativeness of the body referred to in Article 187 § 2 of the Constitution...”

107. The Supreme Court concluded as follows:

“60. On the basis of an overall assessment of all the above circumstances, the Supreme Court concludes that, as of this day, the current NCJ does not provide sufficient guarantees of independence from the legislature and executive authorities in the judicial appointment procedure.”

(b) Resolution of 8 January 2020, no. I NOZP 3/19

108. On 8 January 2020 the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, sitting as a bench of seven judges, issued a resolution following a legal question referred by a bench of three judges. The legal question arose in a case in which unsuccessful candidates for appointment to the post of judge of the Court of Appeal had lodged an appeal against the resolution of the new NCJ proposing another candidate to the same post, and were contesting the NCJ’s status. The Chamber of Extraordinary Review and Public Affairs of the Supreme Court held as follows:

“1. The Supreme Court, when considering an appeal against a resolution of the NCJ proposing to the President of the Republic of Poland a candidate for the post of judge, shall examine, within the limits of the grounds of appeal, whether the NCJ is an independent body in the light of the criteria set out in the judgment of the CJEU of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others v. Supreme Court*, §§ 139 to 144.

2. The Supreme Court quashes, within the limits of the appeal, a resolution of the NCJ proposing to the President of the Republic of Poland a candidate for appointment to the post of judge if the appellant demonstrates that the lack of independence of the NCJ influenced the content of that resolution or if – having regard to the constitutional prohibition on reviewing the effectiveness of the constitutional act of appointing a judge and the constitutional relationship arising therefrom – the appellant demonstrates the circumstance set out in § 125, or jointly the circumstances set out in §§ 147 to 151 of the judgment referred to in point 1., indicating that a bench including such a judge will not be independent and impartial.”

(c) Decisions of 15 January 2020 (nos. III PO 8/18 and III PO 9/18)

109. On 15 January 2020 the Supreme Court, sitting in the Labour and Social Security Chamber, gave two decisions in two remaining cases that had been referred for a preliminary ruling to the CJEU. In these cases, two judges of the Supreme Court contested the fact of being placed on retirement as a result of the entry into force of the new Act on the Supreme Court which provided for the lowering of the retirement age for sitting judges of the Supreme Court. The Supreme Court decided not to transfer the cases to the

Disciplinary Chamber of the Supreme Court. It found that it had no jurisdiction to rule in these cases and remitted them to the District Court. In both decisions, the Supreme Court shared the findings expressed in the Supreme Court's judgment of 5 December 2019 as to the status of the new NCJ and the Disciplinary Chamber of the Supreme Court (see paragraph 100 above).

(d) Resolution of the formation of the joined Civil, Criminal and Labour and Social Security Chambers of the Supreme Court of 23 January 2020 (no. BSA I-4110-1/20)

110. Having regard to the Supreme Court's judgment of 5 December 2019 and the resolution of 8 January 2020 by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, the First President of the Supreme Court requested the three joined Chambers of that court to issue a resolution with the view to resolving divergences in the case-law of the Supreme Court in connection with the CJEU judgment of 19 November 2019. The request concerned the legal question whether the participation in a composition of an ordinary court or the Supreme Court of a person appointed to the office of a judge by the President of the Republic on the proposal of the NCJ formed in accordance with the 2017 Amending Act would result in a violation of Article 45 § 1 of the Constitution, Article 6 § 1 of the Convention or Article 47 of the Charter of Fundamental Rights.

111. On 23 January 2020 the Supreme Court, sitting in a formation of the joined Civil, Criminal and Labour and Social Security Chambers (fifty-nine judges) issued its resolution[13]. It noted that in issuing the resolution, it was implementing the CJEU's judgment of 19 November 2019. The Supreme Court made the following conclusions[14]:

> "1. A court formation is unduly composed within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure, or a court formation is inconsistent with the provisions of law within the meaning of Article 379 § 4 of the Code of Civil Procedure, also where the court includes a person appointed to the office of judge of the Supreme Court on the recommendation of the NCJ formed in accordance with the [2017 Amending Act].
>
> 2. A court formation is unduly composed within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure, or a court formation is inconsistent with the provisions of law within the meaning of Article 379 § 4 of the Code of Civil Procedure, also where the court includes a person appointed to the office of judge of an ordinary or military court on the recommendation of the NCJ formed in accordance with the [2017 Amending Act], if the deficiency of the appointment process leads, in specific circumstances, to a violation of the guarantees of independence and impartiality within the meaning of Article 45 § 1 of the Constitution of the Republic of Poland, Article 47

[13] Six judges annexed separate opinions to the resolution.

[14] The translation is based on the English version of the judgment published on the Supreme Court website, edited by the Registry of the Court.

of the Charter of Fundamental Rights of the European Union and Article 6 § 1 of the [Convention].

3. The interpretation of Article 439 § 1 (2) of the Code of Criminal Procedure and Article 379 § 4 of the Code of Civil Procedure provided in points 1 and 2 above shall not apply to judgments given by courts before the date hereof and judgments to be given in proceedings pending at the date [of the present resolution] under the Code of Criminal Procedure before a given court formation.

4. Point 1 [above] shall apply to judgments issued with the participation of judges appointed to the Disciplinary Chamber of the Supreme Court under the Act of 8 December 2017 on the Supreme Court ... irrespective of the date of such judgments.".

112. In the reasons for the resolution, the Supreme Court held, in so far as relevant:

"31. In the light of Article 179 of the Constitution, the President of the Republic appoints to the office of judge not just anyone, at his sole discretion as to the candidate's qualifications and ability to hold office, but exercises that power on a motion of the NCJ. Therefore, a motion of the NCJ is a condition *sine qua non* for effective appointment. Moreover, a motion concerning a judicial appointment cannot be lodged by anyone except a body acting as the National Council of the Judiciary, not only in name but based on the procedure of its appointment and the conditions under which it exercises its powers (decision of the Constitutional Court of 23 June 2008, 1 Kpt 1/08).

The [2017 Amending Act] terminated the terms of office of the members of the NCJ referred to in Article 187 § 1 (2) of the Constitution, elected in accordance with the previous regulations. The shortening of the terms of office of judges sitting on the National Council of the Judiciary on the date of entry into force of the amending legislation was justified by the need to ensure a joint term of office for all NCJ members; however, the amended Act allows for the term of office of an NCJ member to expire before the end of the four-year term (cf. section 11e(1) and (3), section 14(1) of the Act of 12 May 2011 on the National Council of the Judiciary [as amended]), which is contrary to Article 187 § 3 of the Constitution. Therefore, the argument justifying the amendment was false, and the NCJ's term of office was terminated for other reasons.

New members of the NCJ were elected by the *Sejm* in accordance with [the 2017 Amending Act], which was contrary to Article 187 § 1 (2) of the Constitution. Having challenged on the basis of that provision the requirement that judicial members of the NCJ were to be elected by judges does not permit the designation of a State authority that could elect them. The Constitution does not provide for a presumption of competence in favour of Parliament. After [the 2017 Amending Act], fifteen members of the Council who were judges were elected by the *Sejm* for a joint four-year term of office (section 9a(1) of [the Act on the NCJ as amended by the 2017 Amending Act]). None of them is a judge of the Supreme Court, as is required under Article 187 § 1 (2) of the Constitution.

In view of the procedure of election of judges to the NCJ under [the 2017 Amending Act], the judiciary no longer has any control over the membership of the NCJ and thus, indirectly – in connection with amendments of other systemic provisions – over which candidates are proposed to the President for appointment to the office of judge of an ordinary court, a military court, the Supreme Court, or an administrative court. The NCJ has been dominated by political appointees of the majority in the *Sejm*. Following the election of 15 judges to sit as members of the NCJ by the *Sejm*, as many as 21 out of the 25 members of the NCJ are political appointees of both Houses of Parliament. Following the election of judges to the NCJ [by the *Sejm*], judges sitting as members of

the NCJ no longer represent judges of the Supreme Court, judges of ordinary courts, administrative courts and military courts, as required under Article 187 § 1 (2) of the Constitution. Judges sitting as members of the NCJ by political appointment have no legitimacy as representatives of the judicial community, a task which should be entrusted to persons having authority and remaining independent of political influence. That has largely weakened the role of the NCJ as a guardian of the independence of courts and judges.

The provisions of the [2017 Amending Act] governing the election of judges to the NCJ are incompatible with the principle of the separation and balance of powers (Article 10 § 1 of the Constitution), as well as with the principle of separation and independence of the courts (Article 173 of the Constitution) and independence of judges (Article 178 of the Constitution). The principle of separation of the judiciary is of crucial relevance in this context. According to that principle, based on the separation and balance of powers, the legislature and the executive may interfere with the functioning of the judiciary only to the extent allowed by the Constitution, that is, where expressly provided for in the Constitution. With respect to the NCJ, the principle of separation implies that the legislature and the executive may influence the membership and functioning of the NCJ only to the extent expressly provided for by the Constitution (Article 187 § 1 (1) *in fine*), (3) and § 4). Consequently, in determining the organisational structure, the scope of activity and working procedures of the NCJ (Article 187 § 4 of the Constitution), the legislature cannot create its power – not provided for in the Constitution – to elect members of the NCJ from among judges, because the scope of its power to appoint members of the NCJ was defined in the Constitution (Article 187 § 1 (3)).

In turn, the shortening of terms of office of previous members of the NCJ and the election of new members on the basis of the [2017 Amending Act] raises serious doubts as to compliance with Article 187 §§ 1 and 3 of the Constitution, and, consequently, doubts as to the legality of the NCJ and the procedure for nomination of candidates to the office of judge with the participation of the NCJ."

113. In respect of the endorsement lists for candidates for the NCJ, the Supreme Court noted:

"32. ...Endorsement lists presented by judges running as candidates for the NCJ had to be signed not just by anyone, but by judges... A request for information concerning persons who signed the lists of endorsement of judges running as candidates to the NCJ, according to regulations governing access to public information, confirmed as legitimate by a legally binding judgment of the Supreme Administrative Court of 28 June 2019, no. I OSK 4282/18, dismissing a cassation appeal of the Head of the Chancellery of the *Sejm* against the judgment quashing the decision in part concerning the refusal to disclose such information, has been disregarded by the Head of the Chancellery of the *Sejm* and the Speaker of the *Sejm*, who have refused to comply with the legally binding judgment. That state of affairs has prevailed to date...

According to a published statement of Judge M.N., appointed as a member of the NCJ, he signed his own endorsement list. According to a published statement of four judges, Judge M.N. used withdrawn endorsements to run as a candidate for the NCJ. The endorsements were withdrawn long before the list was verified and used in a vote; the Speaker of the *Sejm* was given an advance notice of the circumstance (on 25 January 2018)... If candidates for the NCJ signed each other's endorsement lists, that is indicative of the scale of endorsement for the members of the NCJ in the judicial community.

114. With regard to the exercise of the President's prerogative to appoint judges, the Supreme Court noted, in so far as relevant:

> "36. According to Article 7 of the Constitution, bodies of public authority shall function on the basis of, and within the limits of, the law; that is, exclusively on the basis of the authority conferred by law, by which their actions are legitimised. That applies also to the President of the Republic because his official acts are not excluded from the scope of Article 7 of the Constitution...
>
> The President appoints judges but he does so not just at any time and at his own discretion but on a motion of the NCJ. No appointment may be granted to anyone who is not concerned by such motion (cf. the decision of the Constitutional Court of 23 June 2008, 1 Kpt 1/08).
>
> The minimum conditions for the exercise of the prerogative in question by the President of the Republic therefore require that his act be initiated by a duly constituted and appointed body having the status of the NCJ. Since the entry into force of the [2017 Amending Act] and the 2017 Act on the Supreme Court, the NCJ has not been duly appointed under the Constitution; consequently, the NCJ could not exercise its powers, which the President of the Republic should have determined before exercising his prerogative. Persons named in the lists of recommendations drawn up in a defective procedure of appointment for judicial positions cannot be considered to have been candidates for office duly presented to the President of the Republic whom the President of the Republic is competent to appoint to the office.
>
> Even assuming that the issuance of letters of appointment to such persons renders them formally appointed to the office of judge, it is necessary to determine whether, and to what extent, such persons may exercise judicial functions, so that the requirement of impartiality and independence of a court administering justice is not thereby infringed."

115. The Supreme Court further made the following observations regarding political influence on the election of the NCJ members:

> "38. The model of procedure for appointment of a specific person to the office of judge has a particular bearing on whether the court comprised of such appointee may be considered an impartial and independent tribunal in a given case...
>
> In this context, it should be noted that, according to the official statement of the Minister of Justice issued in the legislative procedure on 15 January 2020 at the Senate of the Republic of Poland, membership of the NCJ was determined in such a way as to ensure that it was comprised of persons loyal to the parliamentary majority (the political group represented by the Minister of Justice): '*each group could propose judges they are accountable for. We have proposed judges who we thought were willing to co-operate with the judicial reform'* – transcript of the third session of the Senate of the Republic of Poland of the 10th term, 15 January 2020).
>
> Consequently, choices made by the Council are systemically not independent of political interest, affecting the fulfilment of the objective criteria of impartiality and independence by persons appointed to the office of judge on the motion of the NCJ. In other words, because the NCJ has been politicised, 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. In systemic terms, that undermines trust in the impartiality of persons so appointed. The lack of independence essentially consists

in decisions of that body being subordinated to political authorities, in particular the executive...”

116. As regards the lack of independence of the NCJ, the Supreme Court concluded as follows:

“42. ... The formation of the Supreme Court passing the present resolution fully shares the position presented in the judgment of the Supreme Court of 5 December 2019, III PO 7/18 to the effect that the NCJ so formed is not an independent body, but a body subordinated directly to political authorities. Consequently, competitions for the office of judge carried out by the NCJ have been and will be defective, creating fundamental doubts as to the motivation behind motions for the appointment of specific individuals to the office of a judge...

The foregoing [finding] is unrelated to doubts concerning the constitutionality of the election of some [judicial] members of the NCJ. The latter question has not been the subject of interpretation of the Supreme Court; however, it is reasonable to assert that the current functioning of the NCJ is a result of the departure from the constitutional requirements for the election of some members of the Council.”

3. Case-law of the Supreme Administrative Court

117. Following the CJEU’s judgment of 2 March 2021 (see paragraphs 155-156 below), on 6 May 2021 the Supreme Administrative Court gave judgments in five cases (nos. II GOK 2/18; II GOK 3/18; II GOK 5/18; II GOK 6/18 and II GOK 7/18) concerning appeals against resolutions of the NCJ by which the latter had decided not to propose to the President of the Republic the appointment of the appellants to positions as judges of the Civil and Criminal Chambers at the Supreme Court and to propose the appointment of other candidates to those positions. The Supreme Administrative Court quashed the impugned NCJ resolutions both in the part concerning the recommendation of other candidates for appointment to the Supreme Court and in the part concerning the refusal to propose the appointment of the appellants. All the judgments contain similar reasoning.

118. In particular, in its judgment of 6 May 2021, no. II GOK 2/18 the Supreme Administrative Court considered that the current NCJ did not offer sufficient guarantees of independence from the legislative and executive powers in carrying out the functions entrusted to it. In making that assessment, the Supreme Administrative Court relied on the factors set out by the CJEU in its judgments of 2 March 2021 (paragraphs 131-132) and of 19 November 2019 (paragraphs 143-144), namely that: (1) the current NCJ was constituted as a result of the premature termination of the four-year terms of office of former members of the NCJ; (2) in contrast to the former legislation under which fifteen judicial members of the NCJ had been elected by their peers directly, they were currently elected by a branch of the legislature; (3) the potential for irregularities which could adversely affect the process of appointment of certain members of the new NCJ; (4) the manner in which the current NCJ exercised its constitutional responsibility to safeguard the independence of courts and judges. The Supreme

Administrative Court accepted – as did the CJEU in the above-mentioned judgments – that while each element taken in isolation might not necessarily lead to that conclusion, their combination in conjunction with the circumstances in which the current NCJ had been constituted could raise doubts as to its independence.

119. The relevant extracts from the Supreme Administrative Court's judgment no. II GOK 2/18 read as follows:

> "7.6. ... Since the CJEU's judgments of 2 March 2021 and 19 November 2019 were given in an identical legal framework ..., so the assessment of the significance of the criteria relevant for the independence of the NCJ had to take into account the commonly known circumstances and facts relating to the creation of the NCJ in its new composition and its activities, including the sources of knowledge of those circumstances and facts which formed the basis of the findings in case no. III PO 7/18 decided by the Supreme Court in its judgment of 5 December 2019. The Supreme Administrative Court accepts these findings in their entirety as its own (see paragraphs 40-60 of the Supreme Court's judgment).
>
> The Supreme Administrative Court also fully and unreservedly shares the assessment of the significance of these circumstances and facts for the independence of the NCJ ... It [the assessment] warrants the assertion that the current NCJ does not provide sufficient guarantees of independence from the legislative and executive powers in the procedure for appointment of judges.
>
> In this regard, it is also important to emphasise the significance of the fact that the composition of the NCJ currently includes fourteen representatives of judges of ordinary courts and does not include judges of the Supreme Court and judges of administrative courts, as categorically required by Article 187 § 2 of the Constitution, which cannot be complied with only in so far as possible, as provided for in section 9a of the Act on the NCJ.
>
> Moreover, among the [judicial] members of the [current] NCJ, i.e. among judges of ordinary courts..., there are (and certainly there were on the date when the resolution subject to the review in the present case was adopted) presidents and vice-presidents of ordinary courts appointed by the executive in place of those dismissed earlier by that power. This leads to the conclusion that those members of the Council are strictly functionally subordinated to the executive, which is represented in the Council by the Minister of Justice, thus also making that subordination of an institutional nature. ...
>
> A part of the executive, but also of the legislative power – given the peculiar fusion of these powers resulting from the logic of the system of government adopted – and thus powers that are political by nature, therefore significantly gain in importance and influence in a body whose primary role is to safeguard the independence of the courts and judges.
>
> This can and should also be inferred from the fact that twenty-three of the twenty-five members of the NCJ are nominated to its composition by powers other than the judiciary. At the same time, the rules governing election of fifteen judges to the NCJ by the *Sejm* have to be regarded as far removed from respecting the principle of representativeness, since their election is not only made by the first chamber of Parliament (the *Sejm*), but may also be made – quite apart from the fact that they are nominated from among candidates put forward by a group of 2,000 citizens ... – from among candidates put forward by a group of twenty-five judges, with the exception of retired judges. Such a quantitative criterion of successful candidature does not

constitute a reliable criterion for assessing the representativeness of a candidate, especially when compared with the number of judges in service and, moreover, when compared with the practice of assessing its fulfilment. The latter allowed for support for one's own candidature, mutual support between candidates or even, in an extreme case, the use, as support given, of support that was (effectively) withdrawn by the judges originally supporting ... the candidature.

The rules and procedure for determining the personal composition of the NCJ were thus clearly motivated by an intention to subject it to a kind of supervision of the executive power, and hence of the parliamentary majority, which, in the context of the procedure for selecting members of the NCJ and the majority required to do so, as well as in relation to the functional and institutional subordination of the Council, also emphasises the significance of the factor of (political) loyalty of the candidates to the entity conducting the election. This is confirmed by the ... the content of the statement [of the Minister of Justice] recorded in the transcript of the 3rd session of the Senate of the 10th term of 15 January 2020. – '*each group could propose judges they are accountable for. We have proposed judges who we thought were willing to co-operate with the judicial reform'*.

The so determined composition of the NCJ thus nullifies the possibility of it effectively carrying out its basic function, namely safeguarding the independence of the courts and judges.

... There is also no position ... of the NCJ which could indicate that it, a constitutional body appointed to uphold the independence of the courts and judges, respects the positions of national and European institutions and bodies stressing the importance of the principle of independence of the courts and judges in relation to situations directly indicating that they suffer a significant damage, or that it opposes such situations, including in particular actions disregarding the legal consequences of the order of the Court of Justice of 8 April 2020 in case C-791/19 R. Evidence of its abdication in this respect – for the Council's attitude remains in clear opposition to the duties and functions conferred on it by the Constitution – is undoubtedly also the fact that the NCJ was suspended from membership of the ENCJ in September 2018. ...

In the light of the foregoing arguments, it is therefore reasonable to conclude that the current NCJ does not provide sufficient guarantees of independence from the executive and the legislative powers in the procedure for appointing judges. The degree of its dependence on the legislative and executive powers in the performance of the tasks entrusted to it is, in turn, so high that it cannot be without significance for the assessment as to whether the judges selected by it meet the objective requirements ... of independence and impartiality under Article 47 of the Charter of Fundamental Rights."

II. INTERNATIONAL LAW AND PRACTICE

A. Vienna Convention on the Law of Treaties

120. Article 27 of the Vienna Convention on the Law of Treaties of 1969 provides, in so far as relevant:

Internal law and observance of treaties

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty..."

B. The Permanent Court of International Justice

121. The Permanent Court of International Justice in its advisory opinion of 4 February 1932 on Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (PCIJ, Series A/B, no. 44) held, in so far as relevant:

> "[62] It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force..."

C. The United Nations

122. The UN Special Rapporteur on the independence of judges and lawyers, Mr Diego García-Sayán undertook an official visit to Poland from 23 to 27 October 2017. The report of 5 April 2018 on his mission to Poland contains the following findings relating to the NCJ, in so far as relevant:

> "68. ... According to the new selection procedure, 21 members of the Council will now be appointed by the legislative branch, and 1 by the executive. The fact that judges will no longer have a decisive role in the appointment of the 15 judicial members of the Council puts the new election method at odds with relevant international and regional standards. In this regard, the Special Rapporteur notes that while the National Council of the Judiciary is not a judicial authority per se and does not exercise judicial functions, its role of safeguarding judicial independence in Poland requires that it be independent and impartial from the executive and legislative branches...
>
> 70. The new Act also provides that the mandate of all judicial members of the National Council of the Judiciary will be terminated at the moment of the election of the new members. This early termination decided by the legislative branch constitutes an additional interference with the independence of the Council and a breach of the principles of separation of powers and security of tenure. Coupled with the early termination of all the judicial members of the Council, the implementation of the new Act will lead to the creation of a 'new' National Council of the Judiciary dominated by political appointees, in contravention of existing standards on the independence of the judiciary and the separation of powers."

123. The UN Special Rapporteur on the independence of judges and lawyers published a report on "Judicial Councils" on 2 May 2018. He made the following recommendations, in so far as relevant:

> "Establishment of judicial councils
>
> 92. In order to guarantee their independence from the executive and legislative branches and ensure effective self-governance for the judiciary, judicial councils should be established under the Constitution in those countries having a written Constitution, or in the equivalent basic law or constitutional instrument in other countries. The Constitution or the equivalent basic law should include detailed provisions regarding the setting-up of such a body and its composition and functions, and guarantee the autonomy of the council vis-à-vis the executive and legislative branches of power."

D. The Council of Europe

1. The Committee of Ministers

(a) Recommendation CM/Rec (2010)12

124. The relevant extracts from the appendix to Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, provide:

"*Chapter I – General aspects*

...

4. The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law.

Chapter IV − Councils for the judiciary

26. Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.

27. Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.

...

Chapter VI – Status of the judge

Selection and career

...

46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice."

(b) Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality

125. At the 1253rd meeting of the Ministers' Deputies, on 13 April 2016, the Committee of Ministers adopted the Plan of Action on Strengthening Judicial Independence and Impartiality. The relevant extracts read as follows:

"**Line of action 1**

Safeguard and strengthen the judiciary in its relations with the executive and legislature

Action 1.1 Ensure the independent and effective working of judicial councils or other appropriate bodies of judicial governance

Remedial action by member States

Measures should be taken to de-politicise the process of electing or appointing persons to judicial councils, where they exist, or other appropriate bodies of judicial governance. Members should not represent political factions or be politically partisan in the performance of their functions. They should also not be subject to, or be susceptible to, political influence either from the executive or legislature.

Such measures might include rules on the minimum number of judicial members and procedures for election by their peers (at least half, not taking into account any *ex-officio* members), or on the maximum number of non-judicial members (and how they are elected or selected) whilst ensuring that a majority or at least half of them are judicial members representing all levels of the judiciary; rules on the minimum length of prior judicial experience; rules on ensuring gender equality and representation of society as a whole and rules on character and probity.

Members not appointed or elected by the judiciary should not represent the executive or legislature but should be appointed on the basis of their personal standing and in their own right. It is desirable that the membership of a judicial council should not include persons who hold their position *de facto* by virtue of an executive office or position in the legislature.

The rules governing the composition of judicial councils or other appropriate bodies of judicial governance and how they conduct their business should be transparent and allow foreseeability. The same applies to the process of selecting, appointing and promoting judges. Of particular importance in this respect are the rules aimed at avoiding improper interference by the executive or legislature.

Changes to the legal framework for the operation of judicial councils should not lead to the early termination of the mandates of persons elected under the previous framework, except when the change of the legal framework aims to reinforce the independence of the council's composition."

2. The Parliamentary Assembly of the Council of Europe

126. The Parliamentary Assembly, in its resolution of 11 October 2017 on new threats to the rule of law in Council of Europe member States (Resolution 2188 (2017)), expressed concerns about developments in Poland which put respect for the rule of law at risk, and in particular the independence of the judiciary and the principle of the separation of powers. It called on the Polish authorities to, *inter alia*, refrain from amending the Act on the NCJ in a way that would modify the procedure for appointing judicial members of the Council and would establish political control over the appointment process of these members. It also called on the Polish authorities to refrain from implementing any legal provisions that would terminate the term of office of the judicial members of the Polish NCJ.

127. On 28 January 2020 the Parliamentary Assembly decided to open its monitoring procedure in respect of Poland. In its resolution of the same date entitled "The functioning of democratic institutions in Poland" (2316 (2020)), the Assembly stated, in so far as relevant:

> "7. The Assembly lauds the assistance given by the Council of Europe to ensure that the reform of the justice system in Poland is developed and implemented in line with European norms and rule of law principles in order to meet their stated objectives. However, it notes that numerous recommendations of the European Commission for Democracy through Law and other bodies of the Council of Europe have not been implemented or addressed by the authorities. ... The Assembly therefore calls upon the authorities to revisit the total reform package for the judiciary and amend the relevant legislation and practice in line with Council of Europe recommendations, in particular with regard to: ...
>
> 7.2. the reform of the National Council of the Judiciary, the Assembly expresses its concern about the fact that, counter to European rule of law standards, the 15 judges who are members of the National Council of the Judiciary are no longer elected by their peers but by the Polish Parliament. This runs counter to the principle of separation of powers and the independence of the judiciary. As a result, the National Council of the Judiciary can no longer be seen as an independent self-governing body of the judiciary. The Assembly therefore urges the authorities to reinstate the direct election, by their peers, of the judges who are members of the National Council of the Judiciary;"

128. On 26 January 2021 the Parliamentary Assembly adopted a resolution entitled "Judges in Poland and in the Republic of Moldova must remain independent" (2359 (2021)). The Assembly, referring to the concerns expressed in Resolution 2316 (2020), noted that "given the current composition of the National Council of the Judiciary and the judgment handed down by the CJEU on 19 November 2019, the NCJ can no longer be regarded as an autonomous body independent of the legislature and the executive". The Assembly further called on the Polish authorities to, *inter alia*, "revert to the previous system of electing judicial members of the NCJ or adopt a reform of the justice system which would effectively ensure its autonomy from the political power".

3. The European Commission for Democracy through Law (Venice Commission)

129. The Venice Commission, in its report on the Independence of the Judicial System Part I: the Independence of Judges, adopted at its 82nd Plenary Session (Venice, 12-13 March 2010, CDL-AD(2010)004) observed, in so far as relevant:

> "32. To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all

cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of *ex-officio* members these judges should be elected or appointed by their peers."

130. The Venice Commission, in its Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, adopted at its 94th Plenary Session (Venice, 8-9 March 2013, CDL-AD(2013)007), addressed, *inter alia*, the proposed reform of the High Judicial Council. The relevant part of the Opinion read as follows:

"**V. Transitional provisions – termination of functions of the current High Judicial Council of Georgia.**

67. Paragraph 2 of Article 3 of the amendments provides that upon enactment of the Law "authority of the members of the High Council of Justice, except the chairman of the Supreme Court, is terminated".

68. During the visit, it was explained to the delegation of the Venice Commission by the proponents of this measure, that they wish to do so because they regard the existing composition of the High Council of Justice as so flawed that any significant reform of the judiciary can only be achieved through a complete renewal of the Council.

69. The Commission recalls that an important function of judicial councils is to shield judges from political influence. For this reason, it would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections.

70. The Organic Law provides for a four-year term of office. This term does not appear to have a constitutional basis. Both the law in force and the draft amendments establish an exhaustive list of the grounds for pre-term termination of the mandate of the members of the High Council of Justice. Neither of them includes norms which expressly provide or can be interpreted in the way that the mandate of the members of the High Council of Justice can be terminated when the procedure for appointment is changed.

71. The Venice Commission is of the opinion that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council.

72. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council [footnote omitted]. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. While the Commission was informed that there are no cases pending in Georgia, any such change must be regarded with concern.

...

74. The Commission is cognisant of the dilemma which the Georgian authorities face. Nevertheless, even though the composition of the current High Council of Justice seems unsatisfactory, the Venice Commission recommends that the members complete their mandate. However, it would seem possible to apply transitory measures which would bring the current Council closer to the future method of composition, ..."

131. The relevant extracts from the Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (11-12 March 2016, CDL-AD(2016)007)[15], read as follows:

> "81. '[I]t is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges'. Judicial councils 'should have a pluralistic composition with a substantial part, if not the majority, of members being judges.' [footnote omitted]. That is the most effective way to ensure that decisions concerning the selection and career of judges are independent from the government and administration. [footnote omitted]. There may however be other acceptable ways to appoint an independent judiciary.
>
> 82. Conferring a role on the executive is only permissible in States where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation [footnote omitted]. Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided [footnote omitted]. An appropriate balance should be found between judges and lay members [footnote omitted]. The involvement of other branches of government must not pose threats of undue pressure on the members of the Council and the whole judiciary. [footnote omitted]."

132. The Venice Commission, in its Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court proposed by the President of Poland and on the Act on the Organisation of Ordinary Courts, which it adopted at its 113th Plenary Session (Venice, 8-9 December 2017, CDL-AD(2017)031), observed, in so far as relevant:

> "17. In the past decades many new European democracies created judicial councils – compound bodies with functions regarding the appointment, training, promotion and discipline of judges. The main function of such a body is to ensure the accountability of the judiciary, while preserving its independence [footnote omitted]. The exact composition of the judicial councils varies, but it is widely accepted that at least half of the council members should be judges elected by their peers [footnote omitted]. The Venice Commission recalls its position expressed in the Rule of Law Checklist, in the Report of the Judicial Appointments and in the Report on the Independence of the Judicial System (Part I: The Independence of Judges) to the effect that 'a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself' [footnote omitted].
>
> 18. The 'democratic element' of such councils is usually represented by lay members, elected by Parliament or appointed otherwise. Judicial members, by contrast, are elected by other judges and hence have no strong political affiliation [footnote omitted]. Thus, the current composition of the Polish NCJ is in this regard in harmony with this prevailing European standard.

[15] Endorsed by the Ministers' Deputies at the 1263th Meeting (6-7 September 2016), by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016) and by the Parliamentary Assembly of the Council of Europe at its 4th part Session (11 October 2017).

...

24. In any event, the proposal by the President is still at odds with the European standards (as far as those countries which have a judicial council are concerned), since the 15 judicial members are not elected by their peers, but receive their mandates from Parliament. Given that six other members of the NCJ are parliamentarians, and four others are *ex officio* members or appointed by the President of the Republic..., the proposed reform will lead to a NCJ dominated by political nominees. Even if several 'minority candidates' are elected, their election by Parliament will inevitably lead to more political influence on the composition of the NCJ and this will also have immediate influence on the work of this body, which will become more political in its approach.

...

2. Early termination of the mandate of the current members of the NCJ

28. Article 6 of the Draft Act provides for early termination of mandates of all judicial members of the NCJ at the moment of the election of new members. According to the [Polish authorities'] Memorandum, this measure is called for by the judgment of the Constitutional Court of 20 June 2017 [footnote omitted]. In that judgment the Tribunal held, in particular, that all judicial members of the NCJ should have the same term of office. The Draft Act, proposed by the President, in Article 1 (new Article 9a § 1) speaks of the 'joint term of office' of the judicial members of the NCJ. That implies that all mandates will start and end simultaneously, and that the composition of the NCJ should be fully renewed every 4 years.

29. The very idea of a 'joint term of office' is open to criticism. Desynchronised terms of office are a common feature in collegiate bodies in Europe. They help to preserve institutional memory and continuity of such bodies. Moreover, they contribute the internal pluralism and hence to the independence of these bodies: where members elected by different terms of Parliament work alongside each other, there are better chances that they would be of different political orientation. By contrast, simultaneous replacement of all members may lead to a politically uniform NCJ [footnote omitted].

30. But even assuming that a 'joint term of office' is politically legitimate, this aim may be achieved otherwise, in a way which does not interfere with the term of office of the current members. The judgment of the Constitutional Tribunal does not call for the simultaneous removal of *all currently serving* judicial members. The currently serving judicial members may remain in their positions until the original term of their mandate expires, while new members (i.e. those elected under the new rules) could be elected for a *shorter* period, ensuring that at some point in future the whole composition of the NCJ will be renewed simultaneously [footnote omitted]. This solution will not only respect the security of tenure but also better ensure the institutional continuity of the body [footnote omitted].

31. In sum, the proposed change in the manner of appointment of the 15 judicial members of the NCJ, in conjunction with their immediate replacement, is going to weaken the independence of the Council with regard to the majority in Parliament. Against the background of other reforms in the field of the judiciary..., this measure contributes to a weakening of the independence of justice as a whole. Therefore, the Venice Commission urges the Polish authorities to abandon this proposal and keep the current system, which combines election of lay members by Parliament and election of the judicial members of the NCJ by the judges themselves.

...

IV. Conclusions

128. The officially stated goal of the 2017 amendments (both adopted and those which are being discussed) is to enhance the democratic control over the Polish judiciary. The Venice Commission has always stated that the judiciary should not be an entirely self-governing corporation but accountable to the society. However, mechanisms of accountability should not interfere with the independence of the judges, and of the bodies of judicial governance. The judiciary should be insulated from quickly changing political winds. The courts have often to adjudicate on conflicts between individual rights and the State, and that relationship is imperilled when the State takes over the control of judicial functions.

129. The Venice Commission has examined the Act on Ordinary Courts, the Draft Act on the National Council of the Judiciary, and the Draft Act on the Supreme Court, proposed by the President of the Republic. It has come to the conclusion that the Act and the Draft Acts, especially taken together and seen in the context of the 2016 Act on the Public Prosecutor's Office, enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law.

130. Several key aspects of the reform raise particular concern and call for the following recommendations:

A. The Presidential Draft Act on the National Council of the Judiciary

The election of the 15 judicial members of the National Council of the Judiciary (the NCJ) by Parliament, in conjunction with the immediate replacement of the currently sitting members, will lead to a far-reaching politicisation of this body. The Venice Commission recommends that, instead, judicial members of the NCJ should be elected by their peers, as in the current Act."

133. On 18 June 2020 the Venice Commission endorsed by written procedure replacing the 123rd Plenary Session its and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe Joint Urgent Opinion (CDL-AD(2020)017) on Amendments to the Law on the Common Courts, the Law on the Supreme Courts and Some Other Laws. The relevant extracts of the Opinion read as follows:

"**A. Judicial reform of 2017 – an outline**

8. The stated goal of the 2017 reform was to enhance the democratic accountability of the Polish judiciary. However, in the 2017 Opinion the Venice Commission concluded that, instead, this reform jeopardised the judicial independence and "enabled the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice" (§ 129 of the 2017 Opinion) [footnote omitted]. As a result of the 2017 reform:

• The judicial community in Poland lost the power to delegate representatives to the NCJ, and hence its influence on recruitment and promotion of judges. Before the 2017 reform 15 (out of 25) members of the NCJ were judges elected by their peers. Since the 2017 reform those members are elected by Parliament. Taken in conjunction with the immediate replacement, in early 2018, of all the members appointed under the old rules, this measure led to a far-reaching politicisation of the NCJ;

...

9. It should be stressed that the Venice Commission never advocated a self-governing judiciary as a general standard, and that it is very much conscious of the diversity of legal systems in Europe in this respect. There are democratic countries where the judiciary is independent even though judicial appointments are made by the executive. Nevertheless, the Venice Commission has always welcomed that practically all new democracies, where in the recent history the judiciary was subordinated to other branches of power, have established judicial councils [footnote omitted]. Such councils help in ensuring that the judicial community may make a meaningful input in decisions concerning judges [footnote omitted]. This was the choice made by the Polish constituent assembly, which is reflected in Article 186 of the Polish Constitution stating that "the NCJ shall safeguard the independence of courts and judges", as well is in Article 187 which provides that 15 members of the Council should be chosen "from among the judges".

10. The simultaneous and drastic reduction of the involvement of judges in the work of the National Council for the Judiciary, filling the new chambers of the Supreme Court with newly appointed judges, mass replacement of court presidents, combined with the important increase of the powers of the President of the Republic and of the Minister of Justice/Prosecutor General – and this was the result of the 2017 reform – was alarming and led to the conclusion that the 2017 reform significantly reduced the independence of the Polish judiciary vis-à-vis the Government and the ruling majority in Parliament.

...

61. ... In order to avoid further deepening of the crisis, the Venice Commission invites the Polish legislator to seriously consider the implementation of the main recommendations contained in the [December] 2017 Opinion of the Venice Commission, namely:

• to return to the election of the 15 judicial members of the NCJ not by Parliament but by their peers;

...

• to restore the powers of the judicial community in the questions of appointments, promotions, and dismissal of judges; ..."

4. The Council of Europe Commissioner for Human Rights

134. The Commissioner for Human Rights, Ms Dunja Mijatović carried out a visit to Poland from 11 to 15 March 2019. The report from her visit, published on 28 June 2019, reads in so far as relevant:

"1.2 Changes affecting the National Council for the Judiciary

...

16. On her part, the Commissioner regrets the retroactive shortening of the constitutional terms of duty of all serving members of the National Council for the Judiciary, a move which was found by the Consultative Council of European Judges of the Council of Europe (CCJE) to be "not in accordance with European standards for judicial independence", and was criticised in the same vein by the above-mentioned UN Special Rapporteur. She considers that the former members of the Council should have been allowed to serve out their full mandates according to their constitutional duration. According to the 2016 joint report by the CCJE and the Consultative Council of European Prosecutors of the Council of Europe (CCPE), "the independence of judges

and prosecutors can be infringed by weakening the competences of the Council for the Judiciary, ... or by changing its composition" (paragraph 12). ...

1.2.1 Conclusions and Recommendations

18. The Commissioner recalls that councils for the judiciary are independent bodies that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system (paragraph 26 of the aforementioned recommendation of the Committee of Ministers CM/Rec(2010)12). She considers that the collective and individual independence of the members of such bodies is directly linked, and complementary to, the independence of the judiciary as a whole, which is a key pillar of any democracy and essential to the protection of individual rights and freedoms.

19. The Commissioner considers that serious concerns remain with regard to the composition and independence of the newly constituted National Council for the Judiciary. She observes that under the new rules, 21 out of the 25 members of the body have been elected by Poland's legislative and executive powers; this number includes the body's 15 judicial members, who have been elected by the *Sejm*.

20. The Commissioner considers that entrusting the legislature with the task of electing the judicial members to the National Council for the Judiciary infringes the independence of this body, which should be the constitutional guarantor of judicial independence in Poland. She considers that the selection of members of the judiciary should be a decision process independent of the executive or the legislature, in order to preserve the principles of separation of powers and the independence of the judiciary, and to avoid the risk of undue political influence.

21. For these reasons, the Commissioner encourages the Polish authorities to bring the legislation governing the composition and the process of selecting the judicial members of the National Council for the Judiciary in line with the above-mentioned Council of Europe standards and the Polish Constitution, in particular by ensuring that the fifteen judicial members of the body are duly elected by a wide representation of their peers and not by the legislative branch."

5. The Consultative Council of European Judges ("the CCJE")

(a) Opinion no. 10 (2007)

135. Opinion no. 10 (2007) of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society adopted on 23 November 2007 reads, in so far as relevant:

"II. General mission: to safeguard the independence of the judiciary and the rule of law

8. The Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges. The existence of independent and impartial courts is a structural requirement of a state governed by the rule of law.

...

III. Membership: to enable an optimum functioning of an independent and transparent council for the judiciary

III. A. A Council for the Judiciary composed by a majority of judges

15. The composition of the Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions effectively.

...

17. When the Council for the Judiciary is composed solely of judges, the CCJE is of the opinion that these should be judges elected by their peers.

18. When there is a mixed composition (judges and non-judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers.

19. In the CCJE's view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self-protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice.

...

III. C. Selection methods

III. C. 1. Selection of judge members

25. In order to guarantee the independence of the authority responsible for the selection and career of judges, there should be rules ensuring that the judge members are selected by the judiciary."

(b) Magna Carta of Judges

136. The Magna Carta of Judges (Fundamental Principles) was adopted by the CCJE in November 2010. The relevant section reads as follows:

"Body in charge of guaranteeing independence

13. To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions."

(c) Opinion of the CCJE Bureau of 12 October 2017

137. Following a request of the Polish NCJ, on 12 October 2017 the CCJE Bureau adopted its Opinion on the Draft Act on the NCJ submitted by the President of Poland (see paragraphs 46-48 above). The Opinion stated, in so far as relevant:

"**E. The most significant changes introduced by the Draft Act presented by the President of Poland**

11. Thus, the most significant concerns caused by the adopted and later vetoed act on the Council related to:

- the selection methods for judge members of the Council;

- the pre-term removal of the judges currently sitting as members of the Council;

- ...

12. Out of these concerns, the only significant change in the present draft ... is the requirement for a majority of 3/5 in the *Sejm* for electing 15 judge members of the Council. However, this does not change in any way the fundamental concern of transferring the power to appoint members of the Council from the judiciary to the legislature, resulting in a severe risk of politicised judge members as a consequence of a politicised election procedure [footnote omitted]. This risk may be said to be even greater with the new draft, since it provides that if a 3/5 majority cannot be reached, those judges having received the largest number of votes will be elected.

13. Furthermore, since the President of Poland proposes, as in the previous draft, that the *Sejm* also elects 15 judge members of the Council, in addition to 4 *ex officio* members of the Council and 6 members presently elected by Parliament from among MPs, this effectively means that almost all members of the Council would be elected by the Parliament. Such a proposal contradicts the Council of Europe's standards for judicial self-governing bodies such as councils for the judiciary.

14. The CCJE Bureau reiterates that by its *Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities*, the Committee of Ministers of the Council of Europe took the position that not less than half the members of Councils for the Judiciary should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary [footnote omitted]. This is also reflected in the Opinions of the CCJE and other relevant bodies at the European level set up in order to safeguard the rule of law and the basic principles for judicial independence and impartiality. The Venice Commission has particularly advocated that judicial members of a Council for the Judiciary should be elected or appointed by their peers [footnote omitted]. Furthermore, the proposed new method for selecting judge members contradicts the principles set out in the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality [footnote omitted]. ...

16. As regards the term of office of members of the Council, the new draft foresees, similarly to the previous draft, the pre-term termination of the mandate of the 15 judges who are currently members of the Council. They will serve in the Council only until the election of the new 15 members by the *Sejm*.

17. The CCJE has underlined in general that a member of any Council for the Judiciary, which is a constitutional body entrusted with a mission of fundamental importance for the independence of the judiciary, should only be removed from office following the application - as a minimum - of those safeguards and procedures that would apply when consideration is being given to a removal from office of an ordinary judge. The procedure in the case of pre-term removal should be transparent and any risk of political influence should be firmly excluded, which is not the case either in the previous or in the new draft.

...

F. Conclusions

20. The Bureau of the CCJE, which represents the CCJE members who are serving judges from all Council of Europe member States, reiterates once again that the Draft Act would be a major step back as regards judicial independence in Poland.
...

21. In order to fulfil European standards on judicial independence, the judge members of the National Council of the Judiciary of Poland should continue to be chosen by the judiciary. Moreover, the pre-term removal of the judges currently sitting as members of the Council is not in accordance with European standards and it endangers basic safeguards for judicial independence.

22. The Bureau of the CCJE is deeply concerned by the implications of the Draft Act for the principle of the separation of powers, as well as that of the independence of the judiciary, as it effectively means transferring the power to appoint members of the Polish National Council of the Judiciary from the judiciary to the legislature. The CCJE Bureau recommends that the Draft Act be withdrawn and that the existing law remain in force. Alternatively, any new draft proposals should be fully in line with the standards of the Council of Europe regarding the independence of the judiciary."

138. On 10 November 2017 the CCJE confirmed the above-mentioned Opinion of the CCJE Bureau.

(d) Opinion no. 24 (2021)

139. Opinion no. 24 (2021) of the CCJE on the Evolution of the Councils for the Judiciary and Their Role in Independent and Impartial Judicial Systems, adopted on 5 November 2021 states, in so far as relevant:

"**II. Tasks, organisation and composition of Councils for the Judiciary**

1. The tasks of a Council for the Judiciary

19. The CCJE accepts that there is not one single model for a Council for the Judiciary. However, every Council should have adequate competences to defend the independence of the judiciary and individual judges [footnote omitted], so that individual judges are free to decide cases without undue influence from outside and inside the judiciary [footnote omitted]. Judicial independence requires special protection in decisions which have an effect on judicial decision making, such as the selection of judges, ... Where it has such responsibilities, a Council for the Judiciary should ensure that such decisions are made in a way that protects and enhances judicial independence.

...

2. *Composition of a Council for the Judiciary*

...

29. The CCJE recommends that Councils for the Judiciary should be composed of a majority of judges elected by their peers. Other members may be added depending on the functions of the Councils. The CCJE recommends that a Council also have non-judicial members possibly including lay persons who are not legal professionals [footnote omitted]. While judges should always be in the majority, non-judicial members preferably with voting rights ensure a diverse representation of society, decreasing the risk of corporatism [footnote omitted]. The participation of lay persons may increase legitimacy and fight the perception of the judiciary as a "lawyers-only affair". The CCJE takes a more nuanced view in this respect than in Opinion No. 10 (2007).

3. Selection of members and chair of a Council for the Judiciary

30. The CCJE wishes to strongly reaffirm that the majority of members should be judges elected by their peers, guaranteeing the widest possible representation of courts and instances [footnote omitted], as well as diversity of gender [footnote omitted] and regions. Elected judges should be able to participate in the Council's activities in a way compatible with their workload. Where the Council includes non-judges, they should be able to devote adequate time to participation in the Council's activities.

31. An election of judge members by parliament or selection by the executive must be avoided [footnote omitted]. An election by parliament of non-judicial members might, however, be acceptable. As an alternative an election or nomination by institutions such as Bar Associations or nomination by NGOs is a possibility.

32. By whatever means members are selected and appointed [footnote omitted], this should not be done for political reasons. ... Members of the Council for the Judiciary should not be under the authority or influence of others.

...

4. Security of tenure of members of a Council for the Judiciary

36. Members should be selected for a fixed time in office and must enjoy adequate protection for their impartiality and independence [footnote omitted]. Members must be protected from internal and external pressures. However, except, in cases of death, retirement or removal from office, for example as a result of disciplinary action, a member's term should only end upon the lawful election of a successor to ensure that the Council is able to exercise its duties lawfully even if the appointment of new members has failed, because of a deadlock in parliament [footnote omitted]. CCJE draws attention to the possible impact of re-election on the independence of the members of a Council for the Judiciary. ... Continuity and efficiency can be improved if not all terms of office expire simultaneously.

37. The CCJE wishes to reaffirm the importance of security of tenure of all Council members as such [footnote omitted] as a crucial precondition for the independence of the Council. Judges appointed to the Council for the Judiciary should be protected with the same guarantees as those granted to judges exercising jurisdictional functions, including the conditions of service and tenure and the right to a fair hearing in case of discipline, suspension, and removal [footnote omitted]. Non-judicial members should have equivalent protection. ...

38. Members may only be removed from office based on proven serious misconduct in a procedure in which their rights to a fair trial are guaranteed. Members may cease to be members in the event of incapacity or loss of the status on the basis of which they were elected or appointed to the Council. If the Council itself or a special body within it are responsible for this decision, the rights of the dismissed member to an appeal must be ensured. The CCJE underlines the importance that procedures which may lead directly or indirectly to termination of office are not misused for political purposes but respect fair trial rights [footnote omitted]. In this respect, this Opinion amplifies Opinion No. 10 (2007)."

6. Group of States against Corruption ("GRECO")

140. Following considerable amendments to legislation affecting the judiciary in Poland in 2016/2017, GRECO decided at its 78th Plenary Meeting (4-8 December 2017) to apply an *ad hoc* procedure in respect of Poland. This

procedure can be triggered in exceptional circumstances, such as when GRECO receives reliable information concerning institutional reforms, legislative initiatives or procedural changes that may result in serious violations of anti-corruption standards of the Council of Europe.

141. The relevant extracts from the Addendum to the Fourth Round Evaluation Report on Poland, adopted by Greco at its 80th Plenary Meeting (Strasbourg, 18-22 June 2018, Greco-AdHocRep(2018)3), read as follows:

> "26. ... The Polish authorities indicate that these amendments [the 2017 Amending Act] were made to ensure a better representation of the whole judiciary in the NCJ (in light of the underrepresentation of district court judges in the past) and to make the NCJ more democratic in order to counter corporatism [footnote omitted]. ...
>
> 27. ... The GET [Greco Evaluation Team] regrets the enforcement of the simultaneous dismissal of the judicial members of the NCJ and the fact that it was not possible for judicial members to challenge the dismissals. The GET takes the view that it would have been possible to achieve the aim of "the same term of office" for NCJ members, as required by a judgment of the Constitutional Tribunal, without the pre-term dismissal of all serving judicial members [footnote omitted]. New elections of the 15 judge members took place on 7 March 2018. Only 18 judges stood for election, 17 of which were proposed by groups of 25 judges and one by a group of more than 2000 citizens. The GET was informed that a large part of the judiciary had boycotted the elections, as had several opposition parties in the *Sejm*, and that most of the new judge members were at the time judges seconded to the Ministry of Justice or presidents of courts who had recently been appointed by the Minister (which reportedly was similar for judge members of the previous NCJ) [footnote omitted]. ...
>
> 28. While the GET takes note of the stated aim of making the NCJ more representative of the judiciary, it considers that this could and should have been done through other means. It also notes that despite this aim the 15 judge members chosen by the *Sejm* do not include any judges from courts of appeal, military courts, the Supreme Court or Supreme Administrative Court (other than *ex officio* members). The current method for electing judge members to the NCJ limits considerably the influence of the judiciary on these elections in favour of the legislature. ...
>
> 29. The GET takes note of these points, but at the same time cannot disregard the fact that effectively 21 of the 25 members of the NCJ are now elected by Parliament (a majority of which by the ruling party). The GET maintains that, following the 2017 [Amending Act], the election of representatives of the judiciary to the NCJ is no longer in compliance with Council of Europe standards, nor with GRECO's well-established practice, which require that at least half of the members of a judicial council should consist of judges elected by their peers, as was the case in Poland before the amending law was adopted [footnote omitted]. This is particularly problematic in light of the NCJ's central role in the process of appointing judges in Poland. In view of the above, **GRECO recommends that the provisions on the election of judges to the National Council of the Judiciary be amended, to ensure that at least half of the members of the National Council of the Judiciary are judges elected by their peers."** (bold in the original)

142. In December 2019 GRECO assessed whether Poland had implemented any of the recommendations it issued in the Addendum to the Fourth Round Evaluation Report of June 2018. In its report

GrecoRC4(2019)23 adopted at its 84th Plenary Meeting (Strasbourg, 2-6 December 2019), GRECO stated as follows:

"**Rule 34 recommendation i.**

30. GRECO recommended that the provisions on the election of judges to the NCJ be amended, to ensure that at least half of the members of the NCJ are judges elected by their peers.

31. The authorities did not provide any information on measures taken to implement this recommendation.

32. GRECO regrets ─ in particular given the NCJ central role in the process of appointing judges in Poland ... ─ that no steps were taken to amend the Law on the NCJ, to ensure that at least half of the members of the NCJ are judges elected by their peers. GRECO maintains its position, as outlined in the Rule 34 Report, that the current composition of the NCJ (whereby effectively 21 out of 25 members of the NCJ are being elected by Parliament) is not in compliance with Council of Europe standards.

33. GRECO concludes that Rule 34 recommendation i has not been implemented."

143. In its Interim Compliance Report GrecoRC4(2021)18 adopted at is 88th Plenary Meeting (Strasbourg, 20-22 September 2021), GRECO concluded that Rule 34 recommendation i remained not implemented (see paragraph 142 above).

E. The Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE/ODIHR)

144. The OSCE/ODIHR prepared its Final opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland of 5 May 2017 upon a request received from the Chairperson of the NCJ[16]. The Final Opinion read, in so far as relevant:

"**3.1. The Modalities of Appointing Judge Members of the Judicial Council**

3.1.1. Appointing Authority

34. Article 1 [paragraphs] 1-3 of the Draft Act proposes to replace the existing selection methods with a procedure whereby the fifteen judges sitting on the Judicial Council will be chosen by the *Sejm*. ...

37. In principle, judicial councils or other similar bodies are crucial to support and guarantee the independence of the judiciary in a given country, and as such should themselves be independent and impartial, i.e., free from interference from the executive and legislative branches. Indeed, interfering with the independence of bodies, which are guarantors of judicial independence, could as a consequence impact and potentially jeopardize the independence of the judiciary in general. As is the case in Poland..., such councils are generally in charge of key issues pertaining to the independence of judges,

[16] This opinion concerned an earlier version of the draft Act; however, the earlier draft already contained two principal amendments, namely regarding the change of manner of electing judicial members of the NCJ and the early termination of the term of office of the sitting members.

particularly judicial appointments and promotion, and also represent the interests of the judiciary as a whole, in particular vis-à-vis the executive and legislative powers. ...

40. The approach of the Draft Act, which places the procedure of appointing members of the Judicial Council primarily in the hands of the other two powers, namely the executive and/or the legislature (apart from the *ex officio* members, 21 members would now be appointed by the legislative branch and one by the executive), increases the influence of these powers over the appointment process of its members, thereby threatening the independence of the Judicial Council, and as a consequence, judicial independence overall as guaranteed by Article 173 of the Constitution. ...

42. The principle of having judge members of judicial councils selected by their peers exists primarily to prevent any manipulation or undue pressure from the executive or legislative branches, and to ensure that judicial councils are free from any subordination to political party considerations, so as to be able to perform their roles of safeguarding the independence of the judiciary and of judges. ...

47. Based on the foregoing, it is recommended that Articles 1(1) – 1(3) of the Draft Act be reconsidered and that judicial members of the Judicial Council continue to be chosen by the judiciary ...

5. The Termination of the Mandate of Current Judge Members of the Judicial Council

81. The early termination of the mandate of judges duly elected to a constitutional body, for no legitimate reason other than an amendment to relevant legislation, raises concerns with regard to respect of the independence of such a body, and as a consequence of the judiciary as a whole.

82 In this context, it is noted that Article 14 of the 2011 Act lists a number of limited circumstances in which the early termination of members of the Judicial Council is possible. The list therein does not, however, include amendments to relevant legislation. ... In principle, the removal of a member before the expiration of his or her mandate should be possible only for the reasons specified in the respective law, and Parliament should refrain from adopting measures which would have a direct and immediate effect on the composition of the Judicial Council. Generally, and while noting that the judge members to the Council will not lose their status of judge, the early termination of the mandates of judge members of judicial councils should be guided by similar safeguards and principles. These principles advise for clearly established and transparent procedures and safeguards, based on clear and objective criteria, in order to exclude any risk of political influence on judges' early removal from office. This means that judge members' appointments should only be reconsidered if some breach of disciplinary rules or the criminal law by the individual judges sitting on the Council is clearly established, following proper disciplinary or judicial procedures. ...

85. In light of the above, it is recommended to remove Article 5 par 1 from the Draft Act, so that members of the Judicial Council may serve their full term of office, all the more since there do not seem to be any legal or other compelling reasons justifying the early termination of their mandates."

III. EUROPEAN UNION LAW

A. The Treaty on European Union

145. Article 2 of the Treaty on European Union ("the TEU") reads as follows:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

146. Article 19 § 1 of the TEU provides:

> "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
>
> Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

B. The Charter of Fundamental Rights

147. Title VI of the Charter, under the heading 'Justice', includes Article 47 thereof, entitled 'Right to an effective remedy and to a fair trial', which states as follows:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. ..."

C. Case-law of the CJEU

1. Judgment of 27 February 2018 in Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, EU:C:2018:117

148. The request for a preliminary ruling was made in proceedings between the *Associação Sindical dos Juízes Portugueses* (ASJP) and the *Tribunal de Contas* (Court of Auditors, Portugal) concerning the temporary reduction in the remuneration paid to that court's members, in the context of Portugal's budgetary policy guidelines. In finding that the principle of judicial independence in Article 19(1) TEU does not preclude general salary-reduction measures, such as those at issue in those proceedings, the CJEU reasoned as follows:

> "30. According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, *inter alia*, justice prevails. In that regard, it should be noted that mutual trust between

the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU (see, to that effect, Opinion 2/13 (Accession of the European Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 168).

...

32. Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 66; judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 90, and of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 45).

...

34. The Member States are therefore obliged, by reason, *inter alia*, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 68). In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 100 and 101 and the case-law cited).

35. The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraphs 29 to 33).

36. The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 73 and the case-law cited).

37. It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.

38. In that regard, the Court notes that the factors to be taken into account in assessing whether a body is a 'court or tribunal' include, *inter alia*, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 27 and the case-law cited).

...

42. The guarantee of independence, which is inherent in the task of adjudication (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 49; of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 60; and of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 40), is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts.

...

44. The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 37 and the case-law cited)."

2. *Judgment of 19 November 2019 in A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982*

149. Between August and October 2018 the Labour and Social Security Chamber of the Supreme Court made three requests to the CJEU for a preliminary ruling in cases pending before that court which arose in connection with the lowering of the retirement age for judges of the Supreme Court in the new Act on the Supreme Court adopted in December 2017. This rule was also applicable to judges of the Supreme Administrative Court. The cases in question involved proceedings brought by a judge of the Supreme Administrative Court (A.K.) against the NCJ, and proceedings brought by two Supreme Court judges (C.P. and D.O.) against the President of the Republic. The requests concerned, *inter alia*, the issue whether the newly established Disciplinary Chamber of the Supreme Court that was to have jurisdiction in such cases could be regarded as an independent court under EU law in light of the fact that it was composed of judges selected by the new NCJ.

150. On 19 November 2019 the CJEU delivered its preliminary ruling. It held, in so far as relevant:

"Article 47 of the Charter of Fundamental Rights of the European Union and Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provisions. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts,

in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Supreme Court.

If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field."

151. On the interaction between EU law and the Convention, the CJEU found as follows:

"115. In that regard, according to settled case-law, when there are no EU rules governing the matter, although it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, the Member States are, however, responsible for ensuring that, pursuant to Article 47 of the Charter, the right to effective judicial protection of those rights is effectively protected in every case (see, to that effect, judgments of 22 October 1998, *IN. CO. GE.'90 and Others*, C-10/97 to C-22/97, EU:C:1998:498, paragraph 14 and the case-law cited; of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraphs 44 and 45; and of 19 March 2015, *E.ON Földgáz Trade*, C-510/13, EU:C:2015:189, paragraphs 49 and 50 and the case-law cited).

116. Furthermore, it should be noted that Article 52(3) of the Charter states that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR.

117. As is clear from the explanations relating to Article 47 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the first and second paragraphs of Article 47 of the Charter correspond to Article 6(1) and Article 13 of the ECHR (judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraph 40 and the case-law cited).

118. The Court must therefore ensure that the interpretation which it gives to the second paragraph of Article 47 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 European Court of Human Rights (judgment of 29 July 2019, *Gambino and Hyka*, C-38/18, EU:C:2019:628, paragraph 39).

119. As regards the substance of the second paragraph of Article 47 of the Charter, it is clear from the very wording of that provision that the fundamental right to an effective remedy enshrined therein means, *inter alia*, that everyone is entitled to a fair hearing by an independent and impartial tribunal.

120. That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 58 and the case-law cited).

121. According to settled case-law, the requirement that courts be independent has two aspects to it. The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 63 and the case-law cited, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 72).

122. The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 65 and the case-law cited, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 73).

123. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66 and the case-law cited, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 74).

124. Moreover, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive (see, to that effect, judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 35).

125. In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules set out in paragraph 123 above must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (see, to that effect, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 112 and the case-law cited).

126. That interpretation of Article 47 of the Charter is borne out by the case-law of the European Court of Human Rights on Article 6(1) of the ECHR according to which that provision requires that the courts be independent of the parties and of the executive

and legislature (ECtHR, 18 May 1999, *Ninn-Hansen v. Denmark*, ..., p. 19 and the case-law cited).

127. According to settled case-law of that court, in order to establish whether a tribunal is 'independent' within the meaning of Article 6(1) of the ECHR, regard must be had, *inter alia*, to the mode of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body at issue presents an appearance of independence (ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e S v. Portugal*, ..., § 144 and the case-law cited), it being added, in that connection, that what is at stake is the confidence which such tribunals must inspire in the public in a democratic society (see, to that effect, ECtHR, 21 June 2011, *Fruni v. Slovakia*, ..., § 141).

128. As regards the condition of 'impartiality', within the meaning of Article 6(1) of the ECHR, impartiality can, according to equally settled case-law of the European Court of Human Rights, be tested in various ways, namely, according to a subjective test where regard must be had to the personal convictions and behaviour of a particular judge, that is, by examining whether the judge gave any indication of personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. In this connection, even appearances may be of a certain importance. Once again, what is at stake is the confidence which the courts in a democratic society must inspire in the public, and first and foremost in the parties to the proceedings (see, *inter alia*, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, ..., § 191 and the case-law cited, and 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, ..., §§ 145, 147 and 149 and the case-law cited).

129. As the European Court of Human Rights has repeatedly held, the concepts of independence and objective impartiality are closely linked which generally means that they require joint examination (see, *inter alia*, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, ..., § 192 and the case-law cited, and 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, ..., § 150 and the case-law cited). According to the case-law of the European Court of Human Rights, in deciding whether there is reason to fear that the requirements of independence and objective impartiality are not met in a given case, the perspective of a party to the proceedings is relevant but not decisive. What is decisive is whether such fear can be held to be objectively justified (see, *inter alia*, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, ..., §§ 193 and 194 and the case-law cited, and of 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, ..., §§ 147 and 152 and the case-law cited).

130. In that connection, the European Court of Human Rights has repeatedly stated that, although the principle of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law, neither Article 6 nor any other provision of the ECHR requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State, nor requires those States to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction. The question is always whether, in a given case, the requirements of the ECHR have been met (see, *inter alia*, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, ..., § 193 and the case-law cited; 9 November 2006, *Sacilor Lormines v. France*, ..., § 59; and 18 October 2018, *Thiam v. France*, ..., § 62 and the case-law cited)."

152. With regard to the status of the new NCJ, the CJEU found, in so far as relevant:

> "136. In the present cases, it should be made clear that Article 30 of the New Law on the Supreme Court sets out all the conditions which must be satisfied by an individual in order for that individual to be appointed as a judge of that court. Furthermore, under Article 179 of the Constitution and Article 29 of the New Law on the Supreme Court, the judges of the Disciplinary Chamber are, as is the case for judges who are to sit in the other chambers of the referring court, appointed by the President of the Republic on a proposal of the [NCJ], that is to say the body empowered under Article 186 of the Constitution to ensure the independence of the courts and of the judiciary.
>
> 137. The participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective ... In particular, the fact of subjecting the very possibility for the President of the Republic to appoint a judge to the [Supreme Court] to the existence of a favourable opinion of the [NCJ] is capable of objectively circumscribing the President of the Republic's discretion in exercising the powers of his office.
>
> 138. However, that is only the case provided, *inter alia*, that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal ...
>
> 139. The degree of independence enjoyed by the [NCJ] in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Article 186 of the Constitution, to ensure the independence of the courts and of the judiciary, may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter.
>
> 140. It is for the referring court to ascertain whether or not the [NCJ] offers sufficient guarantees of independence in relation to the legislature and the executive, having regard to all of the relevant points of law and fact relating both to the circumstances in which the members of that body are appointed and the way in which that body actually exercises its role.
>
> 141. The referring court has pointed to a series of elements which, in its view, call into question the independence of the [NCJ].
>
> 142. In that regard, although one or other of the factors thus pointed to by the referring court may be such as to escape criticism *per se* and may fall, in that case, within the competence of, and choices made by, the Member States, when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors are taken individually, that conclusion is not inevitable.
>
> 143. Subject to those reservations, among the factors pointed to by the referring court which it shall be incumbent on that court, as necessary, to establish, the following circumstances may be relevant for the purposes of such an overall assessment: first, the [NCJ], as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time; second, whereas the 15 members of the [NCJ] elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the legislature among candidates capable of being proposed *inter alia* by groups of 2 000 citizens or 25 judges, such a reform leading to appointments bringing the number of members of the [NCJ] directly

originating from or elected by the political authorities to 23 of the 25 members of that body; third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed [NCJ].

144. For the purposes of that overall assessment, the referring court is also justified in taking into account the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive." [17]

3. Judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153

153. By resolutions adopted in August 2018, the NCJ decided not to present to the President of the Republic proposals for the appointment of five persons ('the appellants') as judges at the Supreme Court and to put forward other candidates for those positions. The appellants lodged appeals against these resolutions with the Supreme Administrative Court, the referring court. Such appeals were governed at that time by the Act on the NCJ, as amended by a law of July 2018. Under those rules, it was provided that unless all the participants in a procedure for appointment as judge at the Supreme Court challenged the relevant resolution of the NCJ, that resolution became final with respect to the candidate presented for that position, so that the latter could be appointed by the President of the Republic. The referring court, taking the view that such rules precluded in practice any effectiveness of the appeal lodged by a participant who had not been put forward for appointment, initially requested a preliminary ruling on whether those rules were in compliance with EU law.

154. After that initial referral, the Act on the NCJ was once again amended, in 2019. Pursuant to that amendment, it became impossible to lodge appeals against decisions of the NCJ concerning the proposal or non-proposal of candidates for appointment to judicial positions at the Supreme Court. Moreover, that amendment declared appeals which were still pending to be discontinued by operation of law. Considering that from now on it was deprived of its jurisdiction to obtain an answer to the questions that it had previously referred to the CJEU, the referring court, i.e. the Supreme Administrative Court, in its complementary request for a preliminary ruling, asked a question about the compatibility of those new rules with EU law.

155. On 2 March 2021 the CJEU delivered a preliminary ruling, which found in the operative part in so far as relevant:

"1. Where amendments are made to the national legal system which, first, deprive a national court of its jurisdiction to rule in the first and last instance on appeals lodged by candidates for positions as judges at a court such as the [Supreme Court, Poland] against decisions of a body such as the [National Council of the Judiciary, Poland] not

[17] See the follow-up rulings of the Supreme Court of 5 December 2019 and 15 January 2020 in paragraphs 100-107 and 109 above.

to put forward their application, but to put forward that of other candidates to the President of the Republic of Poland for appointment to such positions, which, secondly, declare such appeals to be discontinued by operation of law while they are still pending, ruling out the possibility of their being continued or lodged again, and which, thirdly, in so doing, deprive such a national court of the possibility of obtaining an answer to the questions that it has referred to the Court for a preliminary ruling:

...

– the second subparagraph of Article 19(1) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed, by the President of the Republic of Poland, on the basis of those decisions of the Krajowa Rada Sądownictwa (National Council of the Judiciary), to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

Where it is proved that those articles have been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made."

156. The relevant reasons for the judgment read as follows:

"121. ... the guarantees of independence and impartiality required under EU law presuppose, *inter alia*, the existence of rules governing the appointment of judges.

...

124. Having noted that, under Article 179 of the Constitution, the judges of the [Supreme Court] are appointed by the President of the Republic on a proposal from the [NCJ], that is to say the body empowered under Article 186 of the Constitution to ensure the independence of the courts and of the judiciary, the Court stated, in paragraph 137 of the judgment in *A. K. and Others*, that the participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective, by circumscribing the President of the Republic's discretion in exercising the powers of his or her office.

125. In paragraph 138 of that judgment, the Court stated, however, that that is only the case provided, *inter alia*, that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal.

126 In that regard, it should be noted that, as the referring court has pointed out, under Article 179 of the Constitution, the act by which the [NCJ] puts forward a candidate for appointment to a position of judge at the [Supreme Court] is an essential condition for such a candidate to be appointed to such a position by the President of the Republic. The role of the [NCJ] in that appointment process is therefore decisive.

127. In such a context, the degree of independence enjoyed by the [NCJ] in respect of the Polish legislature and the executive in exercising the responsibilities attributed to it may become relevant when ascertaining whether the judges which it selects will be

capable of meeting the requirements of independence and impartiality arising from EU law (see, to that effect, judgment in *A. K. and Others*, paragraph 139).

...

129. Thus, while the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU, the situation is different in circumstances in which all the relevant factors characterising such a process in a specific national legal and factual context, and in particular the circumstances in which possibilities for obtaining judicial remedies which previously existed are suddenly eliminated, are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process.

130. As is apparent from the judgment in *A.K. and Others*, that may particularly be the case where it appears, on the basis of criteria such as those mentioned by the referring court and which are referred to in paragraph 43 of this judgment, that the independence of a body such as the [NCJ] from the legislature and executive is open to doubt.

131. In paragraphs 143 and 144 of the judgment *A.K. and Others*, the Court thus already identified, from among the relevant factors to be taken into account for the purposes of assessing the requirement of independence which must be satisfied by a body such as the [NCJ], first, the fact that the [NCJ], as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time, second, the fact that, whereas the 15 members of the [NCJ] elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the Polish legislature, third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed [NCJ], and, fourth, the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers. In such a context, the possible existence of special relationships between the members of the [NCJ] thus established and the Polish executive, such as those referred to by the referring court and mentioned in paragraph 44 of this judgment, may similarly be taken into account for the purposes of that assessment.

132. In addition, in the present case, account should also be taken of other relevant contextual factors which may also contribute to doubts being cast on the independence of the [NCJ] and its role in appointment processes such as those at issue in the main proceedings, and, consequently, on the independence of the judges appointed at the end of such a process.

133. It should be observed, in that regard, that the legislative reform which led to the establishment of the [NCJ] in its new composition took place in conjunction with the adoption, which was highly contentious, of the provisions of Articles 37 and 111 of the New Law on the Supreme Court which the referring court has mentioned and which lowered the retirement age of the judges of the [Supreme Court] and applied that measure to judges currently serving in that court, while empowering the President of the Republic with discretion to extend the exercise of active judicial service of those judges beyond the new retirement age set by that law.

134. It is therefore common ground that the establishment of the [NCJ] in its new composition took place in a context in which it was expected that many positions would

soon be vacant in the [Supreme Court] following, in particular, the retirement of the judges of that court who had reached the newly set age limit of 65 years." [18]

4. Judgment of 20 April 2021, Repubblika v. Il-Prim Ministru, C-896/19, EU:C:2021:311

157. The First Hall of the Civil Court, sitting as a Constitutional Court of Malta made a request for a preliminary ruling on the conformity with EU law of the provisions of the Constitution of Malta governing the procedure for the appointment of members of the judiciary.

158. On 20 April 2021 the CJEU gave the following ruling, in so far as relevant:

"2. The second subparagraph of Article 19(1) TEU must be interpreted as not precluding national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body responsible for, *inter alia*, assessing candidates for judicial office and giving an opinion to that Prime Minister."

159. The relevant reasons for the judgment read as follows:

"63. It follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, *inter alia*, Article 19 TEU ...

64. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary ...

65. In that context, the Court has already held, in essence, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding national provisions relating to the organisation of justice which are such as to constitute a reduction, in the Member State concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence (see, to that effect, judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court-Actions)*, C-824/18, EU:C:2021:153).

66. By contrast, the involvement, in the context of a process for appointing members of the judiciary, of a body such as the Judicial Appointments Committee established, when the Constitution was reformed in 2016, by Article 96A of the Constitution may, in principle, be such as to contribute to rendering that process more objective, by circumscribing the leeway available to the Prime Minister in the exercise of the power conferred on him or her in that regard. It is also necessary that such a body should itself be sufficiently independent of the legislature, the executive and the authority to which it is required to submit an opinion on the assessment of candidates for a judicial post ...

[18] See the follow-up judgments of the Supreme Administrative Court of 6 May 2021 in paragraphs 117-119 above.

67. In the present case, a series of rules mentioned by the referring court appear to be such as to guarantee the independence of the Judicial Appointments Committee vis-à-vis the legislature and the executive. The same applies to the rules, contained in Article 96A(1) to (3) of the Constitution, relating to the composition of that committee and the prohibition on politicians sitting in that committee, the obligation imposed on members of that committee by Article 96A(4) of the Constitution to act on their individual judgment and not to be subject to direction or control by any person or authority, and the obligation for that committee to publish, with the consent of the Minister responsible for justice, the criteria which it has drawn up, and also its assessments, something which was, moreover, done, as the Advocate General observes in point 91 of his Opinion.

68. Furthermore, the referring court has not, in the present case, expressed any doubts as to the conditions under which the members of the Judicial Appointments Committee established by Article 96A of the Constitution were appointed or as to how that body actually performs its role.

69. It is thus apparent that the introduction of the Judicial Appointments Committee by Article 96A of the Constitution serves to reinforce the guarantee of judicial independence."

5. *Judgment of 15 July 2021 in Commission v. Poland (Disciplinary regime for judges), C-791/19, EU:C:2021:596*

160. Following its interim decision of 8 April 2020 (see paragraph 23 above), on 15 July 2021 the Grand Chamber of the CJEU delivered its judgment in the case of *Commission v. Poland (Disciplinary regime for judges)* holding that the new disciplinary regime for judges was not compatible with EU law. The CJEU found, *inter alia*, that in light of the global context of major reforms that had recently affected the Polish judiciary, in which context the Disciplinary Chamber of the Supreme Court had been created, and owing to a combination of factors that framed the process whereby that new chamber had been established, that chamber did not provide all the guarantees of impartiality and independence and, in particular, was not protected from the direct or indirect influence of the Polish legislature and executive; among those factors, the Court criticised, in particular, the fact that the process for appointing judges to the Supreme Court, including the members of the Disciplinary Chamber, was essentially determined by the NCJ, which had been significantly reorganised by the Polish executive and legislature and whose independence could give rise to reasonable doubts.

161. The relevant reasons for the judgment read as follows:

"96. In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 54 and the case-law cited).

97. Concerning, more specifically, the circumstances in which decisions to appoint judges of the Supreme Court and, in particular, of the Disciplinary Chamber, are made, it is true that the Court has already had occasion to state that the mere fact that the judges

concerned are appointed by the President of a Member State does not give rise to a relationship of subordination of those judges to the latter or to doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 56 and the case-law cited).

98. However, the Court has stated that it is still necessary to ensure that the substantive conditions and procedural rules governing the adoption of those appointment decisions are such that they cannot give rise to reasonable doubts in the minds of individuals as to the imperviousness of the judges concerned to external factors and their neutrality with respect to the interests before them, once they have been appointed as judges, and that it is important, *inter alia*, in that perspective, that those conditions and procedural rules should be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (see, to that effect, judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraphs 55 and 57 and the case-law cited).

99. Having noted that, under Article 179 of the Constitution, the judges of the Supreme Court are to be appointed by the President of the Republic on a proposal from the [NCJ], namely the body entrusted under Article 186 of the Constitution with the task of safeguarding the independence of courts and judges, the Court stated, in paragraph 137 of the judgment in *A. K. and Others* and paragraph 124 of the judgment in *A.B. and Others*, that the participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective, by circumscribing the President of the Republic's discretion in exercising the powers of his or her office.

100. In paragraph 138 of the judgment in *A. K. and Others* and paragraph 125 of the judgment in *A.B. and Others*, the Court stated, however, that this is not the case unless, *inter alia*, that body is itself sufficiently independent of the legislature and the executive and of the authority to which it is required to deliver such an appointment proposal.

101. In that regard, it should be noted that, under Article 179 of the Constitution, the act by which the [NCJ] puts forward a candidate for appointment to a judge's post at the Supreme Court is an essential condition for that candidate to be appointed to such a post by the President of the Republic. The role of the [NCJ] in that appointment process is therefore decisive (see, to that effect, the judgment in *A.B. and Others*, paragraph 126).

102. In such a context, the degree of independence enjoyed by the [NCJ] in respect of the Polish legislature and executive in performing the tasks thus entrusted to it may become relevant when ascertaining whether the judges which it selects will themselves be capable of meeting the requirements of independence and impartiality derived from EU law (see, to that effect, judgments in *A. K. and Others*, paragraph 139, and *A.B. and Others*, paragraph 127).

103. It is true that ... the Court has previously held that the fact that a body, such as a national council of the judiciary, which is involved in the process for appointing judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that process (see, to that effect, judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraphs 55 and 56). However, it is also apparent from the case-law of the Court and, more specifically, from the judgments in *A. K. and Others* and *A.B. and Others*, that the situation may be different where that fact, combined with other

relevant factors and the conditions under which those choices were made, leads to such doubts being raised.

104. In that regard, it should be noted, first, that ... whereas the 15 members of the [NCJ] selected from among the judges were previously selected by their peers, the Law on the [NCJ] has recently been amended, so that, as is apparent from Article 9a of that law, those 15 members are now appointed by a branch of the Polish legislature, with the result that 23 of the 25 members of the [NCJ] in that new composition have been appointed by the Polish executive or legislature or are members thereof. Such changes are liable to create a risk, hitherto absent from the selection procedure previously in force, of the legislature and the executive having a greater influence over the [NCJ] and of the independence of that body being undermined.

105. Secondly ... it is apparent from Article 6 of the Law of 8 December 2017 ... that the thus newly constituted [NCJ] was established through the shortening of the existing four-year term of office, provided for in Article 187 § 3 of the Constitution, of the members which had, until that point, made up that body.

106. Thirdly, it is important to point out that the legislative reform which thus governed the process whereby the [NCJ] was established in that new composition took place at the same time as the adoption of the new Law on the Supreme Court which carried out a wide-ranging reform of the Supreme Court including, in particular, the creation, within that court, of two new chambers, one being the Disciplinary Chamber, and the introduction of the mechanism, since held to be contrary to the second subparagraph of Article 19(1) TEU ... providing for a lowering of the retirement age for judges of the Supreme Court and the application of that measure to serving judges of that court.

107. It is, accordingly, common ground that the premature termination of the terms of office of certain then-serving members of the [NCJ] and the reorganisation of the [NCJ] in its new composition took place in a context in which it was expected that numerous posts would be soon be vacant within the Supreme Court, and in particular within the Disciplinary Chamber, as the Court of Justice has already emphasised, in essence, in paragraphs 22 to 27 of the order of 17 December 2018, *Commission* v *Poland* (C-619/18 R, EU:C:2018:1021), in paragraph 86 of the judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), and in paragraph 134 of the judgment in *A.B. and Others*.

108. It must be held that the factors highlighted in paragraphs 104 to 107 of the present judgment are such as to give rise to legitimate doubts as to the independence of the [NCJ] and its role in an appointment process such as that resulting in the appointment of the members of the Disciplinary Chamber.

109. Furthermore, it is apparent from paragraphs 89 to 94 of the present judgment, first, that that appointment process applies to candidates for the post of member of a newly created judicial chamber created to give rulings, *inter alia*, in disciplinary proceedings concerning national judges and on issues relating to the reform of the provisions relating to the Supreme Court, certain aspects of which have already led to a finding of a failure to fulfil obligations under the second subparagraph of Article 19(1) TEU on the part of the Republic of Poland, and, second, that that body is required to be made up exclusively of new judges who are not already sitting within the Supreme Court and who will receive a significantly higher level of remuneration, and has a particularly high degree of organisational, functional and financial autonomy in comparison with the conditions prevailing in the other judicial chambers of the Supreme Court.

110. Those factors, taken in the context of an overall analysis including the important role played by the [NCJ] – a body whose independence from the political authorities is questionable, as is apparent from paragraph 108 of the present judgment – in appointing members of the Disciplinary Chamber, are such as to give rise to reasonable doubts in the minds of individuals as to the independence and impartiality of that Disciplinary Chamber."

D. The European Commission

162. On 20 December 2017 the Commission launched the procedure under Article 7(1) of the TEU. The Commission submitted a reasoned proposal to the Council of the European Union, inviting it to determine that there was a clear risk of a serious breach by the Republic of Poland of the rule of law, one of the values referred to in Article 2 of the TEU, and to address appropriate recommendations to Poland in this regard.

163. The Commission noted that the situation in Poland had continuously deteriorated, despite the three recommendations issued under the rule of law framework. It considered that the situation in Poland represented a clear risk of a serious breach by the Republic of Poland of the rule of law, enshrined in Article 2 of the TEU. The Commission observed that over a period of two years more than thirteen consecutive laws had been adopted affecting the entire structure of the justice system in Poland: the Constitutional Court, the Supreme Court, the ordinary courts, the National Council for the Judiciary, the prosecution service and the National School of Judiciary. The common pattern in all these legislative changes was the executive or legislative powers being systematically enabled to interfere significantly with the composition, powers, administration and functioning of those authorities and bodies.

164. As regards the law on the NCJ, the Commission noted that its role had a direct impact on the independence of judges. For this reason, in Member States where a Council for the Judiciary has been established, its independence was particularly important for avoiding undue influence from the Government or the Parliament on the independence of judges. The Commission considered that the law on the NCJ increased the concerns regarding the overall independence of the judiciary by providing for the premature termination of the mandate of all judicial members of the NCJ, and by establishing an entirely new regime for the appointment of its judicial members allowing a high degree of political influence.

165. The relevant extracts from the European Commission reasoned proposal read as follows:

"4.2. **The law on the National Council for the Judiciary**

...

138. For this reason, in Member States where a Council for the Judiciary has been established, its independence is particularly important for avoiding undue influence from the Government or the Parliament on the independence of judges (footnote omitted).

139. The law on the National Council for the Judiciary increases the concerns regarding the overall independence of the judiciary by providing for the premature termination of the mandate of all judges-members of the National Council for the Judiciary, and by establishing an entirely new regime for the appointment of its judges-members which allows a high degree of political influence.

140. According to Article 6 of the law on the National Council for the Judiciary the mandates of all the current judges-members of the National Council for the Judiciary will be terminated prematurely. This termination decided by the legislative powers raises concerns for the independence of the Council and the separation of powers. The Parliament will gain a decisive influence on the composition of the Council to the detriment of the influence of judges themselves. This recomposition of the National Council for the Judiciary could already occur within one and a half month after the publication of the law [footnote omitted]. The premature termination also raises constitutionality concerns, as underlined in the opinion of the National Council for the Judiciary, of the Supreme Court and of the Ombudsman.

141. Also, the new regime for appointing judges-members of the National Council for the Judiciary raises serious concerns. Well established European standards, in particular the 2010 Recommendation of the Committee of Ministers of the Council of Europe, stipulate that 'not less than half the members of [Councils for the Judiciary] should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary' [footnote omitted]. It is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary. However, where such a Council has been established, as it is the case in Poland, its independence must be guaranteed in line with European standards.

142. Until the adoption of the law on the National Council for the Judiciary, the Polish system was fully in line with these standards since the National Council for the Judiciary was composed of a majority of judges chosen by judges. Articles 1(1) and 7 of the law amending the law on the National Council for the Judiciary would radically change this regime by providing that the 15 judges-members of the National Council for the Judiciary will be appointed, and can be re-appointed, by the *Sejm* (footnote omitted). In addition, there is no guarantee that under the new law the *Sejm* will appoint judges-members of the Council endorsed by the judiciary, as candidates to these posts can be presented not only by groups of 25 judges, but also by groups of at least 2000 citizens (footnote omitted). Furthermore, the final list of candidates to which the *Sejm* will have to give its approval *en bloc* is pre-established by a committee of the *Sejm* (footnote omitted). The new rules on appointment of judges-members of the NCJ significantly increase the influence of the Parliament over the Council and adversely affect its independence in contradiction with the European standards. The fact that the judges-members will be appointed by the *Sejm* with a three fifths majority does not alleviate this concern, as judges-members will still not be chosen by their peers. In addition, in case such a three fifths majority is not reached, judges-members of the Council will be appointed by the *Sejm* with absolute majority of votes.

...

145. In their opinions concerning the draft law, the Supreme Court, the National Council for the Judiciary and the Ombudsman raised a number of concerns as regards the constitutionality of the new regime. In particular, the National Council for the Judiciary notes that under the Polish constitution, the Council serves as a counterweight to the parliament which has been constitutionally authorized to decide on the content of law. The political appointment of judges-members and the premature termination of mandates of the current judges-members of the Council therefore violates the principles

of separation of powers and judicial independence. As explained in the previous Recommendations, an effective constitutional review of these provisions is currently not possible."

166. The procedure under Article 7(1) TEU is still under consideration by the Council of the European Union.

E. The European Parliament

167. In its resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017)0835 – 2017/0360R(NLE)), the European Parliament stated, in so far as relevant:

"**The composition and functioning of the new National Council of the Judiciary**

24. Recalls that it is up to the Member States to establish a council for the judiciary, but that, where such council is established, its independence must be guaranteed in line with European standards and the Member State's constitution; recalls that, following the reform of the National Council of the Judiciary, which is the body responsible for safeguarding the independence of the courts and judges in accordance with Article 186 § 1 of the Polish Constitution, by means of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, the judicial community in Poland was deprived of the power to delegate representatives to the National Council of the Judiciary, and hence its influence on recruitment and promotion of judges; recalls that before the reform, 15 out of 25 members of the National Council of the Judiciary were judges elected by their peers, while since the 2017 reform, those judges are elected by the Polish parliament; strongly regrets that, taken in conjunction with the premature termination in early 2018 of the mandates of all the members appointed under the old rules, this measure led to a far-reaching politicisation of the National Council of the Judiciary;".

IV. COMPARATIVE LAW MATERIAL

168. The Court has conducted a comparative survey of the domestic law and practice in 41 State Parties to the Convention on the issue of the premature termination *ex lege* of a judge's term of office as a member of a Council for the Judiciary[19].

169. It emerges from the contributions from the States surveyed, that most of them (36) have councils for the judiciary or equivalent bodies with the function of safeguarding the independence of the judiciary. Of these, the majority (26) make provision in their domestic law for premature termination

[19] Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Republic of Moldova, Monaco, Montenegro, the Netherlands, North Macedonia, Norway, Portugal, Romania, Russian Federation, San Marino, Serbia, the Slovak Republic, Slovenia, Spain, Switzerland, Turkey, Ukraine and the United Kingdom.

of the term of office of a judge elected as a member of such council, although on grounds that vary considerably between the different States.

170. In 17 countries the possibility to challenge premature termination of a council members' term of office in judicial proceedings is either expressly provided for by law or implicitly follows from the general domestic legal framework. In 13 States the termination of office at the council for the judiciary is an automatic consequence of the end of the person's term of office as a judge and is therefore not open to legal challenge as such, it being understood that the loss of judicial status is itself subject to judicial review. In respect of two States there is no clear answer to the question whether premature termination of the mandate may be challenged in judicial proceedings. Only in three countries are decisions on early termination of a council member's mandate final and not subject to any form of challenge in judicial proceedings; in one of these, however, a relevant reform is pending.

171. The majority of the States surveyed (24) do not have past experience of adopting laws resulting in the premature termination of office of a member of a council for the judiciary, and there is no indication if it is hypothetically possible in their systems. However, three countries have encountered relevant situations in the past; two of them introduced transitional provisions in relation to the terms of office existing at the time of the new law's entry into force. Two further States accept a theoretical possibility of premature termination of term of office in this manner. By contrast, in four other countries, legislative intervention of this kind would, according to the contributions received from the respective States, run a risk of being found to be unconstitutional on the basis that it would encroach on judicial independence. In the same vein, in two States where a new law regulating the composition of the council for the judiciary may theoretically be adopted, it cannot have retroactive effect. It may be concluded that there is no clear consensus in favour or against the possibility of legislative reform leading to a premature termination of office of a member of judicial council. The justification of such reform in a concrete situation and the existence of safeguards preserving the independence of courts and the judiciary, including transitional provisions, are relevant factors. Ultimately, the balance between the benefit of the reform for the functioning of democratic institutions and the security of tenure plays an important role.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

172. The applicant complained that he had been denied access to a court in order to contest the premature and allegedly arbitrary termination of his term of office as a judicial member of the NCJ. He had been elected as a member of this body for a four-year term, as provided for in Article 187 § 3

of the Constitution, and had the right to remain in office for the duration of that term, thus until 11 January 2020. The applicant claimed that the premature termination of his term of office had violated the Constitution and breached the rule of law. He relied on Article 6 § 1 of the Convention, of which, the relevant part, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

1. Applicability of Article 6

(a) The Government's submissions

173. The Government raised a preliminary objection as to the applicability of Article 6 § 1 of the Convention. They claimed that under Polish law there was no right to exercise public authority, including the right of a judge to be elected to the NCJ or to remain in that office. Moreover, in the present case there was no genuine and serious "dispute" concerning the existence of the alleged civil right of the applicant to remain a member of the NCJ.

174. The Government argued that until 2002 there had been no doubt that the term of office had been of a joint nature for all of the groups of the NCJ's elected members. However, in February 2002 the NCJ had adopted the view that the term of office of a judge elected to the NCJ should be considered individual (following the termination of the term of office of a judicial member who had been appointed to another judicial post). They submitted that, as a result, a discrepancy had arisen between the nature of the term of office of the judicial members and that of the other elected members (deputies and senators) of the NCJ. This differentiation had been reflected in the Act of NCJ of 2011. Consequently, on 11 April 2017 the Prosecutor General had lodged an application with the Constitutional Court on this issue. In its judgment of 20 June 2017 (no. K 5/17), the Constitutional Court had ruled that the term of office of all of the NCJ's elected members should be a joint one (see paragraph 42 above).

175. The Government maintained that in order to implement the Constitutional Court's judgment of 20 June 2017, the authorities had prepared a bill amending the Act on the NCJ. They argued that the decision to terminate the applicant's term of office had been legitimate. Its rationale was to implement the Constitutional Court's judgment in so far as the nature of the term of office of the NCJ's judicial members was concerned. It thus constituted a merely technical measure aimed at the establishment of a new term of office consonant with the relevant constitutional provisions.

176. The Government noted that the NCJ was a constitutional body tasked with safeguarding judicial independence, but not a judicial authority. It was

situated "between the three constitutional powers" and embodied the balance between them. They argued that the fact that the present case concerned a judicial member of the NCJ did not have any particular significance for the applicability of Article 6 § 1.

177. They emphasised the distinction between the applicant's status as a judge and his function as a member of the NCJ. The latter pertained to the exercise of public authority (*władztwo publiczno-prawne*). The NCJ included persons who were not entitled to independence, such as the deputies and senators, the Minister of Justice and a representative of the President of the Republic. The latter two members could be dismissed from their positions. Thus, it could not be said that a seat on the NCJ was protected in any particular way. Moreover, since the Constitution and the Act on the NCJ did not differentiate between the status of the NCJ's members depending on who appointed or elected them, it was difficult to treat the NCJ's judicial members differently from other members. Since the possibility of dismissing some members from the NCJ had never been a sign of a lack of independence of this body, it was thus not possible to derive from the rule of the NCJ's independence an absolute prohibition on removal of its members. Furthermore, it was impossible to conclude from the Court's case-law that only the existence of an independent judicial council could serve as a guarantee of the independence of the judiciary.

178. The Government submitted that election to the NCJ did not constitute "employment" or any other comparable legal relationship. Moreover, the present case did not concern an "employment dispute" similar to the cases of *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II) or *Baka v. Hungary* ([GC], no. 20261/12, 23 June 2016). NCJ members performed their functions *pro bono*. The only financial reward for NCJ members was the payment of *per diem* allowances for taking part in plenary sessions, or other work, and the reimbursement of relevant expenses. However, under the case-law of the domestic courts those allowances were not regarded as remuneration. Thus, the fact of being a member of the NCJ could not be regarded as a right either under domestic law or under the Convention.

179. The Government maintained that a certain stability of the term of office of the NCJ's elected members was established by law not to protect any "individual interest" of a judge, but to safeguard the public interest of ensuring the proper exercise of the NCJ's functions. Consequently, a member of the NCJ did not have any "right" to hold his position. The early termination of a term of office pertaining to the exercise of public authority did not constitute an interference with the rights of an individual. There were no safeguards in the Convention guaranteeing the exercise of public authority. They further argued that Article 60 of the Constitution, providing for the right of access to public service, did not apply to the present case.

180. As regards the first condition of the *Eskelinen* test, the Government maintained that under Polish law the applicant had been excluded from the right of access to a court in so far as his seat on the NCJ was concerned. This exclusion had been in place already on the date of his election to the NCJ and thus the 2017 Amending Act had not affected this.

181. The Government referred to section 14 of the Act on the NCJ, as applicable at the material time, containing the list of reasons for termination of the term of office of an NCJ member before the expiry of that term, and also to section 6 of the 2017 Amending Act. They noted that the Act on the NCJ had never provided for any form of appeal or remedy in connection with the expiry, termination or renunciation of the office for the members of this body. The same was true of the 2001 Act on the NCJ, which had envisaged in section 10(3) the possibility of removal of a member of the NCJ by the body that had elected him or her.

182. The Act on the NCJ provided that a judicial member of the Council could be appointed as a "permanent member of the Council's bureau". In such a case they were considered to be an employee and were entitled to bring court proceedings pertaining to their employment in the Council's bureau. Domestic law provided for the right of access to a court only in those limited circumstances.

183. The Government maintained that "civil rights" did not concern NCJ members and that the public-law nature of their office had never been questioned. Matters pertaining to participation in the NCJ did not constitute a "case" (*sprawa*) within the meaning of Article 45 § 1 of the Constitution and as such were excluded from the right to a court *ratione materiae*. The Government thus concluded that national law "excluded access to a court" for an individual claim based on the alleged unlawfulness of the termination of the term of office. The first condition of the *Eskelinen* test had therefore been met.

184. As regards the second condition of the *Eskelinen* test, the Government argued that the subject-matter of the applicant's complaint related exclusively to the exercise of State power (*acta iure imperii*).

185. The Government maintained that the amendments in the 2017 Amending Act had been proportionate since the aim had been to adjust the election rules to the relevant provisions of the Constitution, as interpreted by the Constitutional Court in its judgment of 20 June 2017 (no. K 5/17). They referred to the reasons for this judgment, noting that the amendments fell within the ambit of the legislature's margin of appreciation. Article 187 § 1(2) of the Constitution provided for election of the NCJ's judicial members from among judges. However, the Constitution did not determine who had to elect those judges and how they had to be elected. These modalities were to be regulated by statute, in accordance with Article 187 § 4 of the Constitution.

186. The Government maintained that under the previous legislation, fifteen judicial members of the NCJ were elected by judges in a complicated

and non-transparent procedure which favoured senior judges and those holding administrative functions. Currently, the judicial members were elected by the *Sejm* only from among the judges who obtained adequate support from other judges or from citizens.

187. The Government submitted that in the Constitutional Court's case-law the protection of the term of office of the NCJ's judicial members was not regarded as absolute. While not negating the significance of the stability of the term of office, the Constitutional Court had also acknowledged an equally important aspect, namely the representativeness of the judiciary in the NCJ. Reducing the term of office was to be considered an exception, but a permissible one in a situation where there was no real possibility of introducing temporary solutions, when the rules on the representation of the judiciary in the NCJ changed following the modification of the manner of electing the judicial members to the Council. Owing to the individual terms of office of the NCJ's judicial members, the introduction of the new system without shortening the terms of office of the sitting members would have both stretched that process over time and complicated it. In the Government's view, the cohesion of the changes which made it possible for the NCJ to operate in compliance with the Constitution justified the termination of the terms of office of the NCJ's judicial members who had been elected on the basis of the previous provisions. Furthermore, the "democratisation" of the NCJ election procedure constituted an important public interest which justified in turn the early termination of the term of office of the NCJ's judicial members. In this context, the Government submitted that under the 2017 Amending Act judicial members of the NCJ were to be elected by the *Sejm* from among the judges who obtained an adequate support from other judges or from citizens.

188. The Government concluded that the applicant's exclusion from access to a court was justified on objective grounds in the State's interest. The second condition of the *Eskelinen* test had therefore been met as well.

189. In the present case, since both conditions of the *Eskelinen* test had been fulfilled, the applicant's complaint under Article 6 § 1 should be considered incompatible *ratione materiae*.

190. In the alternative, the Government submitted that the complaint under Article 6 § 1 was inadmissible as manifestly ill-founded.

(b) The applicant's submissions

191. The applicant maintained that Article 6 § 1 under its civil head was applicable to his case.

192. He asserted that the Polish Constitution guaranteed to a judge elected to the NCJ the right to serve a full four-year term of office. This conclusion stemmed from Article 60 read in conjunction with Article 187 § 3 of the Constitution. He noted that under the basic principles of the Constitution all rights guaranteed to individuals referred to the relationship between them and

the State authorities. Therefore, the early termination of his term of office in the NCJ had to be seen as an interference with his individual right of access to public service, not as a deprivation of the exercise of public power. The latter was exercised by the NCJ as a collective body, not by its individual members.

193. The applicant argued that the termination of his term of office had had clear pecuniary consequences for him. He had received substantial *per diem* allowances for taking part in the NCJ's plenary sessions or other work as well as the reimbursement of relevant expenses. The allowances were subject to income tax deductions and therefore had a monetary component within the meaning of applicable tax regulations. In addition, each judicial member of the NCJ was entitled under the relevant regulation to a reduction in their workload of cases, while maintaining their remuneration as a judge. The applicant's workload had been reduced from three to one judicial session per month.

194. The applicant submitted that the stability of tenure of the NCJ's members was fundamental to ensuring the proper functioning of that body. He submitted that the regulations on the NCJ that had been in force before the adoption of the 2011 Act had respected the tenure of the Council's elected members. Section 50 of the 2011 Act on the NCJ provided that the terms of office of members of the NCJ elected on the basis of the previous Act on the NCJ would last until the end of the period for which they had been elected.

195. Furthermore, the Constitutional Court had underlined in its judgment of 18 July 2007 (no. K 25/07) that only extraordinary circumstances could warrant a breach of the tenure of the NCJ's members. The applicant submitted that the Government's argument that there had been no alternative to the shortening of his term of office in connection with the introduction of the new system of electing the NCJ's judicial members could not be accepted as proportionate or legitimate. He argued that ensuring him the right of access to a court should also be considered as a positive obligation of the State stemming from Article 6 in connection with the Preamble to the Convention.

196. As regards the first condition of the *Eskelinen* test, the applicant argued that the domestic law had never explicitly excluded access to a court for judicial members of the NCJ whose term of office had been prematurely terminated. The premature termination in his case had been unprecedented. The Act on the NCJ in force at the time of his election to the Council did not provide for such termination, except in the situations provided for in section 14 of the Act. The termination at issue had resulted from the *ad hoc* application of statute law and lacked the characteristics of abstract legal norms. It could not be concluded that the national law "expressly excluded access to a court" for a claim based on the alleged unlawfulness of the measure at issue.

197. Even assuming that domestic law excluded access to a court in his case, the applicant argued that the exclusion was not based on objective

grounds in the State's interest. Firstly, the exclusion had a significant impact on his status as a judge since he had been elected to the NCJ in his capacity as a judge of an administrative court, not as an ordinary citizen. His election to the NCJ had been aimed at ensuring the proper operation of the NCJ, a body responsible for safeguarding judicial independence.

198. Secondly, the applicant maintained that the intention behind the Constitutional Court's judgment of 20 June 2017 (no. K 5/17) had been to find defective the method of electing the NCJ's judicial members. This judgment had to be seen as a false pretext justifying the introduction of changes to the NCJ's composition at the time when the legislative procedure, initiated by the Ministry of Justice, had been pending in Parliament. Moreover, the impugned judgment was invalid and contrary to the Constitution owing to the participation of Judges M.M. and L.M. in the adjudicating panel.

199. Thirdly, the 2017 Amending Act was in violation of the constitutional principle of the separation of powers. Its objective was not to make the NCJ election procedure more democratic, but to subordinate that body to the legislative and executive powers.

200. Fourthly, the exclusion of the right of access to a court was incompatible with the rule of law. The shortening of the applicant's term of office could not be regarded as a merely technical measure. Rather, it constituted a serious violation of Article 187 § 3 of the Constitution and interference with the right of access to public service under Article 60 of the Constitution.

201. The fact that the case concerned a member of the NCJ, a body tasked with safeguarding judicial independence, was of significance. The applicant asserted that, as a judicial member of the NCJ, he should have been protected from abuse on the part of the legislative and executive powers. This protection should have been through the oversight of an independent court able to examine the lawfulness of the termination of his term of office.

202. The premature termination of his term of office and that of the other judicial members of the NCJ had initiated a series of events, such as the election of new members to the NCJ and its participation in the nomination procedure for the judges of the two new chambers of the Supreme Court, which had ultimately undermined the stability of the domestic legal and judicial system, and resulted in numerous applications being lodged with the Court and multiple proceedings before the CJEU. It had also to be seen as one of the root causes of the current rule of law crisis in Poland. The NCJ in its current composition was no longer an independent body fulfilling its constitutional mission. Lastly, the fact that the case concerned a judge and a member of the NCJ required stricter scrutiny of the justification for excluding access to a court.

203. The applicant concluded that there had been a serious and genuine dispute over his "right" to serve a full, four-year term of office as the NCJ's

judicial member and that this right was "civil" in nature within the meaning of Article 6 § 1. Accordingly, this provision was applicable to his case.

(c) Submissions of third-party interveners

204. The submissions received pertain both to the admissibility and merits of the complaint under Article 6 § 1.

(i) European Network of Councils for the Judiciary

205. The intervener is an association of twenty-four judicial councils of member States of the EU. It submitted that councils for the judiciary had a pivotal role to play in ensuring judicial independence and they operated autonomously within the judicial systems of their respective jurisdictions to guarantee, *inter alia*, the maintenance of the rule of law and the protection of individual rights. In Europe, there were many countries which provided for the establishment of self-governing judicial bodies such as High Councils for the Judiciary and Councils of Justice to protect the independence of judges. There were other jurisdictions where such a body had not been established, but where other independent organs had competence for the administration and financial management of the courts, and in some cases, the appointment and career progression of judges.

206. The ENCJ noted that the composition of a council for the judiciary varied greatly from country to country and depended, *inter alia*, on the origins of each council. There was, however, an emerging international consensus that the majority of the members of such a council should be judges. The most successful model appeared to be the councils with representation from a combination of members elected from the ranks of legal, academic and civil society, with sufficiently broad powers to promote both judicial independence and accountability. The mechanism for appointing judicial members of a Council should exclude any interference on the part of the executive or the legislature. The judges should be elected solely by their peers and on the basis of a wide representation of the relevant sectors of the judiciary.

207. The ENCJ adopted no formal standard on the length or termination of the term of office of the members of a judicial council and there were no specific international standards on this point. The absence of such standards showed that it was self-evident that the term of office of individual members of constitutionally established bodies entrusted, *inter alia*, with safeguarding judicial independence could not be prematurely terminated by the executive or legislature.

(ii) Amnesty International and International Commission of Jurists

208. The interveners noted that in many European jurisdictions, members of judicial councils played a significant role in the self-governance of the judiciary. They typically held powers relating to judicial appointments,

evaluations, promotions and disciplinary proceedings. The international standards cited by the interveners explicitly recognised all of these functions as potentially having an impact on the independence and impartiality of individual judges and of the judiciary as a whole. Removal, or the threat of removal, of a judge from membership of a judicial council during his or her term had the potential to affect his or her personal independence. International standards on the independence of the judiciary enshrined the principle that the political powers should not be responsible for, or otherwise interfere with, the appointment, functioning or removal of members of judicial councils. They referred, *inter alia*, to the CCJE's Opinion no. 10 (2007) on the Council for the Judiciary at the service of society.

209. The interveners maintained that appointment as a member of a judicial council differed from appointment as a judge in that it was for a short, fixed term of office to carry out a range of functions, many or all of which could be of a more administrative or quasi-judicial, rather than judicial, character. Nonetheless, the principle of independence of the judiciary necessarily implied a substantial degree of security of tenure for the members of a judicial council, for the duration of their terms of office. In order to ensure such security of tenure and to maintain the independence of individual members of judicial councils, and also the overall capacity of the Council to uphold the independence of individual judges and the independence of the judiciary, proceedings for the removal of a member of a judicial council during his or her term of office should provide guarantees of independence and fairness of the proceedings. Where the Council or its organs exercised a judicial or quasi-judicial role in the removal of judges from office, the grounds and procedure for removal from the Council should resemble those required for removal of a judge from judicial office.

210. These general principles should also be reflected in the application of Article 6 § 1 both as regards its scope of application and in the substance of the protection afforded.

211. The interveners submitted that, when assessing any justification advanced by the State for excluding judges' access to court in regard to their career and security of tenure, or membership of judicial governance bodies, consideration must be given to the strong public interest in upholding the role, independence and integrity of the judiciary in a democratic society under the rule of law. It could never be in the legitimate interests of the State to deprive judges who were members of judicial councils, of access to court or of the protection of due process in disputes capable of affecting their institutional or individual independence, including in cases that concerned their security of tenure or conditions of service relative to the discharge of judicial governance functions.

212. They further argued that in the assessment of the adequacy of procedural safeguards in accordance with Article 6 § 1, and in considering the justification of any restrictions on aspects of Article 6 § 1 rights in cases

concerning the career of judges, consideration should be given to the particular significance of these proceedings for judicial independence and the rule of law, a founding principle of the Convention system.

213. While assessing the application of Article 6 § 1 in the present case, it was important to take account of the broader context of attacks on judicial independence in Poland and to recognise the connection between the individual rights of the applicant and their structural consequences, in this case for the right to fair trial of others, and more fundamentally for the rule of law as a whole. The interveners submitted that various laws adopted and implemented in Poland between 2015 and 2018 have severely undermined the independence of the judiciary and rendered it vulnerable to political influence.

214. They argued that the application of Article 6 § 1 to the present case was manifestly justified because the functioning of the NCJ – without pressure or influence from the executive and legislative branches or other outside forces – was crucial to the overall independence of the judiciary in Poland. The NCJ played an essential role in defending judicial independence, a cornerstone of the rule of law and the protection of human rights. One of the safeguards ensuring the independence of the NCJ was constitutionally protected tenure of its members. Forcible termination of the tenure of NCJ members in March 2018 had both breached individual rights and undermined the NCJ's ability to safeguard the independence of the judiciary. If judges who were members of the NCJ were at risk of arbitrary removal from the NCJ, its overall functioning as the defender of judicial independence would be impaired to the detriment of individual judges, of the judiciary as an equal branch of government, and of the public, which had the right to an independent and impartial judicial system.

(iii) The Helsinki Foundation for Human Rights

215. The Helsinki Foundation for Human Rights submitted that the reform of the NCJ adopted in 2017 had given rise to a serious controversy and been criticised as inconsistent with judicial independence. As regards the stability of the tenure of the NCJ's members, the intervener argued that judges elected to the NCJ had an entitlement under Polish law to protection against removal from that body. In the past, the law had provided for the possibility of dismissal of elected judicial members of the NCJ by the bodies which elected them. However, until 2017 there had never been a situation in which the judicial members of the NCJ were collectively removed from office by statute.

216. The Constitution of 1997 protected the term of office of the individuals composing the constitutional organs that had been appointed or elected before the entry into force of the Constitution (Article 238 § 1). Similarly, the 2011 Act on the NCJ provided that the terms of office of those members who had been elected on the basis of previous regulations would be

respected. In addition, when in 2007 the Parliament adopted a law introducing a new *incompatibilitas* criterion into the 2001 Act on the NCJ that was to be applicable not only to newly elected members, but also to those who had been elected before the entry into force of the new law, the Constitutional Court ruled that the law was incompatible with the Constitution (judgment of 18 July 2007, no. K 25/07; see paragraphs 82-85 above).

217. The intervener further referred to the Constitutional Court's judgment of 23 March 2006 declaring unconstitutional the Act providing for *ex lege* termination of terms of office of members of the National Broadcasting Council, in which that court had underlined the need to secure the stability of tenure (case no. K 4/06; see paragraphs 79-81 above). In another judgment of 9 December 2015 (case no. K 35/15), the Constitutional Court found that the law providing for *ex lege* removal of the President and Vice-President of the Constitutional Court had violated the Constitution and Article 6 § 1 of the Convention. In the intervener's opinion, the standards developed by the Constitutional Court in the above rulings could be applied *per analogiam* to the elected judicial members of the NCJ, especially since their term of office was explicitly regulated in the Constitution.

218. Next, the intervener argued that the *ex lege* termination of the terms of office of elected judicial members of the NCJ without providing them with access to a court was inconsistent with the principle of the rule of law. The declared purpose of the 2017 Amending Act was the implementation of the Constitutional Court's judgment of 20 June 2017 (no. K 5/17). In its view, however, the impugned judgment was controversial, firstly because it had been delivered with the participation of two unlawfully elected judges and, secondly, owing to a highly questionable interpretation of the Constitution. The same applied to a subsequent judgment (no. K 12/18) in which the Constitutional Court had upheld the constitutionality of the 2017 Amending Act. In both judgments, the Constitutional Court seemed to ignore the significance of the NCJ's independence for the independence of the whole judiciary. It also departed from its earlier case-law holding that the Constitution required that the judicial members of the NCJ were elected by judges. Furthermore, the intervener submitted that the Constitutional Court had not specified that its judgment of 20 June 2017 (no. K 5/17) had required the termination of the terms of office of elected judicial members of the NCJ.

219. While deciding whether to terminate the terms of office of the elected members of the NCJ, Parliament should have taken into account the international and constitutional standards of the rule of law. From that perspective, the termination at issue could negatively affect the independence of the NCJ, which in turn could threaten the independence of the judiciary.

220. The intervener noted that the CJEU's judgment of 19 November 2019 in joined cases *A.K. and Others*, no. C-585/18, C-624/18 and C-625/18 concerning the independence of the NCJ and the Disciplinary Chamber of the

Supreme Court could be relevant for the interpretation of the Convention in the present case.

221. The intervener did not exclude that in some extraordinary circumstances the termination of terms of office of elected judicial members of the NCJ could be justified. Such a situation might arise if termination would be objectively necessary in order to restore the independence of the NCJ. In order to avoid any abuse in this regard, such a necessity should be a consequence of a judgment of an independent and impartial domestic or international court.

(iv) Polish Judges' Association Iustitia

222. Iustitia is the largest professional association of judges in Poland representing over one-third of all judges. The intervener submitted that the present case did not only concern the individual status of the applicant, but also problems of the utmost importance relating to judicial independence.

223. The intervener noted that the NCJ had a direct impact on the independence of judges, in particular as regards promotion, transfer, disciplinary proceedings, dismissal and early retirement. The NCJ was established by the Act of 20 December 1989 as a result of a bill prepared by lawyers associated with the Solidarity trade union. It was agreed that the majority of its members would be judges elected by judges, and up to the adoption of the 2017 Amending Act the law had maintained that principle. Owing to that Act, Parliament had gained a decisive influence over the Council's composition and, in effect, made the judicial system an extension of Parliament. This change in the relationship between the judiciary and Parliament had effectively destroyed the independence of the judiciary and, moreover, it had been done without constitutional amendment.

224. The 2017 Amending Act significantly reduced the formal requirements for candidates to the NCJ. Currently, a candidate was required to demonstrate the support of twenty-five judges, equivalent to 0.25% of all judges. Moreover, a candidate had to obtain the support of a political party in the *Sejm*. The intervener submitted that the judiciary was effectively boycotting the unconstitutional changes. Out of 10,000 judges in Poland only 18 had decided to stand for election to the new NCJ. Some candidates had supported each other and most of them had some links with the Ministry of Justice, i.e. they had been seconded to the Ministry. Once appointed, they had been seconded by the Minister of Justice to higher courts or appointed as Presidents or Vice-Presidents of courts. The relations between the Ministry of Justice and the current members of the NCJ were difficult to ascertain since the endorsement lists for candidates standing for election to the Council had remained confidential, despite a final court judgment ordering their disclosure.

225. The intervener noted that the former NCJ, judges' associations and numerous assemblies of judges had expressed their disapproval of the new

method of electing judicial members of the NCJ. Those actions showed that the new NCJ, which had been elected almost entirely by politicians (23 out of 25 members) did not enjoy the legitimacy in the eyes of judges. From the beginning of its operations in March 2018, the new Council's work had given rise to controversy, in particular as regards its role in the process of selecting judges. It had become clear that the role of guardian of judicial independence could not be ensured by judges elected by the *Sejm*. For example, this body did not react to politically motivated disciplinary proceedings against judges.

226. The intervener argued that the termination of the applicant's term of office formed part of a broader, political context. It was a part of a mechanism aimed at the dismantling of the previous NCJ and, as a result, at dismantling the rule of law and, at the same time, ensuring that candidates for judicial office were elected by a body dependent on the political power. The intervener underlined that the status of the NCJ impacted the status of all judges in Poland appointed to their offices on the proposal of the current Council. For this reason, the independence of the NCJ was crucial for avoiding undue influence from the executive and legislative powers over the judiciary.

(v) Judges for Judges Foundation and Professor Laurent Pech

227. The interveners, who focused on the EU dimension of the rule of law crisis in Poland, referred to the key findings made by the European Commission in relation to the new NCJ. In its fourth recommendation of December 2017, the European Commission had suggested to the Polish authorities that the Act on the NCJ should be amended so that the terms of office of its judicial members were not terminated and the new election regime was abandoned. The authorities had ignored the Commission's concerns and openly gone against its fourth recommendation. The Commission's assessment had been shared by the European Parliament in its resolution of September 2020.

228. The interveners outlined the findings of the European Commission and the European Parliament as regards the legislative changes made to the judicial system including, *inter alia*, (i) the lack of effective constitutional review, (ii) changes made to the retirement regime of the Supreme Court judges, (iii) changes made to the structure of the Supreme Court and (iv) changes made to the disciplinary regime for judges. They further provided an overview of the CJEU's key judgments regarding legislative changes targeting the Polish judiciary and judges.

229. Their conclusion was that in the time since the European Commission had activated its pre-Article 7 TEU procedure in January 2016, the rule of law situation in Poland had gone from bad to worse. Currently, the authorities were actively organising a process of systemic non-compliance with the CJEU's rulings, but also with the Court's judgments relating to judicial independence *via*, *inter alia*, the active collusion of unlawfully

appointed judges, in a broader context where the violation of the fundamental principles underlying the EU legal order had been "legalised" by Poland's "muzzle law", i.e. the 2019 Amending Act (see paragraph 25 above). In their opinion, judicial independence had to be understood as having been structurally disabled by the Polish authorities.

(vi) The Commissioner for Human Rights of the Republic of Poland

230. The Commissioner noted that during his term of office he had been alarmed by the dismantling of domestic institutions designed to uphold the law and administer justice: the Constitutional Court, the NCJ, the Supreme Court and ordinary courts. Judicial independence was under systemic threat in Poland as the authorities intentionally exerted unlawful pressure on the entirety of judicial structures and subjected some judges to repression. The analysis of changes in the Polish judicial system indicated that the government's intended strategy was to take control of the process of appointing judges and, in consequence, to influence the content of judicial decisions. In addition to the individual dimension of the present case, it also concerned an issue of a systemic nature, namely that the changes affecting the applicant and other judicial members of the NCJ, involved an illegitimate reconstitution of the NCJ, the body responsible for judicial nominations and upholding judicial independence.

231. In 2018 the authorities re-constituted the NCJ in an unconstitutional manner. This was a deliberate action made shortly before the initiation of the process of selecting more than forty new judges for the Supreme Court. In fact, it was expected that even more positions would soon become vacant in that court following the retirement of its judges as they reached the newly imposed lower retirement age. The intention was to appoint to the Supreme Court persons affiliated with the political authorities.

232. The Commissioner considered that the termination of the term of office of the NCJ's judicial members had been arbitrary and unconstitutional. Likewise, the election of new judicial members to the NCJ had violated constitutional rules. In line with the Constitution, judicial members of the NCJ were entitled to a full term of office that was applicable at the time of their election.

233. The Commissioner submitted that the Polish Constitution specified two essential functions of the NCJ, each requiring independence of that body. First, the NCJ organised competitions for judicial posts and recommended candidates for appointment to the President of the Republic. Second, the Council was designated as the guardian of judicial independence. There was no entrenched rule of international law obliging States to create a judicial council, although a demand to this effect was firmly embedded in the Council of Europe's legal area. While Parties to the Convention were not legally bound to establish such council, if they did create one, they should ensure that it could perform the role entrusted to such a body. Since the primary task of

a council was to ensure judicial independence, it had to remain independent of other branches of government.

234. The Commissioner noted that since the NCJ's establishment, a legitimate method of staffing that body was seen as particularly important to enable it to perform its role. Indeed, most of the constitutional rules on the NCJ were dedicated to its composition. All three branches of government were represented in the NCJ. Its composition thus reflected the principle of separation of powers, yet with a clear majority of judges (seventeen out of twenty-five members). Until 2018, fifteen judicial members of the Council were elected by judges. This mechanism was meant to guarantee the independence of the Council from the other powers and constituted a basic premise of its capacity to carry out its constitutional role. The mode of electing judicial members of the NCJ had been introduced at the time of its establishment in 1989, and had been maintained by the 1997 Constitution as well as by the subsequent Acts on the NCJ of 2001 and 2011. It was also supported in the Constitutional Court's case-law and legal scholarship.

235. The intervener noted that the 2017 Amending Act had forced a premature termination of the term of office of the NCJ's judicial members, in manifest breach of the relevant constitutional rule. The authorities failed to identify any objective State interest in adopting such a measure and thus the measure should be considered arbitrary.

236. The 2017 Amending Act transferred the competence to elect judicial members of the Council from judicial assemblies to the *Sejm*, in breach of the Constitution. By prematurely terminating the term of office of the NCJ's judicial members, the legislative and executive branches granted themselves a decisive influence, or indeed a monopoly over the Council's composition. Currently, twenty-three out of twenty-five NCJ members were either elected or appointed by those two branches. In most cases, the *Sejm* elected judges who had some links to the Minister of Justice.

237. The Commissioner maintained that the principle of election of judicial members to the NCJ by their peers had been confirmed by the Constitutional Court in its judgment of 18 July 2007 (no. K 25/07). A different position had been taken by the Constitutional Court in its judgment of 20 June 2017 (no. K 5/17). The constitutional interpretation adopted by the Constitutional Court in the latter judgment was questionable, but even if such a ruling had been delivered by a properly established constitutional court, the Commissioner pointed, *inter alia*, to the following. Polish constitutional law generally accepted that judgments finding unconstitutionality had a prospective effect. For this reason, the NCJ's judicial members elected under the previous regulation could have completed their terms of office and the new rules would have been applicable as of the next election. In addition, there was no reasonable argument to question the independence of the previous NCJ for the sole reason that judicial members had been elected for an individual rather than a joint tenure. Most importantly, the Constitutional

Court's judgment should be disregarded because it had been given by a five-judge panel including two unauthorised persons, i.e. persons appointed to posts that had been already properly filled. Hence, the ruling had been delivered by a body that did not meet the requirements of a tribunal "established by law". Furthermore, the composition of the panel had been manipulated by the President of the Constitutional Court while the case was pending. For example, Judge L.K. had been removed from the panel and replaced by Judge J.P., the Constitutional Court's President. This decision was arbitrary as it had not been reasoned and had no proper legal basis. The same arguments about manipulating the composition of the bench applied to the Constitutional Court's judgment of 25 March 2019 (no. K 12/18) which confirmed the earlier Constitutional Court's judgment. The application in that case had been brought by the new NCJ and had aimed at its own legitimisation. The above indicated that there existed an established pattern of one flawed authority legitimising another flawed authority.

238. The Commissioner proposed that the NCJ's judicial members should enjoy protection analogous to that offered to judges against removal. This approach was based on the NCJ's constitutional responsibility as a guardian of judicial independence. In support of his proposal, the Commissioner made the following arguments: (1) the NCJ's status and the status of its members had to be such as to ensure that it was able to carry out its mission; (2) the NCJ's decisions directly influenced the status of judges; the independence of judges was (3) absolute and (4) indivisible; and (5) persons with the attribute of independence should have a decisive say in the council. The requirement that judges should form the majority of a council was based on the assumption that they brought their integrity and independence into the council. The concept of indivisibility of judicial independence was at the heart of the CJEU landmark judgment in the case of Portuguese Judges (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16). This should be applied, *mutatis mutandis*, to the present context.

239. The Commissioner submitted that, as an alternative, the NCJ's judicial members should be afforded protection in the form of the right of access to a court recognised in the *Eskelinen* case-law.

(vii) The UN Special Rapporteur on the Independence of Judges and Lawyers

240. Following his official mission to Poland in October 2017, the UN Special Rapporteur presented a comprehensive report to the Human Rights Council in June 2018. He noted with concern the threat to the independence of the Polish judiciary.

241. The intervener presented the essence of the official findings and recommendations made at the United Nations regarding the rule of law crisis in Poland. He acknowledged that the power of the Government to undertake reforms of the judiciary could not be questioned. Nonetheless, any reform of

the judicial system should aim at improving its effectiveness, not at undermining the independence of the judiciary and its governing bodies.

242. After the general election in October 2015, the parliamentary majority and the President of the Republic took a coordinated set of actions and adopted a vast array of legal amendments to the legislation regulating the functioning of the judiciary, including the ordinary courts, the Supreme Court and the NCJ. The Special Rapporteur raised concerns about the compliance of these reforms with international legal standards relating to the independence of the judiciary. He underlined that the various legislative acts and measures adopted by the authorities had severely undermined the independence of the judiciary and eroded the possibilities of checks and balances.

243. The intervener referred to judicial governance as the set of institutions, rules and practices that organise, facilitate and regulate the exercise by the judicial branch of its function. In Europe, traditionally the governance of the judiciary was the responsibility of the executive. However, at least since the end of World War II, concerns about judicial independence and judicial accountability had led, in many countries, to the executive gradually losing its monopoly on judicial governance in favour of separate institutions with powers over the career of judges or the management of the judiciary. Some countries had established self-governing judicial bodies, such as judicial councils, in order to protect the independence of the judiciary. The underlying rationale was the need to insulate the judiciary and judicial career processes from external political pressure. Judicial councils often functioned as intermediaries between Governments and the judiciary and operated autonomously within the judicial system of their respective jurisdictions to guarantee, *inter alia*, the maintenance of the rule of law and the protection of human rights. Several Special Rapporteurs had recommended that States establish an independent body in charge of the selection and discipline of judges and to adopt appropriate measures to guarantee a pluralist and balanced composition of that body.

244. The intervener noted that with high indifference to the United Nations' standards the Polish authorities had passed the 2017 Amending Act, targeting the operation and composition of the NCJ. The main objective of this Act was to amend the procedure for the selection of the judicial members of the NCJ. The 2017 Amending Act had allowed the legislature to influence the selection of judges which had resulted in undue political interference in the overall administration of justice. The intervener was concerned about section 5 of the 2017 Amending Act which terminated the terms of office of fifteen judicial members of the NCJ. Such termination was arbitrary, clearly unconstitutional and in breach of international human rights standards recognising, *inter alia*, the right of access to an impartial and independent tribunal. It further interfered with the guarantees of independence enjoyed by the NCJ.

245. The intervener opined that judicial councils played a crucial role in guaranteeing the independence of the judiciary and should themselves be independent. They should be free from any form of interference from the executive and legislative branches. To ensure that such a body can discharge its functions objectively and independently, the judiciary must have a substantial say with respect to selecting its members. The dismissal of its members must comply with international human rights standards, including due process guarantees. Under United Nations standards, judges appointed to judicial councils, should be afforded the same guarantees as those granted to judges exercising judicial functions, including the right to a fair hearing in case of discipline, suspension or removal.

246. The Special Rapporteur emphasised that the judicial reform implemented by the Polish Government had had an adverse effect on the independence of the judiciary. In his assessment, "the series of reforms undertaken by the Government, presented as a cure, appeared to have been worse than the disease". He noted that the independence of the judiciary and the separation of powers must constitute the guiding principles of any judicial reform. The intervener was in favour of extending the application of the principle of irremovability of judges to judicial members of the NCJ and affording them the appropriate judicial safeguards provided for in various international human rights instruments.

(viii) The Government of Denmark

247. The Danish Government maintained that an efficient, impartial and independent judiciary was the cornerstone of the rule of law and of any functioning system of democratic checks and balances. The question of the independence of the NCJ and its judicial members following the 2017 Amending Act was the subject of legal proceedings before the CJEU. The Court should take into account those proceedings as it had never considered the provisions of the Convention as the sole framework of refence for the interpretation of the rights and freedoms enshrined therein. The Danish Government referred to the CJEU's judgment of 19 November 2019 in *A.K. and Others* (C-585/18, C-624/18 and C-625/18) which identified in §§ 143-144 a number of factors for the purposes of assessing the independence of a body such as the NCJ. Subsequent to this CJEU judgment, the Polish Supreme Court held in the rulings of 5 December 2019 and 15 January 2020 that the NCJ in its current composition was not a body independent of the legislature and the executive branch.

248. On this basis, the Danish Government submitted that the Court should determine that the 2017 Amending Act had undermined the independence of the NCJ and its judicial members and, consequently, considering the key role of the NCJ in appointing judges in Poland, had called into question the independence of the Polish judiciary as a whole. Accordingly, the application of Article 6 §1 to the present case, having regard

also to the systemic nature of the case and possible widespread effects of these proceedings, was manifestly justified as it could contribute to maintaining the independence of the NCJ and, thus, to restoring its constitutional role of ensuring the independence of the courts and the rule of law in Poland.

249. The Danish Government asserted that, similarly to the case of *Baka v. Hungary*, the terms of office of the applicant and the other previous judicial members of the NCJ had been prematurely terminated *ex lege*, interrupting a constitutionally guaranteed four-year term, without providing them with access to a court. In this connection, they referred to the CJEU's judgment of 2 March 2021 in *A.B. and Others* (C-824/18). In that judgment the CJEU stated that the possible absence of any legal remedy in the context of a process of appointment to judicial positions may prove to be problematic where all the relevant contextual factors, such as those laid down in §§ 143-144 of the *A.K. and Others* judgment, charactering such an appointment process may give rise to systemic doubts as to the independence and impartiality of judges appointed at the end of that process.

250. Those considerations, having regard to the contextual factors relating to the 2017 Amending Act and the new NCJ, must analogously hold true as regards the *ex lege* termination of the terms of office of the applicant and other previous judicial members of the NCJ. Taking note of the special role in society of the judiciary and the public confidence it must enjoy, the Danish Government found that the lack of access to a court in connection to the premature termination of the terms of office of the previous judicial members of the NCJ was not in accordance with Article 6 § 1 or the standards of the rule of law.

251. In view of the Court's assessment of any grounds advanced by the respondent State on the basis of the *Eskelinen* test as to the legitimacy of excluding the previous judicial members from the protection of Article 6 § 1, the Danish Government requested the Court to consider such grounds in light of the contextual factors mentioned, having regard to the prominent place of the independent judiciary and the right to a fair trial in a democratic society as well as the particular attention which must be paid to the protection of members of the judiciary against measures affecting their status or career that could threaten their judicial independence.

(ix) The Government of the Kingdom of the Netherlands

252. The Dutch Government submitted that the context of the present case concerned the large-scale judicial reforms in Poland. Those reforms had caused widespread concern since they raised questions as to the independence of the judiciary. They also had resulted in several cases before the CJEU in which the Dutch Government had intervened.

253. The present case was of importance as regards the normative impact of the rule of law on interpreting Convention rights. The rule of law was one of the three pillars of the Council of Europe that sought to achieve a greater

unity between its members, as articulated in Article 1 of the Statute of the Council of Europe. In the preamble to the Statute, the rule of law was mentioned as one of the principles which formed the basis of all genuine democracies. Furthermore, Article 3 of the Statute required every member to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. This formed the basis for the reference by the Court to the rule of law as being one of the "fundamental components of the European public order".

254. The principle of the rule of law was not provided for in the provisions of the Convention or its Protocols. However, it was expressly articulated in the Preamble to the Convention which made reference to this principle as part of the common heritage of European countries. The rule of law did not embody one single element but consisted of several components. In its 2011 report on the Rule of Law the Venice Commission had concluded that it included the following elements: (1) legality, including a transparent, accountable and democratic process for enacting law, (2) legal certainty, (3) prohibition of arbitrariness, (4) access to justice before independent and impartial courts, including judicial review of administrative acts, (5) respect for human rights, and (6) non-discrimination and equality before the law.

255. In its case-law the Court had taken into account the elements of the rule of law when interpreting the Convention rights. In doing so, the Court had contributed to rendering concrete the notion of rule of law as a fundamental component of European public order for the protection of human rights and fundamental freedoms. The Court had made it clear that the rule of law was a principle underlying the Convention. In *Golder v. the United Kingdom*, the Court had stated that the rule of law was "one of the features of the common spiritual heritage of the member States of the Council of Europe". In *Engel and Others v. the Netherlands*, it had said that from the rule of law "the whole Convention draws its inspiration". In many subsequent cases, the Court had consistently viewed the rule of law as "inherent in all the Articles of the Convention". This was particularly true for Article 6 of the Convention which provided for the right to a fair hearing before an independent and impartial tribunal.

256. It followed from the above that the independence of the judiciary was an underpinning element of the rule of law and thus of the protection of human rights. The CJEU had also confirmed this in its judgment of 24 June 2019, *Commission v. Poland* (*Independence of the Supreme Court*), C-619/18, finding that the independence of the judiciary gave concrete expression to the value of the rule of law. Ensuring the independence of a judicial body did not necessarily imply that the executive or legislative powers could not have any role in the selection of members of that body. However, their role must be embedded in the law and there must be safeguards to ensure the independence of the members of the judicial body, thereby ensuring the independence of the judiciary as such.

(d) The Court's assessment

(i) General principles

257. For Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Baka v. Hungary* [GC], no. 20261/12, § 100, 23 June 2016; *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 71, 29 November 2016; *Károly Nagy v. Hungary* [GC], no. 56665/09, § 60, 14 September 2017; and *Regner v. the Czech Republic* [GC], no. 35289/11, § 99, 19 September 2017). Lastly, the right must be a "civil" right (see *Mennitto v. Italy* [GC], no. 33804/96, § 23, ECHR 2000-X).

258. Article 6 § 1 does not guarantee any particular content for civil "rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X; *Boulois v. Luxembourg* [GC], no. 37575/04, § 91, ECHR 2012; and *Károly Nagy*, cited above, § 61).

259. In order to decide whether the "right" in question has a basis in domestic law, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see, for example, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 97, 21 June 2016). The Court reiterates that it is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018; *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 148, 22 October 2018; and *Molla Sali v. Greece* [GC], no. 20452/14, § 149, 19 December 2018). Thus, where the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction of access to a court, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law and by finding, contrary to their view, that

there was arguably a right recognised by domestic law (see *Károly Nagy*, § 62; see also *Roche*, § 120, both cited above).

260. With regard to the "civil" nature of the right, the Court has noted that an employment relationship between a public-law entity, including the State, and an employee may be based, according to the domestic provisions in force, on the labour-law provisions governing relations between private individuals or on a body of specific rules governing the civil service. There are also mixed systems, combining the rules of labour law applicable in the private sector with certain specific rules applicable to the civil service (see *Regner*, cited above, § 106).

261. As regards public servants employed in the civil service, according to the criteria established in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II) the respondent State cannot rely before the Court on the applicant's status as a civil servant to exclude the protection embodied in Article 6 unless two conditions are fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a special bond of trust and loyalty between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent State to demonstrate, first, that a civil servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (see *Vilho Eskelinen and Others*, § 62; *Baka*, § 103; and *Regner*, § 107, all cited above).

262. Whilst the Court stated in *Vilho Eskelinen and Others* (cited above, § 61) that its reasoning in that case was limited to the situation of civil servants, it has extended the application of the criteria established in that judgment to various disputes regarding judges. It has noted that although the judiciary is not part of the ordinary civil service, it is considered part of typical public service (see *Baka*, cited above, § 104).

263. The Court has applied the criteria set out in *Vilho Eskelinen and Others* (cited above) to all types of disputes concerning judges, including those relating to recruitment/appointment (see *Juričić v. Croatia*, no. 58222/09, 26 July 2011), career/promotion (see *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), no. 12628/09, 9 October 2012, and *Tsanova-Gecheva*

v. Bulgaria, no. 43800/12, 15 September 2015, §§ 85-87), transfer (see *Tosti v. Italy* (dec.). no. 27791/06, 12 May 2009 and *Bilgen v. Turkey*, no. 1571/07, § 79, 9 March 2021), suspension (see *Paluda v. Slovakia*, no. 33392/12, §§ 33-34, 23 May 2017, and *Camelia Bogdan v. Romania*, no. 36889/18, § 70, 20 October 2020), disciplinary proceedings (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 120, 6 November 2018; *Di Giovanni v. Italy*, no. 51160/06, §§ 36-37, 9 July 2013; and *Eminağaoğlu v. Turkey*, no. 76521/12, § 80, 9 March 2021), as well as dismissal (see *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 91 and 96, ECHR 2013; *Kulykov and Others v. Ukraine*, nos. 5114/09 and 17 others, §§ 118 and 132, 19 January 2017; *Sturua v. Georgia*, no. 45729/05, § 27, 28 March 2017; *Kamenos v. Cyprus*, no. 147/07, §§ 82-88, 31 October 2017; and *Olujić v. Croatia*, no. 22330/05, §§ 31-43, 5 February 2009), reduction in salary following conviction for a serious disciplinary offence (see *Harabin v. Slovakia*, no. 58688/11, §§ 118-123, 20 November 2012), removal from post (for example, President of the Supreme Court, President of the Court of Appeal or Vice-president of the Regional Court) while remaining a judge (see *Baka*, cited above, §§ 34 and 107-111; *Denisov v. Ukraine* [GC], no. 76639/11, § 54, 25 September 2018; and *Broda and Bojara*, cited above, §§ 121-123) or judges being prevented from exercising their judicial functions after legislative reform (see *Gumenyuk and Others v. Ukraine*, no. 11423/19, §§ 61 and 65-67, 22 July 2021). It has also applied the *Eskelinen* criteria to a dispute regarding the premature termination of the term of office of a chief prosecutor (see *Kövesi v. Romania*, no. 3594/19, §§ 124-125, 5 May 2020).

264. Furthermore, the employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence. Thus, when referring to the "special trust and loyalty" that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions *a fortiori* based on the requirements of law and justice, without fear or favour. It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching upon their individual independence and impartiality (see *Bilgen*, § 79, and *Broda and Bojara*, § 120, both cited above).

(ii) Application of the general principles to the present case

265. The Court notes that the present case raises a novel issue, namely the question whether Article 6 § 1 under its civil head is applicable to a dispute

arising out of the premature termination of the applicant's term of office as a judicial member of the NCJ, while he still remains a serving judge.

(α) Existence of a right

266. The Court notes that the applicant is a Supreme Administrative Court judge. On 11 January 2016 he was elected to the NCJ for a period of four years by the General Assembly of Judges of the Supreme Administrative Court with the participation of the Representatives of the General Assemblies of Judges of the Regional Administrative Courts, in accordance with the relevant provisions of the Constitution and the applicable legislation.

267. The Constitution expressly provides in Article 187 § 3 that members of the NCJ are elected for a four-year term of office. Section 14(1) of the 2011 Act on the NCJ, as applicable at the time of the applicant's election to the Council, contained an exhaustive list of reasons for terminating the term of office of elected members of the NCJ before the expiry of their term (death, resignation, appointment to another judicial post, termination of the member's judicial office and retirement; see paragraph 68 above). Under this provision, the only permissible grounds for early termination of the term of office are either of an objective nature (death, termination of judicial office or retirement) or stem from the member's own decision or initiative (resignation or appointment to another judicial post).

268. In determining whether there was a legal basis for the right asserted by the applicant, the Court needs to ascertain only whether the applicant's arguments were sufficiently tenable, not whether he would necessarily have been successful had he been given access to a court (see *Neves e Silva v. Portugal*, 27 April 1989, § 37, Series A no. 153-A, and *Bilgen*, cited above, § 53). In the light of the domestic legal framework in force at the time of his election and during his term of office, the Court considers that the applicant could arguably claim an entitlement under Polish law to protection against removal from his position as a judicial member of the NCJ during that period (see, *mutatis mutandis*, *Baka*, cited above, § 109).

269. The Court considers, moreover, that the applicant's claim to be entitled to serve his full term as a judicial member of the NCJ finds support in the fact that the NCJ is a body mandated by the Constitution to safeguard the independence of courts and judges (see Article 186 of the Constitution). The Court will revert to this issue subsequently in its analysis.

270. The Court reiterates that although there is, in principle, no right under the Convention to hold a public post related to the administration of justice (see *Dzhidzheva-Trendafilova*, § 38, and *Denisov*, § 46, both cited above), such a right may exist at the domestic level. The Court is satisfied that this is the situation in the present case, since Article 187 § 3 of the Constitution provides for, and therefore protects, the four-year term of the elected members of the NCJ. In this connection, the Government's argument that under Polish law there is no right to exercise public authority does not carry

much weight, as the applicant is not claiming such a right. Rather, he claims the right to serve the term of office for which he was lawfully elected. Similarly, another argument of the Government, that election as member of the NCJ did not constitute "employment", cannot be dispositive of the issue, having regard to the constitutional basis for the four-year tenure under Article 187 § 3 of the Constitution. The applicant further relied on Article 60 of the Constitution, guaranteeing the right of access to public service, as a supplementary argument for the proposition that he had had the right to serve a full term, while the Government rejected this. The Court considers that there is no need for it to take a stance on this argument since Article 187 § 3 of the Constitution arguably provides in itself a sufficient basis for a "right" for the purposes of Article 6.

271. The Court notes that the constitutional protection of the security of tenure of elected judicial members of the NCJ was not called into question until the current parliamentary majority introduced a bill amending the 2011 Act on the NCJ on 14 March 2017, ultimately culminating in the enactment of the 2017 Amending Act (see paragraphs 35 and 46-50 above).

272. The Court observes that the Constitutional Court, in its key judgment of 18 July 2007 (no. K 25/07) regarding the status of the NCJ, considered that the Constitution did not provide for the removal of judicial members of the NCJ from that body before the expiry of their term of office and that the NCJ was a constitutional body based on the tenure of elected members (see paragraphs 84-85 above). The only permissible exceptions were exhaustively specified in the then applicable 2001 Act on the NCJ, all of which related to objective inability to hold such office. These exceptions are similar to those laid down in section 14 of the 2011 Act on the NCJ, which were applicable at the time relevant to the present application.

273. In the same judgment of 18 July 2007, the Constitutional Court examined a new statutory provision which was to be applied to the sitting judicial members of the NCJ and could have resulted in the early termination of their term of office. It held that to introduce a new obligation on a person holding such office would, in principle, be permissible only if, first, it was justified by extraordinary, constitutionally valid reasons, and second, an adjustment period was provided. The Constitutional Court considered it appropriate to examine the impugned regulation on termination of office of judicial members of the NCJ in the light of the principle of proportionality. It found that the impugned regulation constituted a disproportionate interference with the constitutionally determined system of appointment and functioning of the NCJ. It held that changes of such a nature, if they were to be compatible with the principle of tenure, would have to be implemented with effect from the beginning of the next term of office of the Council members (see paragraph 85 above).

274. The Court observes that in enacting the new Act on the NCJ in 2011 the legislature also respected the terms of office of members elected on the

basis of the previous regulation (see paragraph 69 above). It can further be noted that Article 238 § 1 of the 1997 Constitution, one of its transitional provisions, protected the term of office of the constitutional bodies or individuals composing them who had been appointed or elected under the provisions that had been applicable before the Constitution's entry into force (see paragraph 66 above). These constitutional and statutory provisions are further indicators of the importance attached by domestic law to the security of tenure of constitutional bodies and their members, including the NCJ.

275. The Government argued that the 2017 Amending Act was adopted with a view to implementing the Constitutional Court's judgment of 20 June 2017 (no. K 5/17), in which that court held that the term of office of all elected members of the NCJ should have been of a joint nature, i.e. starting and ending on the same date (see paragraph 42 above). In the Government's view, the termination of the applicant's term of office resulting from the 2017 Amending Act was thus legitimate and proportionate since it was aimed at establishing a new term of office consonant with the Constitutional Court's interpretation of the relevant constitutional provisions in the judgment of 20 June 2017.

276. The applicant contested the validity of the Constitutional Court's judgment of 20 June 2017, *inter alia*, on the grounds that it had been given by a bench including Judges M.M. and L.M., who, in his submission, had not been duly elected to that court.

277. In this connection, the Court would note the following. In its judgment in *Xero Flor w Polsce sp. z o.o. v. Poland* (no. 4907/18, 7 May 2021, §§ 289-291) the Court held that there had been a violation of Article 6 § 1 as regards the applicant company's right to a "tribunal established by law" on account of the presence on the bench of the Constitutional Court of Judge M.M., whose election it found to have been vitiated by grave irregularities. The same considerations cannot but apply to Judge L.M., who was elected in the same procedure as Judge M.M. (ibid., §§ 19 and 289). In the light of the *Xero Flor* judgment, the presence of the two judges mentioned above on the five-judge bench of the Constitutional Court which gave the judgment of 20 June 2017 (no. K 5/17) necessarily calls into question the validity and legitimacy of that judgment. The Court refers in this respect to the judgment of 5 December 2019 (no. III PO 7/18) of the Supreme Court which, following the preliminary ruling of the CJEU in *A.K. and Others*, also concluded that the impugned judgment of the Constitutional Court had been given with the participation of judges elected in breach of the Constitution, as had been established in several judgments of the Constitutional Court (see paragraphs 102 and 105 above).

278. In any event, the Court notes that that Constitutional Court judgment did not specifically require the termination of the terms of office of the sitting judicial members of the NCJ. This point was made at the time by the Venice Commission in its opinion of 8-9 December 2017 (see paragraph 132 above)

and has been repeated by the Helsinki Foundation for Human Rights in its third-party submissions (see paragraph 218 above). Furthermore, the impugned judgment did not and could not put an end to the four-year term of office for elected members of the NCJ as guaranteed by Article 187 § 3 of the Constitution. It did not identify any extraordinary, constitutionally valid reasons that could exceptionally justify the early termination of the tenure of the Council's elected judicial members. Nor did the Constitutional Court give proper consideration in judgment no. K 5/17 or in judgment no. K 12/18 to its case-law requiring that changes to the status of members of constitutional bodies either be accompanied by an appropriate adjustment period or apply from the beginning of a new term of office (see paragraphs 77-85 above).

279. The Court is not persuaded by the Government's assertion that the implementation of the judgment of 20 June 2017 could not have been accomplished without the shortening of the terms of office of the sitting judicial members of the NCJ. Nor is it convinced that the introduction of a new system without such shortening would have both unduly extended that process over time and complicated it. The Court considers that there were clearly certain alternative measures that could have been taken which would have respected the general rule of the four-year term of office in Article 187 § 3 of the Constitution, while giving effect to the said judgment. For example, and despite the Government's argument to the contrary, the then-sitting judicial members could have remained in their positions until their original term of office expired, while new members could have been elected for a shorter period. In its opinion adopted on 8-9 December 2017, the Venice Commission proposed precisely that alternative (see paragraph 132 above). A similar view was expressed by GRECO (see paragraph 141 above). In the Court's view, having regard to the Constitutional Court's judgment of 18 July 2007 (no. K 25/07), the premature termination of the terms of the elected judicial members of the NCJ clearly raised an issue of proportionality. As stated by the Constitutional Court in that judgment, such changes should have been accompanied by an appropriate adaptation period or, alternatively, should have applied from the beginning of a new term of office (see paragraph 85 above). However, neither of these alternatives was chosen in the 2017 Amending Act.

280. Additionally, even though the Government maintained that the termination of the applicant's term of office, as provided for in the 2017 Amending Act, was prompted by the need to implement the Constitutional Court's judgment of 20 June 2017, the Court notes that the same measure had already been included in the first bill introduced by the government in the *Sejm* on 14 March 2017.

281. Furthermore, the Court observes that the Supreme Court, in its judgment of 5 December 2019 (no. III PO 7/18), analysed in detail the Constitutional Court's finding in the judgment of 20 June 2017 (no. K 5/17) that the relevant provisions of the 2011 Act on the NCJ were unconstitutional

to the extent that they provided for an individual term of office of the NCJ's judicial members. The Supreme Court found that the systemic (*systemowa*) interpretation of the Constitution on which the Constitutional Court had attempted to rely in that judgment contradicted its findings (see paragraph 105 above). The Supreme Court's position in the judgment of 5 December 2019 (no. III PO 7/18) was confirmed by the same court in its subsequent resolution of the three joined Chambers of 23 January 2020 (see paragraph 112 above).

282. The Court is satisfied that, having regard to the terms of Article 187 § 3 of the Constitution, there was in domestic law an arguable right for a judge elected to the NCJ to serve a full term of office, save for the exhaustively enumerated statutory exceptions in section 14(1) of the 2011 Act on the NCJ (see, *mutatis mutandis*, *Baka*, cited above, § 107; and *Loquifer v. Belgium*, nos. 79089/13 and 2 others, § 33, 20 July 2021, which concerned a non-judicial member of the High Council of Justice).

283. The Court notes that section 10(1)3 of the 2001 Act on the NCJ provided that the four-year term of office of elected members of the Council could be prematurely terminated in the event of revocation by the electing authority, i.e. a judicial member of the Council could have been revoked by the relevant assembly of judges that had elected him or her. However, that possibility was not provided for in the 2011 Act on the NCJ, which was applicable to the applicant's election to the Council, and so it is not relevant for the analysis of the applicant's case. Accordingly, the Court is not called upon to consider the conditions in which such a revocation may or may not be Convention-compliant.

284. The Court also takes note of the fact that numerous Council of Europe and other international bodies have consistently supported the view that the judicial members of the NCJ were entitled to serve a full term of office: the Parliamentary Assembly of the Council of Europe; the Council of Europe Commissioner for Human Rights; the Venice Commission; the CCJE; GRECO; the OSCE/ODIHR; the UN Special Rapporteur on the Independence of Judges and Lawyers; the European Parliament and the European Commission (see respectively paragraphs 126, 134, 132, 137 and 139, 141, 144, 122, 167 and 164-165 above).

285. The Court considers that the fact that the applicant's term of office was terminated *ex lege* on the date of election of new members of the NCJ (see paragraph 54 above) cannot be regarded as removing, retrospectively, the arguability of the right that he could claim under the rules in force at the time of his election. As noted above, these rules clearly established a term of four years and enumerated exhaustively the specific grounds on which it could be terminated. Since it was this new legislation (the 2017 Amending Act) which set aside the former rules, it constituted the object of that very "dispute" in regard to which the Article 6 § 1 fair-hearing guarantees were arguably to apply. In the circumstances of the present case, the question

whether a right existed under domestic law cannot therefore be answered on the basis of the new legislation (see *Baka*, cited above, § 110).

286. In the light of the foregoing, the Court finds that in the present case there was a genuine and serious dispute over a "right", namely to serve a full term of four years as a judicial member of the NCJ, which the applicant could claim on arguable grounds under domestic law (see, *mutatis mutandis*, *Baka*, cited above, § 111; *Denisov*, cited above, §§ 47-49; and *Kövesi v. Romania*, no. 3594/19, § 116, 5 May 2020).

(β) Civil nature of the right: the *Eskelinen* test

287. The next issue to be determined is whether the "right" claimed by the applicant was "civil" within the autonomous meaning of Article 6 § 1. The Court reiterates that the concept of "civil rights and obligations" cannot be interpreted solely by reference to the respondent State's domestic law; it is an "autonomous" concept deriving from the Convention (see, among many other authorities, *Naït-Liman v. Switzerland* [GC], no. 51357/07, § 106, 15 March 2018).

288. In their written and oral submissions, the parties addressed this issue in the light of the criteria developed in *Vilho Eskelinen and Others* (cited above), having been invited to do so by the Court. This case-law was developed in the context of ordinary labour disputes between civil servants and the public authority that employs them (ibid., § 61). As recalled above, it has since been applied to many types of disputes involving judges and concerning their service or their careers, as although not part of the ordinary civil service the judiciary forms part of typical public service (see paragraphs 262-263 above). As already noted, the novel aspect of this case is that it concerns not the principal professional activity of the applicant, as a judge, but the serving of his full term of office as an elected judicial member of the NCJ. Taking account of this, and also of the more prominent public law features of the case, the Court considers that some development of the *Vilho Eskelinen* test is appropriate as regards the first condition.

– *The first condition of the Eskelinen test*

289. In the present case the parties offered different interpretations of domestic law and consequently their views diverged starkly on the question of compliance with the first condition of the *Eskelinen* test. The Government argued that the Act on the NCJ had never provided for any form of appeal or remedy in connection with the expiry, termination or renunciation of the office of members of this body. In addition, that office was considered to be of a public-law nature. In their view, Polish law excluded access to a court for claims relating to termination of office of judicial members of the NCJ. The applicant maintained that there had been no provision of national law

"expressly" excluding access to a court for a claim based on the alleged unlawfulness of the termination of his term of office.

290. The Court recalls that in the *Baka* judgment it examined a situation where the applicant's access to a court had been impeded, *inter alia*, by the fact that the impugned measure, namely the premature termination of his term of office as President of the Supreme Court, had been included in the Transitional Provisions of the Fundamental Law. This had precluded Mr Baka from contesting that measure before the relevant judicial body, which he would have been able to do in the event of dismissal on the basis of the previous legal framework (see *Baka*, cited above, § 115). In that context, the Court considered that it had to determine whether access to a court had been excluded under domestic law prior to the time, rather than at the time, when the impugned measure concerning the applicant was adopted. To hold otherwise would have meant that the impugned measure itself, which constituted the alleged interference with the applicant's "right", could at the same time be the legal basis for the exclusion of the applicant's claim from access to a court, thereby opening the way to abuse (ibid., § 116). However, the present case concerns a different situation where, according to the Government, Polish law has at all times excluded access to a court for the claim asserted by the applicant.

291. The Court will now take the opportunity offered by the present case to further develop the first condition of the *Eskelinen* test. It observes that this condition is deliberately strict, given that it is part of a test that, if fully satisfied, will rebut the presumption of the applicability of Article 6 to ordinary labour disputes involving civil servants (see *Vilho Eskelinen and Others*, cited above, § 62), excluding them from one of the most fundamental entitlements provided for in the Convention, the right to a court. The strict nature of this condition is borne out by the fact that it has been seldom satisfied (see *Bilgen*, cited above, § 70). Only very rarely has a respondent State been able to show that access to a court was expressly excluded for an applicant (see *Baka*, cited above, § 113 and the cases referred to therein). As the two conditions stipulated in the *Eskelinen* judgment are cumulative, where the first one is not met, that suffices already to find that Article 6 is applicable, without there being any need to consider the second limb of the test (see *Baka*, cited above, § 118).

292. The Court considers that a straightforward application of the first condition would not be entirely apt in all situations. It is therefore prepared to accept that the first condition can be regarded as fulfilled where, even without an express provision to this effect, it has been clearly shown that domestic law excludes access to a court for the type of dispute concerned. Thus, first of all, this condition is satisfied where domestic law contains an explicit exclusion of access to a court. Secondly, the same condition may also be satisfied where the exclusion in question is of an implicit nature, in

particular where it stems from a systemic interpretation of the applicable legal framework or the whole body of legal regulation.

293. In this connection, the Government argued that Polish law excluded access to a court for a claim based on the alleged unlawfulness of the termination of the applicant's term of office as a judicial member of the NCJ (see paragraphs 180-181 above). However, in responding to the complaint under Article 13 of the Convention, they asserted that the applicant could have obtained a ruling on his claim by lodging a constitutional complaint with the Constitutional Court, thus suggesting the existence of a judicial channel to deal with the applicant's claim. The applicant referred to the limitations of a constitutional complaint and argued that this remedy would not have been available to him in the absence of any prior decision given in connection with the termination of his term of office; thus his complaint would have been rejected as inadmissible (on the effectiveness of a constitutional complaint in Poland, see *Xero Flor w Polsce sp. z o.o.*, cited above, §§ 197-200, and the case-law cited therein). The applicant also asserted that domestic law did not and never had explicitly excluded access to a court for claims relating to the premature termination of the term of office of judicial members of the NCJ (see paragraph 196 above).

294. The Court notes the opposing views of the parties as to whether the first condition of the *Eskelinen* test has been satisfied here (see paragraphs 180-181 and 196 above). It considers that this question can be left open, since in any event, for the reasons set out below, the second condition has not been met.

– *The second condition of the Eskelinen test*

295. The Court will now analyse whether, in the present case, the exclusion of access to a court is justified on objective grounds in the State's interest.

296. As regards the second condition, the Government submitted that the applicant's complaint related to the exercise of State power. The Court reiterates that according to the approach adopted in *Vilho Eskelinen*, the mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. The Government did not explain why the exercise of public authority by judicial members of the NCJ did not merit protection, bearing in mind that this body is tasked with protecting judicial independence (see, *mutatis mutandis*, *Baka*, cited above, § 103).

297. The applicant argued, *inter alia*, that the exclusion of the right of access to a court in his case was incompatible with the rule of law. He submitted that as a member of the NCJ, a body charged with safeguarding judicial independence, he had to be protected from abuse on the part of the other powers.

298. The right of access to a court under Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States (see *Golder v. the United Kingdom*, 21 February 1975, § 34, Series A no. 18; *McElhinney v. Ireland* [GC], no. 31253/96, § 33, ECHR 2001-XI (extracts); and *Markovic and Others v. Italy* [GC], no. 1398/03, § 92, ECHR 2006-XIV). The Court has stated that judicial independence is a prerequisite to the rule of law (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 239, 1 December 2020). The Committee of Ministers has also taken the view that judicial independence constitutes a fundamental aspect of the rule of law (see point 4 of the Appendix to Recommendation CM/Rec (2010)12 of the Council of Europe's Committee of Ministers to member States on judges: independence, efficiency and responsibilities; see paragraph 124 above).

299. The Court reiterates that, in order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law. This concept, which is not only expressly mentioned in the Preamble but is also inherent in all the Articles of the Convention, requires, *inter alia*, that any interference must in principle be based on an instrument of general application (see, *Baka*, cited above, § 117). Section 6 of the 2017 Amending Act cannot be regarded as such an instrument since it was directed at a specific group of fifteen clearly identifiable persons – judicial members of the NCJ elected under the previous regulation, including the applicant – and its primary purpose was to remove them from their seats on that body. It was a one-off statutory amendment that terminated *ex lege* the constitutionally prescribed tenure of the NCJ's judicial members. The Court has already held that laws which are directed against specific persons are contrary to the rule of law (ibid., § 117; and see, *mutatis mutandis*, *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 269, 22 December 2020).

300. The Court considers that its examination of the second condition of the *Eskelinen* test must take due account of the fact that the present case is closely related to judicial independence, since the dispute at issue concerns a judicial member of the NCJ, which is the constitutional body with responsibility for safeguarding the independence of courts and judges. The Court is mindful of the fact that, in the Constitutional Court's view, the NCJ is not a body of judicial self-governance (see paragraph 40 above). Be that as it may, its very *raison d'être* and its task of safeguarding judicial independence require that the NCJ enjoy autonomy *vis-à-vis* the political branches of State power. The Court accepts the view of the third-party interveners that the removal, or threat of removal, of a judicial member of the Council during his or her term of office has the potential to affect the personal independence of that member in the exercise of his or her NCJ duties (see paragraph 208 above). By extension, the Council's mission to safeguard

judicial independence may also be adversely affected, and this would raise a number of rule-of-law issues, including those pertaining to the safeguarding of rights enshrined in and protected by the Convention.

301. In this context, the Court will have regard to the following considerations. First, all Contracting Parties to the Convention have explicit, formal guarantees of judicial independence in their laws, whether of constitutional or of statutory rank. Second, judicial independence is a condition *sine qua non* for the right to a fair hearing under Article 6 of the Convention. Third, judicial independence is operationalised in the persons who are vested with judicial power.

302. In this regard the Court has on many occasions emphasised the special role in society of the judiciary which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if judges are to be successful in carrying out their duties (see, among other authorities, *Baka*, § 164; and *Guðmundur Andri Ástráðsson*, § 234, both cited above). This consideration, set out in particular in cases concerning the right of judges to freedom of expression (see, as a recent example, *Guz v. Poland*, no. 965/12, § 86, 15 October 2020), has been found to be equally relevant in relation to the adoption of measures affecting the right to liberty of members of the judiciary (see *Alparslan Altan v. Turkey*, no. 12778/17, § 102, 16 April 2019, and *Baş v. Turkey*, no. 66448/17, § 144, 3 March 2020) and also to the right of access to a court for judges in matters concerning their status or career (see *Bilgen*, § 58, and *Gumenyuk and Others*, § 52, both cited above). Given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018, with further references), the Court must be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy (see *Bilgen*, cited above, § 58). The Court reiterates that judges can uphold the rule of law and give effect to the Convention only if domestic law does not deprive them of the guarantees required under the Convention with respect to matters directly touching upon their individual independence and impartiality (see paragraph 264 above).

303. Given the role played by judicial councils, the same considerations should apply as regards the tenure of judges, such as the applicant in the present case, who are elected to serve on them because of their status and in view of the need to safeguard judicial independence, which is a prerequisite to the rule of law. In this connection the Court considers that judicial independence should be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to other official functions that a judge may be called upon to perform that are closely connected with the judicial system (see point 17 of the Opinion of the CCJE

Bureau of 12 October 2017 and points 37-38 of the Opinion no. 24 (2021) of the CCJE of 5 November 2021 cited respectively in paragraphs 137 and 139 above).

304. As regards the regulation of the NCJ under domestic law, the Court notes that this body is constitutionally mandated to safeguard the independence of the courts and judges (Article 186 § 1 of the Constitution). In the Court's view, the effective exercise of this essential role is only possible when the council is sufficiently independent from the executive and legislative powers.

305. The requirement to ensure the independence of judicial councils is confirmed in recommendations of the Committee of Ministers as well as by other organs of the Council of Europe (see Committee of Ministers Recommendation (2010)12; the Venice Commission report on the Independence of the Judicial System Part I: the Independence of Judges and the Rule of Law Checklist; and Opinion no. 10(2007) of the CCJE; see respectively paragraphs 124, 129, 131 and 135 above). Under the relevant Council of Europe standards, a judicial council's autonomy in matters concerning judicial appointments must be protected from encroachment by the legislative and executive powers and its independence must be guaranteed. Furthermore, it is recommended that no less than half of the members of judicial councils should be judges chosen by their peers (see paragraphs 124-125, 132, 135-136 and 139 above).

306. One of the key manifestations of the NCJ's role of safeguarding judicial independence is its exclusive competence to propose candidates for appointment at every level of the judiciary and to every type of court. To make it perfectly clear, this covers both initial appointments to judicial office as well as every promotion to a higher level of the judiciary. Formally, the President of the Republic appoints judges, but he may only do so on the basis of proposals submitted by the NCJ (Article 179 of the Constitution).

307. While there exists a widespread practice, endorsed by the Council of Europe, to put in place a judicial council as a body responsible for selection of judges, the Convention does not contain any explicit requirement to this effect. In the Court's view, whatever system is chosen by member States, they must abide by their obligation to secure judicial independence. Consequently, where a judicial council is established, the Court considers that the State's authorities should be under an obligation to ensure its independence from the executive and legislative powers in order to, *inter alia*, safeguard the integrity of the judicial appointment process. The CJEU underlined the importance of this obligation in respect of the NCJ (see §§ 138 and 142-144 of the judgment of 19 November 2019 in *A.K. and Others*, C-585/18, C-624/18 and C-625/18; and §§ 125-131 of the judgment of 2 March 2021, *A.B. and Others*, C-824/18; see respectively paragraphs 152 and 156 above), a conclusion fully endorsed by the Supreme Court and Supreme Administrative Court in their subsequent judgments relating to the NCJ (discussed further in paragraphs 316

and 319-321). The Court observes that States are free to adopt such a model as a means of ensuring judicial independence. What they cannot do is instrumentalise it so as to undermine that independence.

308. The Court has held that "independence" refers to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties (see *Guðmundur Andri Ástráðsson*, cited above, § 234). The Court has also discerned a common thread running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers (ibid., § 233).

309. In this connection, the Court notes that there exists a clear link between the integrity of the judicial appointment process and the requirement of judicial independence in Article 6 § 1 (see *Thiam v. France*, no. 80018/12, §§ 81-82, 18 October 2018). The Venice Commission has noted that "it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions."[20]

310. Having regard to the above, the Court will now examine the fundamental change in the manner of electing the NCJ's judicial members introduced by the 2017 Amending Act, namely that they were to be elected by the *Sejm* instead of by the assemblies of judges.

311. To begin with, the Court notes that the rule that the NCJ's judicial members were to be elected by judges was introduced in the first Act on the NCJ of 20 December 1989. It was retained in the 2001 Act on the NCJ and also in the 2011 Act on the NCJ until the entry into force of the 2017 Amending Act. The same mechanism was in place on the date of entry into force of the Constitution of 1997. The Constitution laid down for the first time the constitutional rules concerning the composition of the NCJ, specifying the term of office of its members and the manner of their appointment or election.

[20] See the compilation of Venice Commission opinions and reports concerning courts and judges (CDL-PI (2015)001).

312. In its judgment of 18 July 2007 (no. K 25/07), the Constitutional Court found that the rules concerning the election of judges to the NCJ were of particular constitutional significance, since their status determined *de facto* the independence of that body (see paragraph 84 above). In the same judgment, the Constitutional Court held that Article 187 § 1 (2) of the Constitution expressly provided that judicial members of the NCJ were to be elected by judges (see paragraph 84 above). This finding of the Constitutional Court was an important element of its reasoning on the issues submitted to it for examination. The Court therefore notes that, in accordance with the Constitutional Court's judgment of 18 July 2007, under the Constitution the independence of the Council is protected by the rule that the majority of its members are judges who are elected by other judges. This arrangement is intended to ensure that the Council can effectively exercise its constitutional role as the guardian of judicial independence.

313. It was only in the judgment of 20 June 2017 (no. K 5/17) that the then composition of the Constitutional Court contested this rule and stated its disagreement with the position adopted in the earlier judgment of 18 July 2007 (no. K 25/07). In the judgment of 20 June 2017 (no. K 5/17), the Constitutional Court held that the Constitution did not determine who could elect judges to the NCJ and that, accordingly, this matter was delegated to statutory regulation. The Constitutional Court stated that Article 187 § 1 (3) of the Constitution indicated that deputies and senators were elected to the NCJ by the *Sejm* and the Senate respectively, whereas there were no constitutional rules as to who elected judicial members of the Council (see paragraph 43 above).

314. In its judgment of 25 March 2019 (no. K 12/18) the Constitutional Court confirmed the constitutionality of the provision of the 2017 Amending Act granting the *Sejm* the competence to elect judicial members of the NCJ (see paragraph 62 above). The Court notes that this judgment essentially relied on the reasons of the Constitutional Court's judgment of 20 June 2017 (no. K 5/17). It also observes that Judge J.Pi., who participated in the five-judge bench of the Constitutional Court which gave the judgment of 25 March 2019 (no. K 12/18), was elected to that court following the death of Judge L.M., one of the judges elected in December 2015 to a seat that had been already filled.

315. Without engaging in an interpretation of the Polish Constitution, the Court reiterates the doubts it has already expressed regarding the validity and legitimacy of the Constitutional Court's judgment of 20 June 2017 relating to the composition of the bench in that case (see paragraph 277 above). Secondly, it considers that the departure, in that judgment, from the earlier position of the Constitutional Court in its judgment of 18 July 2007, namely that judicial members of the NCJ were to be elected by judges, was not accompanied by any cogent explanation. Rather, the reasons given were, in effect, limited to the "disagreement" of that particular bench with the previous

case-law of the Constitutional Court and, therefore, such reasons should be regarded as insufficient (see, in the same vein, *Reczkowicz v. Poland*, no. 43447/19, § 238, 22 July 2021). The Court is also of the view that the Constitutional Court's findings in the judgment of 20 June 2017 did not give consideration to the constitutional mandate of the NCJ to safeguard judicial independence.

316. In this regard, the Court further refers to the findings made in the Supreme Court's judgment of 5 December 2019 (no. III PO 7/18) on the same point. The Supreme Court observed that in the absence of any constitutional amendment, the Constitutional Court, in its judgment of 20 June 2017, had not so much changed its position as regards the election of judges to the NCJ as created a divergence in its case-law on a systemic issue of fundamental importance for the right to a fair hearing (see paragraph 102 above). It went on to note that since its creation in 1989 the judicial members of the NCJ had been elected by the relevant assemblies of judges and that this mechanism was in force at the time of the adoption of the Constitution in 1997. As noted by the Supreme Court, the drafters of the Constitution had confirmed their intention of entrusting the election of judicial members of the NCJ to the judicial community (see paragraph 105 above). The Supreme Court emphasised that in the absence of any constitutional amendment regarding the principles of electing judicial members of the Council, a statute could not introduce a procedure for election of those members by Parliament (see paragraph 105 above).

317. The Court further refers to the findings made in the resolution of the joined chambers of the Supreme Court of 23 January 2020. As regards the change of manner of electing judicial members of the NCJ, the Supreme Court found that the legislature could not create a power for itself – not provided for in the Constitution – to elect members of the Council from among judges, since the scope of its power to appoint members of the Council, i.e. four deputies of the *Sejm* and two members of the Senate, was defined in Article 187 § 1 (3) of the Constitution (see paragraph 112 above). The Supreme Court added that the Constitution did not provide for a presumption of competence in favour of Parliament.

318. The Court will now examine the consequences of the 2017 Amending Act for the independence of the new NCJ, in particular regarding the early termination of office of the previous members of the NCJ and the change in method of election of the judicial members. It notes that the CJEU in its preliminary ruling of 19 November 2019 in the case of *A.K. and Others* (C-585/18, C-624/18 and C-625/18) referred to a series of factors relevant to ascertaining whether the new NCJ offered sufficient guarantees of independence from the legislative and executive powers (see §§ 142-144 of the preliminary ruling; paragraph 152 above). The first factor was that the new NCJ was constituted as a result of the premature termination of the terms of office of former members. The second factor was the transfer of

competence to elect judicial members of the NCJ from assemblies of judges to the *Sejm*. The third factor was the irregularity of the appointment of certain members of the new NCJ and the fourth was the manner in which that body exercised its constitutional responsibility.

319. In its judgment of 5 December 2019 (no. III PO 7/18), the Supreme Court, having assessed the above-mentioned factors, concluded that the new NCJ did not provide sufficient guarantees of independence from the legislative and executive powers in the judicial appointment procedure (see paragraph 107 above). It found, *inter alia*, that as a result of the 2017 Amending Act the legislative and the executive had gained an almost monopolistic position in determining the NCJ's composition in that they ultimately appointed twenty-three out of twenty-five members of the Council (see paragraph 105 above). In the Supreme Court's view, this situation had resulted in the distortion of the separation of powers.

320. In its leading resolution of three joined chambers of 23 January 2020, the Supreme Court fully endorsed the view that the new NCJ was not an independent body, but a body subordinated to the political authorities. It found, *inter alia*, that judges elected to the NCJ by the *Sejm* had no legitimacy as representatives of the judicial community and that this fact significantly weakened the role of the NCJ as the guardian of judicial independence (see paragraph 112 above).

321. Furthermore, in its judgment of 6 May 2021 (no. II GOK 2/18), the Supreme Administrative Court, having regard to the CJEU's preliminary rulings of 19 November 2019 and 2 March 2021 (see paragraphs 150-152 and 155-156 above) came to the same conclusion as to the lack of independence of the NCJ (see paragraph 118 above). It held that the rules and procedure for determining the personal composition of the NCJ were motivated by an intention to subject it to a form of supervision by the executive, hence by the parliamentary majority. It further noted that the composition of the NCJ as determined by the 2017 Amending Act nullified the possibility of its effectively discharging its function of safeguarding judicial independence (see paragraph 119 above).

322. Having regard to the two rulings of the Supreme Court and the judgment of the Supreme Administrative Court mentioned above, the Court finds that the fundamental change in the manner of electing the NCJ's judicial members, considered jointly with the early termination of the terms of office of the previous judicial members (analysed in paragraphs 266-286 above), meant that its independence is no longer guaranteed (see, in the same vein, *Reczkowicz*, cited above, §§ 265 and 269; see also, for an analogous finding, the CJEU's judgment of 15 July 2021 in *Commission v. Poland (Disciplinary regime for judges)*, see paragraphs 160-161 above). As noted by the Constitutional Court in its judgment of 18 July 2007 (no. K 25/07), the NCJ's independence was determined precisely by the rule that its judicial members were elected by judges for a constitutionally prescribed term of office.

323. The Court considers it appropriate at this juncture to address the general issue of judicial reform. It wishes to make it clear that the Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary (see *Gumenyuk and Others*, cited above, § 43) and agrees with the view expressed, *inter alios*, by the UN Special Rapporteur on the Independence of Judges and Lawyers that the power of a government to undertake reforms of the judiciary cannot be called into question. However, any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies. The CJEU adopted a similar position in its preliminary ruling of 20 April 2021 in the case of *Repubblika v. Il-Prim Ministru* (C-896/19) with regard to member States of the EU. It held at §§ 63-65 of its ruling that EU law precludes the adoption of national laws relating to the organisation of justice which would constitute a reduction in the protection of the value of the rule of law, in particular the guarantees of judicial independence (see paragraph 159 above).

324. The Court considers it appropriate to emphasise in this regard the importance of the principles of subsidiarity and shared responsibility. It reiterates its fundamentally subsidiary role in the supervisory mechanism established by the Convention, whereby the Contracting Parties have the primary responsibility of securing the rights and freedoms defined in the Convention and the Protocols thereto (see, for instance, *Garib v. the Netherlands* [GC], no. 43494/09, § 137, 6 November 2017; and *Guðmundur Andri Ástráðsson*, cited above, § 250). Protocol No. 15 to the Convention has recently inserted the principle of subsidiarity into the Preamble to the Convention. The Court further notes that the principle of subsidiarity imposes a shared responsibility between the States Parties and the Court, and that national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the Convention (see, in particular, the references to the Izmir and Brighton Conferences and Declarations in *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., §§ 120-22, 12 October 2017). In this connection, the Court would emphasise that the Convention system cannot function properly without independent judges. The Contracting Parties' task of ensuring judicial independence is thus of crucial importance.

325. Having regard to all the foregoing considerations, the Court concludes that the second condition of the *Eskelinen* test, namely that the applicant's exclusion from access to a court be justified on objective grounds in the State's interest, has not been met.

326. The applicant's position as an elected judicial member of the NCJ, the body with constitutional responsibility for safeguarding judicial independence, was prematurely terminated by operation of the law in the absence of any judicial oversight of the legality of this measure. The exclusion of the applicant from a fundamental safeguard for the protection of an arguable civil right closely connected with the protection of judicial

independence cannot be regarded as being in the interest of a State governed by the rule of law.

327. Members of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of the legality of a measure such as removal from office is able to render such protection effective (see, *mutatis mutandis*, *Kövesi*, § 124, and *Bilgen*, § 79, both cited above).

2. Conclusion as to the applicability of Article 6 § 1

328. Having regard to the foregoing, the Court finds that Article 6 § 1 under its civil head is applicable, since the second condition of the *Eskelinen* test has not been met.

329. It follows that the Government's objection to the applicability of Article 6 § 1 of the Convention must be dismissed.

3. Objection based on the lack of significant disadvantage

(a) The Government's submissions

330. The Government further submitted that the application was inadmissible on account of the lack of a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention. In their view, the applicant did not suffer any disadvantage of a pecuniary or non-pecuniary nature in connection with the termination of his term of office as a member of the NCJ. In support of this contention, they referred to their earlier arguments on the applicability of Article 6 § 1.

(b) The applicant's submissions

331. The applicant argued that his case could not be rejected under Article 35 § 3 (b) as he had suffered a significant disadvantage in the form of non-pecuniary damage related to the distress caused by the violation of his Convention rights. Furthermore, respect for human rights as defined in the Convention required the examination of his case on the merits since it pertained to the relationship between the principles of the separation of powers and the effective protection of human rights. Lastly, his case had not been duly examined by a domestic court. In fact, he had been deprived of the possibility of challenging the premature termination of his term of office before a court.

(c) The Court's assessment

332. The Court considers that the objection based on Article 35 § 3 (b) cannot be accepted. The present application is now before the Court's Grand Chamber because it was indeed considered to raise serious questions affecting

the interpretation of the Convention or the Protocols thereto and was therefore relinquished by the Chamber under Article 30 of the Convention. The Court is thus of the view that the conditions set forth in Article 35 § 3 (b) are not met, since respect for human rights, as defined in the Convention and the Protocols thereto, requires an examination of the application on the merits (see *Vavřička and Others v. the Czech Republic*, 8 April 2021, no. 47621/13, § 163).

333. The Government's objection under Article 35 § 3 (b) of the Convention must accordingly be dismissed.

4. Overall conclusion on admissibility

334. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

335. As regards the assessment of a legitimate aim for the limitation of the right of access to a court, the applicant submitted that account had to be taken of the detrimental impact of weakening the guarantees of the independence of the judiciary on the protection of individual rights and freedoms. It was imperative for there to be procedural safeguards in order to ensure that the autonomy of judges was not jeopardised by undue external or internal influences.

336. The NCJ's importance in the mechanism of checks and balances and its role in safeguarding judicial independence were of paramount importance for respecting the rule of law. The applicant argued that any limitation on the right of access to a court in the case of removal of the NCJ's judicial members had to pursue a genuine legitimate aim, but that such an aim had been absent in the present case.

2. The Government's submissions

337. The Government maintained that there had been no violation of Article 6 § 1 of the Convention. They reiterated their arguments as to the inapplicability of this provision to the present case.

3. Submissions of third-party interveners

338. The submissions of the third-party interveners on the merits of the case have already been summarised above (see paragraphs 205-256 above).

4. The Court's assessment

(a) Preliminary considerations

339. At the outset, the Court reiterates that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see, among many other authorities, *Amuur v. France*, 25 June 1996, § 50, *Reports of Judgments and Decisions* 1996-III; *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II; and *Baka*, cited above, § 117). The right to a fair hearing under Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States (see *Guðmundur Andri Ástráðsson*, cited above, § 237). Arbitrariness entails a negation of the rule of law (see *Al-Dulimi and Montana Management Inc.*, cited above, § 145) and could not be tolerated in respect of procedural rights any more than in respect of substantive rights (see *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, § 118, 15 October 2020). In that sense, the Convention is essentially a rule of law instrument.

340. All Contracting Parties should abide by the rule of law standards and respect their obligations under international law, including those voluntarily undertaken when they ratified the Convention. The principle that States must abide by their international obligations has long been entrenched in international law; in particular, "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (see the Advisory Opinion of the Permanent Court of International Justice on Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, at paragraph 121 above). The Court observes that, under the Vienna Convention on the Law of Treaties, a State cannot invoke its domestic law, including the constitution, as justification for its failure to respect its international law commitments (see Article 27 of the Vienna Convention, at paragraph 120 above).

341. The Court notes that the present case involves a number of domestic constitutional issues. Being mindful of its subsidiary role, it does not engage in matters of constitutional interpretation and limits its task to the interpretation and application of the Convention as provided for in Article 32 of the Convention, in the light of the rule of law as the principle underlying the Convention and all its provisions.

(b) General principles

342. The right of access to a court was established as an aspect of the right to a fair hearing guaranteed by Article 6 § 1 of the Convention in *Golder v. the United Kingdom* (cited above, §§ 28-36). In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards

enshrined in Article 6, referring to the principles of the rule of law and the avoidance of the arbitrary exercise of power which underlay much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court (see *Zubac v. Croatia* [GC], no. 40160/12, § 76, 5 April 2018, with further references).

343. In respect of matters that fall within the ambit of the Convention, the Court's case-law has tended to show that where there is no access to an independent and impartial court, the question of compliance with the rule of law will always arise (see *Golder*, cited above, § 34). However, the Court has itself acknowledged that the right of access to the courts is not absolute and may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Baka*, § 120, and *Zubac*, § 78, both cited above).

(c) Application of the general principles to the present case

344. The Court recalls that it has left open the question whether the first condition of the *Eskelinen* test has been fulfilled, taking account of the opposing views of the parties on that issue and since, in any event, it has concluded that the second condition has not been met (see paragraph 294 above). However, the Court reiterates that the Government have consistently argued that for the purposes of Article 6 of the Convention the applicant's access to a court was excluded at all times under national law, both before his term of office as a judicial member of the NCJ was terminated by the 2017 Amending Act, as well as after that occurred (see paragraph 180 above). Therefore, the Court is now called upon to assess whether the applicant's lack of access to the domestic courts, to have examined the genuine and serious dispute over his arguable right to serve a full term of four years as a judicial member of the NCJ (see paragraph 286 above), was justified in conformity with the general principles in the Court's case-law (see paragraph 343 above).

345. Referring to its analysis with regard to the issue of the applicability of Article 6 § 1, in particular the importance of the NCJ's mandate to safeguard judicial independence and the link between the integrity of the judicial appointment process and the requirement of judicial independence (see paragraphs 300-303 above), the Court considers that similar procedural safeguards to those that should be available in cases of dismissal or removal of judges should likewise be available where, as in the present case, a judicial member of the NCJ has been removed from his position.

346. The Court further emphasises the need to protect a judicial council's autonomy, notably in matters concerning judicial appointments, from encroachment by the legislative and executive powers, and its role as a

bulwark against political influence over the judiciary. In assessing any justification for excluding access to a court with regard to membership of judicial governance bodies, the Court considers it necessary to take into account the strong public interest in upholding the independence of the judiciary and the rule of law. It also has regard to the overall context of the various reforms undertaken by the Polish Government – of which the present case reflects one problematic aspect – which have resulted in the weakening of judicial independence and adherence to rule-of-law standards.

347. In the instant case the Government have not provided any reasons justifying the absence of judicial review, but have simply reiterated their arguments as to the inapplicability of Article 6 to the case.

348. The Court notes that the whole sequence of events in Poland (see paragraphs 14-28 above) vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the NCJ and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline. At this juncture, the Court finds it important to refer to its judgments related to the reorganisation of the Polish judicial system (see, *Xero Flor w Polsce sp. z o.o.*; *Broda and Bojara*; and *Reczkowicz*; all cited above), as well as the cases decided by the CJEU (see paragraphs 150-156 and 160-161 above) and the respective rulings of the Supreme Court and Supreme Administrative Court (see paragraphs 100-108 and 109-119). As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened. The applicant's case is one exemplification of this general trend.

349. Having regard to the foregoing, the Court finds that on account of the lack of judicial review in this case the respondent State impaired the very essence of the applicant's right of access to a court (see *Baka*, cited above, § 121).

350. Accordingly, the Court finds that there has been a violation of the applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

351. The applicant complained under Article 13 of the Convention that he had been deprived of an effective domestic remedy in relation to the premature termination of his term of office as judicial member of the NCJ. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

352. The Court notes that the complaint under Article 13 is essentially the same as that under Article 6 § 1. It reiterates that the role of Article 6 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by the more stringent requirements of Article 6 (see, for example, *Kudła v. Poland* [GC], no. 30210/96, § 146, ECHR 2000-XI, and *Baka*, cited above, § 181).

353. Consequently, the Court finds that it is not necessary to examine separately the admissibility and merits of the complaint under Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

354. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

355. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage for suffering and distress caused by the violation of his rights under Article 6 § 1 and Article 13 of the Convention, referring to the early termination of his office and the lack of any possibility of having that measure judicially reviewed. He emphasised that his election to the NCJ had served the purpose of the proper operation of the NCJ and constituted the fulfilment of his oath as a judge. The applicant regarded the early termination of his term of office as a form of political repression and as preventing him from fulfilling his obligations related to the protection of judicial independence arising from his seat on the NCJ. The interference with his rights had been an instrument to achieve the political goals of the current majority in Parliament.

356. The Government considered that the applicant's claim was unfounded and invited the Court to reject it. Should the Court establish otherwise, the Government observed that the applicant had not substantiated his claim by providing any proof of having suffered distress, emotional harm, hardship or loss of quality of life. Were the Court to find a violation of the Convention in the case, the Government submitted that the finding of a violation should be regarded as constituting sufficient just satisfaction. Alternatively, they invited the Court to assess the issue of just satisfaction on the basis of its practice in similar cases and national economic circumstances.

357. Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *O'Keeffe v. Ireland* [GC], no. 35810/09, § 199, ECHR 2014).

358. The Court considers that in the particular circumstances of the present case the finding of a violation can be regarded in itself as sufficient just satisfaction for any non-pecuniary damage sustained by the applicant, and thus rejects his claim under this head.

B. Costs and expenses

359. While the case was still pending before the Chamber, the applicant sought EUR 24,029.23, inclusive of VAT, for the costs of his legal representation before the Court.

360. Following the relinquishment of jurisdiction, the applicant additionally claimed EUR 18,450, inclusive of VAT, in costs and expenses regarding his legal representation before the Grand Chamber which were due to be paid after the proceedings before the Court had been finally concluded. The total sum claimed amounted to EUR 42,479.23, inclusive of VAT. In support of his claim, the applicant submitted (1) the legal services agreement between him and the Pietrzak Sidor and Partners Law Firm of 31 July 2018 together with a relevant invoice; (2) the annex to the legal services agreement of 21 January 2020 with a pro-forma invoice for the sum of EUR 24,029.23 gross; and (3) the annex to the above-mentioned agreement of 16 March 2021 with a pro-forma invoice for the sum of EUR 18,450 gross. The legal services agreement concerned the preparation and lodging of the applicant's application and his representation before the Court. It specified that the applicant was due to pay the law firm all necessary costs and expenses relating to his representation.

361. The applicant further requested the reimbursement of the expenses relating to the attendance of his lawyers at the hearing before the Grand Chamber. The applicant and his lawyers intended to take part in the hearing scheduled for 19 May 2021 and to this effect incurred expenses for their plane tickets in the amount of EUR 895.80 and certain additional expenses for car rental and accommodation, for which he submitted supporting documents. Following the President's decision to hold the hearing by videoconference, the applicant managed to cancel the reservations for car rental and accommodation and, accordingly, withdrew his claim in this part. However, he was unable to cancel the reservation of the plane tickets purchased at a non-refundable tariff and thus maintained his claim in this part. In addition, the applicant claimed EUR 938.04 for costs of IT support and rental of IT equipment required for the hearing by videoconference, and submitted supporting documents to this effect. The total amount claimed under the head of costs and expenses was EUR 44,313.07.

362. As regards the claim for costs and expenses incurred in the Chamber proceedings, the Government considered it unfounded and invited the Court to reject it. They did not comment on the applicant's claim for costs and expenses in the Grand Chamber proceedings.

363. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (see *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 189, 17 May 2016).

364. The Court finds that the total amount of legal costs requested in connection with the proceedings before the Court appears excessive. In the light of the above considerations, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 30,000 covering costs and expenses for the proceedings before it.

C. Default interest

365. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, by a majority, the complaint under Article 6 § 1 of the Convention admissible;

2. *Holds*, by sixteen votes to one, that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*, unanimously, that it is not necessary to examine the admissibility and merits of the complaint under Article 13 of the Convention;

4. *Holds*, by fifteen votes to two, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5. *Holds*, by sixteen votes to one,
   (a) that the respondent State is to pay the applicant, within three months, EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be

converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, by fifteen votes to two, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a hearing on 15 March 2022 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Robert Spano
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Lemmens;
(b) joint partly dissenting opinion of Judges Serghides and Felici;
(c) dissenting opinion of Judge Wojtyczek.

R.S.
A.C.

CONCURRING OPINION OF JUDGE LEMMENS

I. INTRODUCTION

1. I voted with my colleagues in finding that there had been a violation of Article 6 § 1 of the Convention on account of an unjustifiable limitation of the applicant's right of access to a court with respect to the premature termination of his term of office as a member of the National Council of the Judiciary (NCJ).

2. Any reader who is familiar with the Court's case-law will realise that the present judgment draws heavily on what has already been stated in a number of recent Chamber judgments (see *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021; *Broda and Bojara v. Poland*, nos. 26691/18 and 27367/18, 29 June 2021; *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021; and *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021; see also *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022, not yet final, delivered after the present judgment was adopted at the Grand Chamber's second deliberations).

The Court's opinion on the judicial reforms in Poland is therefore already abundantly clear. What the present judgment adds to the existing case-law on that issue is the explicit endorsement by the Grand Chamber. Nothing less, but also nothing more.

3. At a more general level, this case afforded an opportunity for the Grand Chamber to clarify the methodology to be used in interpreting and applying Article 6 § 1 in cases where the dispute at domestic level concerns the lawfulness of a decision negatively affecting the rights of a person who is employed in a "public service" (see paragraph 262).

Unfortunately, in my humble opinion, the present judgment not only fails to seize this opportunity, but even contains some confusing applications of established principles. In what follows, I will point to some of the problems created by the present judgment.

II. APPLICABILITY OF ARTICLE 6 § 1

A. The existence of a claimed "right"

4. I agree with the majority that the right asserted by the applicant was the right to serve the term of office for which he was elected (see paragraphs 270, 282 and 286). I also agree with the majority that for that "right" to trigger the application of Article 6 § 1, it is sufficient that the applicant "could arguably claim an entitlement under Polish law to protection against removal from his position ... during [his term of office]" (see paragraph 268).

In order for the right to be "arguable", "the Court needs to ascertain only whether the applicant's arguments were sufficiently tenable, not whether he would necessarily have been successful had he been given access to a court" (see paragraph 268, referring to *Neves e Silva v. Portugal*, 27 April 1989, § 37, Series A no. 153-A, and *Bilgen v. Turkey*, no. 1571/07, § 53, 9 March 2021; see also, in the case-law of the Grand Chamber, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 48, ECHR 2000-IV). As has been aptly stated by Judge Sicilianos, the Court is thus "not called upon to judge at this stage – for a preliminary decision on the applicability of Article 6 – whether the right in question is actually recognised in domestic law with near absolute certainty" (see the separate opinion of Judge Sicilianos, § 4, in *Károly Nagy v. Hungary* [GC], no. 56665/09, 14 September 2017).

5. However, it seems to me that the majority are doing exactly that, when they proceed with a quasi-exhaustive examination of whether there *actually* exists a constitutionally protected right to serve the full term of office. Not only do the majority consider that "Article 187 § 3 of the Constitution provides for, and therefore protects, the four-year term of the elected members of the NCJ" (see paragraph 270), they go on to dismiss, one after the other, the counterarguments of the Government, which relied on the Constitutional Court's judgment of 20 June 2017 (see paragraphs 275-81).

Such an analysis goes too far. It would have been for the domestic courts to decide whether or not the alleged right to serve a full term of four years actually existed. For the applicability of Article 6 § 1, it is sufficient for the applicant to prove that he has an "arguable" right.

B. The "civil" nature of the right

6. I agree with the majority that in order to determine whether the right asserted by the applicant was one of a "civil" nature, the *Eskelinen* test is relevant (see paragraph 261, referring to *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II). That means that there is a presumption that Article 6 applies (or more precisely, a presumption that the right invoked by the public servant is of a "civil" nature), which the Government can rebut. For the presumption to be rebutted, two conditions must be fulfilled. I will discuss them in turn.

1. The first condition for the rebuttal of the presumption of applicability: exclusion of access to a court

7. The majority rightly consider that the requirement of an "express" exclusion of access to a court (first condition) is too strict, and that such exclusion can also be of an implicit nature (see paragraph 292). I would add that while the exclusion may be implicit, it must be certain.

8. Having thus clarified the first condition, the majority then consider it unnecessary to give an answer to the question whether that condition is

fulfilled in the present case (see paragraph 294). By evading the issue, they leave open the question whether account should be taken of the remedies existing *before* the 2017 Amending Act or of those (still) available *after* the termination of the applicant's term of office by virtue of that Act (compare the arguments of the parties on this point, respectively in paragraphs 180-81 and 196).

In my opinion, the assessment should be made on the basis of the situation as it existed *before* the impugned statute providing for *ex lege* termination of the applicant's term of office. What the majority say about the question whether a "right" existed under domestic law, namely that that question cannot be answered on the basis of the new legislation (see paragraph 285, referring to *Baka v. Hungary* [GC], no. 20261/12, § 110, 23 June 2016), applies equally to the question whether the right at issue was one of a "civil" nature (ibid., § 116).

In the present case, the Court would thus have to examine whether a decision terminating the term of office of a judicial member of the NCJ under the old system (for instance, a decision adopted by the relevant assembly of judges) could be challenged before a court. At this point in the reasoning, the possibility or impossibility of a challenge to termination *ex lege* does not come into play.

It is difficult for me to see the reason for not pursuing the matter.

2. The second condition for the rebuttal of the presumption of applicability: justification for the exclusion of access to a court

9. According to the second *Eskelinen* criterion, the Government must demonstrate that the exclusion of access to a court "is justified on objective grounds in the State's interest" (see paragraph 261 of the present judgment, referring to *Vilho Eskelinen and Others*, cited above, § 62).

As is reiterated in the present judgment, for the second condition to be met the State must show "that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond [of trust and loyalty between the civil servant and the State, as employer]" (see paragraph 261 of the present judgment, referring to *Vilho Eskelinen and Others*, cited above, § 62). In other words, under the *Eskelinen* test two justifications are possible, both related to the subject matter of the dispute: one concerns the "exercise of State power", the other concerns the "bond of trust and loyalty" between the two parties.

(a) Exercise of State power

10. The majority do not say very much about the first of the possible justifications. They note "that the Government submitted that the applicant's complaint related to the exercise of State power", but confine themselves to holding that "the Government did not explain why the exercise of public

authority by judicial members of the NCJ did not merit protection, bearing in mind that this body is tasked with protecting judicial independence" (see paragraph 296).

This is a quite formal response to the Government's argument. I would have preferred it if the Court had seized the opportunity to explain what kind of "exercise of State power" would be needed to justify excluding a public servant from access to a court.

The *Eskelinen* judgment is not very clear on this point, at least not in the passage quoted above from its paragraph 62. However, from a reading of that paragraph in combination with paragraphs 59 and 61, it seems to me that one must conclude that under the first justification for the exclusion of a public servant from access to a court the dispute must relate to the "effective functioning of the State" (ibid., § 59) or to the exercise of powers "intrinsic to State sovereignty" (ibid. § 61).

11. I have no difficulty in concluding that a dispute about the premature termination of office of a member of the NCJ does not concern the effective functioning or the sovereignty of the Polish State. Whatever the outcome of such a dispute, the State could continue to function effectively. Neither could it affect the exercise of the State's sovereign power within its territory.

(b) Bond of trust and loyalty

12. The Government did not invoke the second of the possible justifications, namely that the dispute between the applicant and the State had called into question the special bond of loyalty between them.

If they had invoked that justification, the answer would simply have been that "the employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence. Thus, when referring to the 'special trust and loyalty' that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power" (see paragraph 264, referring to *Bilgen*, cited above, § 79, and *Broda and Bojara*, cited above, § 120; see also *Gumenyuk and Others v. Ukraine*, no. 11423/19, § 66, 22 July 2021). For that reason it is not justified to exclude members of the judiciary from the protection of Article 6 of the Convention in matters concerning the conditions of their employment on the basis of the special bond of loyalty and trust with the State (*Bilgen*, cited above, § 79; *Broda and Bojara*, cited above, § 122; and *Gumenyuk and Others*, cited above, § 66).

This means, in short, that the second justification is not a valid one when the dispute is about the conditions of "employment" of a judge.

13. That short answer would be sufficient. The majority, however, devote many paragraphs to the rule of law (paragraph 299, referring to *Baka*, cited above, § 117) and to the independence of the judiciary (paragraphs 300-24). Their reasoning boils down to the following: if access to a court is excluded, this cannot "have any effect under Article 6 § 1 in a particular case" (see

paragraph 299) if it is incompatible with higher norms. Since there is indeed in the present case an incompatibility with the two above-mentioned general principles of law, there can be no justification for the applicant's exclusion from access to a court.

Such reasoning leads the Court far away from the "mere" examination of whether the right invoked by the applicant is one of a "civil" nature. It seems to me that, if the Court had to address the issues of the rule of law and the independence of the judiciary, the right place would have been the examination of the merits of the complaint about the lack of access to a court, not the examination at the admissibility stage of the nature of the right that is the subject matter of the dispute.

III. THE RIGHT OF ACCESS TO A COURT

14. Turning to the merits of the complaint, the judgment reiterates that the right of access is not absolute and that it may be subject to limitations, provided that they do not impair the very essence of that right and that they pursue a legitimate aim and are reasonably proportionate to the aim pursued (see paragraph 343, referring to *Baka*, cited above, § 120, and *Zubac v. Croatia* [GC], no. 40160/12, § 78, 5 April 2018).

15. The majority are again ambiguous about the situation to be assessed: is it the alleged lack of access to a court *before* the applicant's term of office as a member of the NCJ was terminated, *after* the *ex lege* termination of his term of office, or "at all times" *before and after* the impugned act (see paragraph 344, referring to the Government's argument)?

It would have been preferable not to leave any ambiguity. In reality, there can be no ambiguity. What is to be examined, under the merits, is the situation once the dispute has arisen, and that is of course the situation created by the 2017 Amending Act. Again, the *Baka* case sets a clear precedent: it was the lack of judicial review resulting from the legislation that provided for the *ex lege* termination of the applicant's judicial office that was the object of the Court's analysis (*Baka*, cited above, § 121).

Thus, for the purpose of determining the nature – whether "civil" or not – of the right invoked by the applicant, it is the situation *before* the 2017 Amending Act, when there had not yet been any statutory interference with that right, that should be taken into account (see paragraph 8 above); for the purpose of determining whether the applicant's right of access to a court has been violated, it is by contrast the situation *created by the 2017 Amending Act*, giving rise to the dispute between the applicant and the State, that should be taken into account.

16. In their examination of the limitation of the right of access to a court with respect to the dispute about the premature termination of the applicant's term of office, the majority refer, on the one hand, to "the strong public interest in upholding the independence of the judiciary and the rule of law",

and on the other, to "the overall context of the various reforms undertaken by the Polish Government – of which the present case reflects one problematic aspect – which have resulted in the weakening of judicial independence and adherence to rule-of-law standards" (see paragraph 346). They also note that the Government did not advance any specific reasons to justify the absence of judicial review, but simply reiterated their arguments as to the inapplicability of Article 6 to the case (see paragraph 347).

I have no problem with these statements as such. I would merely reiterate that the analysis with regard to judicial independence, which the majority undertake in their assessment of whether the applicant's alleged right to serve the full term of his office as a member of the NCJ is of a "civil" nature, could better have been included here, in the analysis of the merits of the complaint (see paragraph 13 of this opinion above). Even so, I do not think that an extensive analysis of the Polish situation is necessary in order to reach the conclusion that the very essence of the applicant's right of access to a court has been impaired (see paragraph 349, referring to *Baka*, cited above, § 121).

IV. CONCLUDING REMARK

17. While a more concise and focused reasoning would have been preferable in my view, I cannot deny that the intended significance of the present judgment lies precisely in the analysis of the Polish situation and in the assessment that the Polish legislature and executive have undertaken, and continue to undertake, reforms aimed at "weakening" the judiciary (see paragraph 348; the word "weakening" is perhaps an understatement).

The judiciary constitutes the branch of State power intended to protect the rights of citizens, whether these rights are fundamental rights or ordinary rights, and whether the interference with an individual's rights comes from another individual or from an authority vested with State power. With a judiciary turned into a mere judicial arm of the political powers of the day and lacking the independence which gives it the courage and the legitimacy to stand up to these powers when necessary, such protection in many cases becomes an illusion.

My comments above are in no way intended to detract from that core message. They concern only the legal analysis under Article 6 § 1 of the Convention.

JOINT PARTLY DISSENTING OPINION OF JUDGES SERGHIDES AND FELICI

Just satisfaction under Article 41 of the Convention: non-pecuniary damage

A. Introduction

1. Our only disagreement with the judgment concerns points 4 and 6 of the operative provisions, holding "that the finding of a violation [of Article 6 § 1 of the Convention] constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant", and dismissing "the remainder of the applicant's claim for just satisfaction", respectively.

2. Our disagreement is thus focused on the decision not to award the applicant a sum in respect of non-pecuniary damage (see paragraphs 357-58 of the judgment and the above points of the operative provisions).

B. Fulfilment of the requirements under Article 41

3. The applicant claimed non-pecuniary damage for suffering and distress caused by the violation of his rights under Article 6 § 1 and Article 13 of the Convention due to the early termination of his office and lack of any possibility of judicial review of the measure (see paragraph 355 of the judgment). We confine ourselves, however, only to the applicant's claim under Article 6, since we join the rest of our eminent colleagues in finding that it is not necessary to examine the admissibility and merits of the complaint under Article 13 of the Convention. Unlike the majority, we accept the applicant's allegation that the early termination of his office caused him suffering and distress.

4. In our view, all the requirements of Article 41 are satisfied in the present case for an award of just satisfaction: "there has been a violation" of a Convention provision, specifically Article 6; the High Contracting Party concerned allows for no or "only partial reparation"; and it is "necessary" for such an award to be granted to the applicant who sustained suffering and distress.

C. The "finding of a violation" and "just satisfaction" under Article 41

5. The judgment in paragraph 357, with reference to *O'Keeffe v. Ireland* ([GC], no. 35810/09, § 199, ECHR 2014), observes that "Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate." And in paragraph 358 it "considers that in the particular

circumstances of the present case the finding of a violation can be regarded in itself as sufficient just satisfaction for any non-pecuniary damage sustained by the applicant, and thus rejects his claim under this head".

6. We respectfully disagree with the above reasoning and conclusion of the Court, which, despite the fact that it found a violation of the applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention, nevertheless awarded no amount to the applicant by way of non-pecuniary damage.

7. Our view is that the finding of a violation of Article 6 does not constitute sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant. Article 41 of the Convention, as worded, cannot be interpreted as meaning that "[the] finding [of] a violation of a Convention provision" could in itself constitute sufficient "just satisfaction to the injured party". This is so *because the former is a prerequisite for the latter* and one *cannot take them to be the same* (see similarly paragraph 9 of the partly dissenting opinion of Judge Serghides in *Abdi Ibrahim v. Norway* [GC], 15379/16, 10 December 2021).

8. But even if we were wrong in our above reading of Article 41, we would still make an award for non-pecuniary damage, because we consider that *in the particular circumstances of the present case*, the applicant should receive just satisfaction in respect of such damage.

D. Conclusion: consequences of not making an award for non-pecuniary damage

9. Failure to award the applicant a sum in respect of non-pecuniary damage for the violation of his Article 6 right amounts, in our view, to rendering the protection of his right illusory and fictitious. This runs counter to the Court's case-law to the effect that the protection of human rights must be practical and effective and not theoretical and illusory, as required by the principle of effectiveness which is inherent in the Convention (see *Artico v. Italy*, §§ 33, 47-48, 13 May 1980, Series A no. 37).

10. We would thus award the applicant an amount in respect of non-pecuniary damage, by way of just satisfaction under Article 41 of the Convention. Since, however, we are in the minority, it is not necessary to determine the sum that should have been awarded.

DISSENTING OPINION OF JUDGE WOJTYCZEK

With all due respect to my colleagues, I am unable to subscribe to their view that Article 6 is applicable in the instant case. As, in my opinion, this provision is not applicable, it could not have been violated. Moreover, I have serious reservations concerning the procedure applied in the instant case.

1. Preliminary remarks

1.1. The case touches upon issues which are important for the rule of law. The rule of law is founded upon clear and precise meta-rules relating in particular to the validity of law, its interpretation, inference of rules from rules, and conflicts between them. It begins with reliance upon the strength, precision and clarity of legal argument, as well as with the quality of legal reasoning and methodological rigour. It consists in the strict observance, by the holders of public power, of the legal rules defining their mandate and the scope of their powers. It presupposes further procedural justice with due respect for the rights of the parties to different types of judicial and non-judicial proceedings.

1.2. The case also concerns the organisation of the judicial branch of government. The primary goal of the judicial branch is substantive justice. The organisation of the judicial branch should aim at the quality of the system and its capacity to achieve substantive justice. One of the most important tools for achieving this aim is judicial independence and impartiality. Judicial independence has therefore an instrumental – albeit very important – value and is not the ultimate objective. Its implementation depends upon institutional arrangements: the separation of powers and an efficient system of checks and balances in interinstitutional relations. In a constitutional democracy, "oversight by an independent judicial body of the legality of a measure such as removal from office" (see paragraph 327) is first and foremost a question of objective law guarantees and an element of State organisation which can be put in place without granting to the power-holders concerned individual subjective rights, which – by definition – would serve to protect individual interests. At the same time it goes without saying that judges are right-holders in matters concerning their legitimate individual interests (on these questions I refer to point 6 of my dissenting opinion appended to the judgment in the case of *Broda and Bojara v. Poland*, nos. 26691/18 and 27367/18, 29 June 2021).

2. Issues of procedural justice

2.1. The instant case raises serious issues of procedural justice. The respondent Government opposed the relinquishment of the case to the Grand Chamber. They provided certain reasons for their position, no less extensive

than those provided by other Governments opposing relinquishment. On 9 February 2021 the Chamber decided nonetheless to reject the Government's opposition to relinquishment. The Grand Chamber in the instant judgment, noting that the Government had not challenged the Chamber's decision in the proceedings before it, decided to take "**no position** on the Chamber's decision to relinquish jurisdiction" (see paragraph 11, emphasis added).

2.2. The Court has established the following principles concerning procedure (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 50, 29 June 2012):

> "While it is not formally bound to follow any of its previous decisions or judgments, the Court considers that it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart from its own precedents without compelling reason (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I). The same is true, *a fortiori*, with regard to procedural rules, where legal certainty is of particular importance and the Court's precedents should be followed even more strictly so as to ensure that the requirements of foreseeability and consistency, which serve the interests of all the parties to the proceedings, are met."

I would note, in this context, that the constant practice has so far been to uphold the objections of respondent governments to relinquishment of jurisdiction.

2.3. The Grand Chamber has further asserted the power to review the decision concerning the relinquishment of jurisdiction by the Chamber (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 60, 17 September 2009):

> "In the light of the foregoing, the Court considers that the Second Section's decisions to declare the application admissible and to relinquish jurisdiction in favour of the Grand Chamber were adopted in accordance with the Convention and its Rules and do not prejudice the further examination of the case."

While, in that case, the review of the decision to relinquish was performed in response to the Government's pleadings, nothing prevents the Grand Chamber from performing such a review *proprio motu*. The Government's objection still stands, even if the Government decide not to present any further submissions on this point before the Grand Chamber.

The Grand Chamber has refrained from endorsing the Chamber's decision to relinquish the case of *Grzęda v. Poland*. However, in the light of the foregoing, the Grand Chamber should have verified whether the Chamber's decision to relinquish jurisdiction in favour of the Grand Chamber had been adopted in accordance with the Convention and the Rules of Court and did not prejudice the further examination of the case.

2.4. The Chamber, in deciding to relinquish the case and to reject the Government's objection, did not deliver any reasoned decision. However, the Registry prepared an official press release which explains the reasons for the decision taken, in the following terms:

> "The Chamber considered that in order for the Government's objection to be regarded as valid under the terms of Article 30 of the Convention, in conjunction with Rule 72

> § 4, it must be satisfied that the Government provided reasons as to why the present case would not meet the criteria laid down in Article 30 and would not raise 'a serious question affecting the interpretation of the Convention or the Protocols thereto' or that 'the resolution of a question before the Chamber' would not 'have a result inconsistent with a judgment previously delivered by the Court'."

I note in this context that, firstly, such requirements have never been formulated hitherto and could have come as a surprise for the parties. Secondly, it is simply impossible for a party to provide reasons as to why a case would not meet the criteria laid down in Article 30 (on this issue see below point 3.1.), if the Chamber has not previously explained why – in its view – a case meets these criteria.

2.5. The press release further states the following:

> "The Chamber took note of the reasons given by the Polish Government in support of their objection. In the Chamber's assessment, those reasons, in essence limited to reliance on the power of objection which was – and still is – formally available to the Government in accordance with as yet unamended Article 30, could be regarded as tantamount to an attempt to re-argue the legal policy choices that Poland had itself made voluntarily and unreservedly by signing the Brighton Declaration and ratifying Protocol No. 15."

I note that Protocol No. 15 contains a transitional provision (Article 8 § 2) which clearly confirms the right of governments to oppose relinquishment in pending cases:

> "The amendment introduced by Article 3 of this Protocol shall not apply to any pending case in which one of the parties has objected, prior to the date of entry into force of this Protocol, to a proposal by a Chamber of the Court to relinquish jurisdiction in favour of the Grand Chamber."

The Explanatory Report in respect of Protocol No. 15 uses the term "the parties' **right to object** to relinquishment" (Explanatory Report, § 16, emphasis added), unequivocally stressing a "strong" procedural right. It further indicates that the transitional provision set out in Article 8 § 2 was introduced "out of concern for legal certainty and procedural foreseeability" (ibid., § 20). It is therefore clear that Protocol No. 15 is not a valid argument for rejecting the Government's opposition to relinquishment.

2.6. The press release invokes the Brighton Declaration. I note that the Court has so far avoided relying on declarations adopted at diplomatic conferences in interpreting Convention provisions (a notable exception is the very specific decision in the case of *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., §§ 121, 189-193 and 212, 12 October 2017).

2.7. In the period following the adoption of the Brighton Declaration (on 20 April 2012) objections by governments to relinquishment have been accepted. A Chamber of the Court dealt with an objection to relinquishment of jurisdiction raised by the Swiss Government in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* (no. 5809/08, § 9, 26 November 2013). In its decision of 17 September 2013, i.e. also after the opening for signature of Protocol No. 15 (on 24 June 2013), the Chamber

took note of the Government's objection and continued to examine the case. Similarly, in the case of *Trabelsi v. Belgium*, no. 140/10, § 54, ECHR 2014 (extracts), a Chamber accepted the Government's objection to relinquishment, lodged on 8 November 2013.

2.8. The above-mentioned press release argues in substance that the respondent Government have been estopped from exercising the right to oppose relinquishment. International legal scholarship has expressed, in particular, the following views in respect of estoppel (Th. Cottier and J. P. Müller, "Estoppel", in A. Peters and R. Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, (Oxford University Press 2008–) www.mpepil.com, accessed 9 February 2022, par. 1):

> "Despite varying perceptions and definitions in doctrine and practice, the following features and essential components of estoppel in public international law are generally accepted today, as stated by Judge Spender in the *Temple of Preah Vihear* Case,
>
> 'the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.' (*Case concerning the Temple of Preah Vihear [Cambodia v Thailand] [Merits] [Dissenting Opinion of Sir Percy Spender]* 143–44; International Court of Justice ...)'"

The Chamber relied wrongly upon the estoppel doctrine, because the conditions for estoppel have not been fulfilled. In particular, there has been neither clear nor unequivocal representation. Moreover, there is neither prejudice for another party, nor unfair advantage to the State.

2.9. The reasons given in the press release in respect of the Government's objection could not be invoked in respect of an individual applicant's objection. The approach adopted therefore undermines the principle of equality of arms between parties. Under the approach thus adopted, one party (the applicant) had the unlimited right to object to relinquishment (unaffected by the Brighton Declaration), whereas the other party (the Government) was deprived of such a right under the Brighton Declaration.

2.10. For all these reasons, the Chamber's decision to relinquish jurisdiction in favour of the Grand Chamber and the Grand Chamber decision not to review the relinquishment are both procedurally flawed.

3. Questions of legal methodology

3.1. The fundamental legal issue at stake

3.1.1. The majority define the most important legal issue at stake in the following terms in paragraph 265:

> "The Court notes that the present case raises a novel issue, namely the question whether Article 6 § 1 under its civil head is applicable to a dispute arising out of the

premature termination of the applicant's term of office as a judicial member of the NCJ, while he still remains a serving judge."

This approach raises at least four objections.

Firstly, paragraph 265 is placed at the beginning of the part entitled "Application of the general principles to the present case", which suggests that the novel issue is limited to the application of established principles.

Secondly, the issue is formulated as system-specific, limited to the Polish legal system and connected with the premature termination of **the present** applicant's term of office as a judicial member of **the NCJ**. The role of the Grand Chamber is to decide on general legal questions arising under the Convention, relevant for all High Contracting Parties. A system-specific legal issue does not really call for examination by the Grand Chamber.

Thirdly, the main legal question defined by the majority is of limited practical importance for the respondent State and concerns a secondary issue from the perspective of the rule of law in Poland. Much more important legal questions concerning the reform of the Polish judiciary have already been settled in several Chamber judgments (see *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021; *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021; *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021; and *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022). It is difficult to understand why the instant case has been relinquished to the Grand Chamber whereas other cases, brought against Poland and concerning more fundamental questions connected with judicial independence, have been decided by a Chamber.

Fourthly, and more importantly, the majority misrepresent the fundamental legal issue put forward by the applicant. In the instant case, the applicant's term of office in the National Council of the Judiciary was terminated *ex lege* with the entry into force of the impugned general legislative provisions (section 6 of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and Certain Other Acts – presented in paragraph 76). The applicant complained in substance that he had been deprived of access to a court empowered to invalidate the legislative measures adopted. In this context, the most important legal issue which arises in the instant case is the question whether Article 6 encompasses the right of access to a court empowered to review and invalidate primary legislation.

3.1.2. In my concurring opinion appended to the judgment in the case of *Xero Flor* (cited above), I presented in detail the Court's case-law addressing the issue of applicability of Article 6 to the constitutional review of legislation. The exclusion of the applicability of Article 6 to constitutional review of legislation seems to be the rule, whereas judgments and decisions declaring Article 6 applicable to such review appear rather to be an exception, justified by certain specific grounds. In any event, this question requires clarification by the Grand Chamber. I regret that that the Grand Chamber has decided to avoid this crucial aspect of the case and to reason its judgment as

if it concerned the mere right of access to a court empowered only to apply legislation.

3.2. Methodology applied for the purpose of establishing domestic law

3.2.1. The instant case reveals once again the difficulty of establishing the content of domestic law in proceedings before the Court (compare my dissenting opinion appended to the judgment in the case of *Broda and Bojara,* cited above). Establishing the content of domestic law is a difficult task for an international court and the principle *iura novit curia* in international judicial proceedings does not apply to domestic law. The task in question requires the Court to devise a clearly defined and homogenous methodology and to take into account all the relevant elements of domestic law, including meta-rules as understood and applied in the domestic legal systems.

3.2.2. In the instant case, the Court, while seeking to establish the content of domestic law, applies very different approaches to the different legal issues at stake. As a result, different rules of domestic law are established under different methodologies and especially under different rules of interpretation.

The question whether, in the domestic law, there is a subjective right for a member of the National Council of the Judiciary to remain in office until the end of the four-year term is addressed by the majority mainly on the basis of a prima facie reading of the letter of the Constitution. Although the Court refers to four domestic judgments it should be stressed that these judgments do not answer the question of the existence of a subjective right, whereas the reasoning passes under silence the relevant case-law dealing with the issue whether provisions defining terms of office are a source of subjective rights. Literal interpretation ("the law in books") is considered decisive. Systemic and teleological interpretation, as well as domestic case-law, are tacitly rejected as irrelevant.

The question whether the national Constitution allows the election by Parliament of the judicial members of the National Council of the Judiciary is dealt with on the basis of the relevant case-law ("the law in action") and of a systemic interpretation of the Constitution, whereas the literal interpretation of the Constitution is tacitly rejected as irrelevant.

The question whether in the domestic law the applicant had access to a court, in order to contest the measures terminating his term of office, is addressed mainly on the basis of the Government's pleadings ("the law in parties' submissions"). Relevant constitutional and legislative provisions and the relevant case-law are passed under silence. Literal, systemic and functional methods of interpretation are not applied. The Court keeps to the formal truth.

The general context of the judicial reforms is established *proprio motu,* taking into account the relevant legislation and case-law of domestic courts, the case-law of the CJEU, and the statements of various international bodies (elements of both "the law in books" and "the law in action"). The Court's

aim in this domain is to establish material truth. Interestingly, pronouncements of various international bodies become an important element in the interpretation of the domestic law.

3.2.3. This methodological cherry-picking is difficult to reconcile with the international rule of law. As a result, the outcome of the case is truly surprising. Concerning the crucial question – whether the applicant had access to a court – the Court recognises that it is unable to provide any certain answer (see paragraph 294). The finding of a violation of Article 6 is thus based upon the Government's general concession (contested by the applicant in paragraph 54 of his submissions, dated 3 March 2020) that access to a court has been excluded (see paragraph 344). The precise content of the relevant domestic legal rules remains unclear to the Court and thus it is not even sure that a problem of access to a court really exists in the domestic legal system.

4. The content of domestic law

4.1. The question of access to a court in the domestic law

4.1.1. The question of access to a court empowered to invalidate primary legislation is addressed in the Polish Constitution, in particular in its Article 79. This provision, not quoted in the part of the judgment presenting the domestic law (see paragraph 66), is worded as follows (official translation on the website of the Polish *Sejm*, emphasis added):

> "In accordance with principles specified by statute, everyone **whose constitutional freedoms or rights** have been infringed, shall have the right to appeal to the Constitutional [Court] for its judgment on the conformity to the Constitution of a statute or another normative act **upon which basis a court or organ of public administration has made a final decision** on his freedoms or rights or on his obligations specified in the Constitution."

4.1.2. The wording of this provision calls for two remarks. Firstly, individuals can contest the constitutionality of primary legislation by lodging a constitutional complaint only if an individual act applying this legislation has been issued. Individuals cannot lodge a constitutional complaint against legislation producing effects *ex lege* without implementing measures. It should be stressed that direct individual access to a court empowered to invalidate primary legislation was excluded in a general manner by Article 79 of the Constitution in respect of any legislation which produced effects *ex lege* without requiring any individual implementing measures.

Secondly, anyone lodging a constitutional complaint must substantiate the allegation that his or her constitutional freedoms or rights have been infringed. In Poland, Article 187 § 3 of the Constitution, defining the term of office of the members of the National Council of the Judiciary, is not considered a source of constitutional freedoms or rights within the meaning of Article 79 of the Constitution (see point 4.2. below).

It is also important to note that the case involves an interplay between general provisions on access to a court, enacted before 2015, and the claim to the review and invalidation of legislation enacted in 2017. The relevant provisions defining (or limiting) the scope of access to the different courts – the Constitutional Court, the ordinary courts and the administrative courts – predate the judicial reforms which began in 2015. The applicant's complaint in this respect concerns limitations on access to a court enshrined in provisions enacted before 2015. All these provisions have been widely considered so far as compliant with the standards of the rule of law. The paradox of the case is that the finding of a violation of Article 6 pertains to the general limitations set forth in much earlier provisions which have remained uncontested hitherto.

4.2. The existence of a subjective right

4.2.1. The majority express, in paragraph 286, the following view concerning the question of applicability of Article 6:

> "In the light of the foregoing, the Court finds that in the present case there was a genuine and serious dispute over a 'right', namely to serve a full term of four years as a judicial member of the NCJ, which the applicant could claim on arguable grounds under domestic law (see, *mutatis mutandis*, *Baka*, cited above, § 111; *Denisov*, cited above, §§ 47-49; and *Kövesi v. Romania*, no. 3594/19, § 116, 5 May 2020)."

In my view, this conclusion is incorrect. In my dissenting opinion appended to the judgment in the case of *Broda and Bojara* (cited above), I presented in detail the domestic case-law and legal scholarship concerning the question whether provisions defining the length of a term of office are a source of subjective rights. The analysis shows that the answer to this question provided by both the domestic case-law and legal scholarship is clearly in the negative.

4.2.2. I would add that the Constitutional Court in its judgment of 9 December 2015 (K 35/15) found that section 2 of the Act of 19 November 2015 amending the Constitutional Court Act (Journal of Laws – *Dz. U.* item 1928) was inconsistent with Article 2, Article 7, Article 45 § 1, Article 180 §§ 1 and 2, and Article 194 § 1, in conjunction with Article 10, of the Constitution, as well as with Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also with Article 25(c) in conjunction with Article 2 and Article 14 § 1 of the International Covenant on Civil and Political Rights. It should be stressed that, in this judgment, the Polish Constitutional Court found that the provision under review was incompatible with the guarantees of judicial independence, limiting its analysis to the objective dimension of the question. It established neither the existence of subjective rights nor the need to guarantee individual access to a court for persons holding office in the judiciary. The judgment confirms the existing case-law in this domain.

4.2.3. Under the domestic law as interpreted by the courts and legal scholarship, the applicant's claim that he had a subjective right does not reach the threshold of arguability for the purposes of Article 6. The following quotation, taken from the judgment in the case of *Károly Nagy v. Hungary* ([GC], no. 56665/09, § 77, 14 September 2017), can sum up the situation also in the instant case:

> "Consequently, ... the Court cannot but conclude that the applicant had no 'right' which could be said, at least on arguable grounds, to be recognised under domestic law. To conclude otherwise would result in the creation by the Court, by way of interpretation of Article 6 § 1, of a substantive right which had no legal basis in the respondent State."

4.3. The meaning of Article 187 § 3 of the Constitution

4.3.1. The majority made the following findings concerning the domestic law:

> "271. The Court notes that the constitutional protection of the security of tenure of elected members of the NCJ was not called into question until the current parliamentary majority introduced a bill amending the 2011 Act on the NCJ on 14 March 2017, ultimately culminating in the enactment of the 2017 Amending Act (see paragraphs 35 and 46-50 above).
>
> 272. The Court observes that the Constitutional Court, in its key judgment of 18 July 2007 (no. K 25/07) regarding the status of the NCJ, considered that the Constitution did not provide for the removal of judicial members of the NCJ from that body before the expiry of their term of office and that the NCJ was a constitutional body based on the tenure of elected members (see paragraphs 84-85 above). The only permissible exceptions were exhaustively specified in the then applicable 2001 Act on the NCJ, all of which related to objective inability to hold such office. These exceptions are similar to those laid down in section 14 of the 2011 Act on the NCJ, which were applicable at the time relevant to the present application."

4.3.2. These findings are inaccurate and are contradicted in paragraph 283, which acknowledges the existence of the possibility of revoking members of the NCJ, although stresses its irrelevance.

Article 187 § 3 enshrines an objective guarantee of the rule of law. However, this objective guarantee of the term office of the members of the National Council of the Judiciary has a limited and relative nature. It is important to draw attention here to two pieces of legislation implementing the constitutional provisions. Under the 1989 Act on the National Council of the Judiciary (in force for twelve years until 2001), Article 7 point 3 read as follows:

> "The office of an elected member of the Council shall expire during the term of office of the Council in case of:
>
> ... (3) revocation by the body which performed the election; ..."

Under the 2001 Act on the National Council of the Judiciary (in force for ten years until 2011), Article 10 point 3 read:

> "The office of an elected member of the Council shall expire before the end of the four-year term of office in case of:
>
> ... (3) revocation by the body which performed the election; ..."

As a result, from the entry into force of the Constitution in 1997 until 2011, ordinary legislation granted to the body which elected a member of the NCJ the power to revoke this appointment *ad nutum*. Members of the NCJ could be revoked at any time and did not have any guarantee of stability of their office. Their security of tenure was limited. This uncontested legislative practice, for as long as fourteen years, is not irrelevant for the interpretation of the Constitution, even if the argument is not decisive.

4.3.3. Moreover, such a solution was widely accepted in legal scholarship. L. Garlicki expressed the following view on this question ("Article 187", in L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej*. *Komentarz*. Warsaw, 2004, vol. 4, pp. 5-6, emphasis added):

> "The Constitution does not mention the revocation of a member of the Council before the end of its term of office, but given the nature of the Council as *sui generis* representation of professions and institutions, **a revocation would not contravene against the nature of this body.** The procedure of revocation should nonetheless be regulated by statute (see remark 11 to Article 183), and the revocation can be performed only by the body which performed the election not by the Council itself."

A. Bodnar and Ł. Bojarski commented on the same question in the following terms ("Judicial Independence in Poland", in A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, Springer, 2012, emphasis added):

> "Members of the NCJ **may in general be dismissed by the organs which elected them**. In case of judges (constituting the majority of the NCJ members) it is not dangerous to the integrity of the NCJ, since they are elected by different judicial self-governing bodies. Their function is also connected with the type of courts they represent."

4.3.4. There was a general agreement in Poland that the four-year term of office in Article 187 of the Constitution meant no more than four years with a possibility of earlier revocation, under certain conditions. Against this backdrop, the Grand Chamber tends to substitute its own interpretation of the Polish law for the well-established interpretation by domestic courts and legal scholars.

4.4. The question as to who should elect the judicial members of the National Council of the Judiciary

4.4.1. The majority state the following in paragraph 312 (emphasis added):

> "In the same judgment, the Constitutional Court held that Article 187 § 1 (2) of the Constitution **expressly provided that judicial members of the NCJ were to be elected by judges** (see paragraph 84 above). This finding of the Constitutional Court was an important element of its reasoning on the issues submitted to it for examination. The Court therefore notes that, in accordance with the Constitutional Court's judgment

> of 18 July 2007, under the Constitution the independence of the Council is protected by the rule that the majority of its members are judges who are elected by other judges. This arrangement is intended to ensure that the Council can effectively exercise its constitutional role as the guardian of judicial independence."

Actually, in its judgment of 18 July 2007 (K 25/07), the Constitutional Court expressed the following view:

> "The Constitution in Article 187 § 1 (2) directly enshrines the principle of the election of judges to the National Council of the Judiciary, determining in this manner the personal structure of the Council. It clearly specifies that members of the National Council of the Judiciary may be judges, elected by judges, without indicating any additional features that would condition their membership in the Council."

According to the Constitutional Court, the Constitution clearly specifies that members of the National Council of the Judiciary may be judges. The principle that judges are elected by judges is mentioned only *en passant,* as an *obiter dictum*, without any further argument in support. This finding of the Constitutional Court was not an important element of its reasoning on the issues submitted to it for examination in that case (K 25/07).

4.4.2. The majority further express the following views (paragraph 315):

> " ... [the Court] considers that the departure, in that judgment, from the earlier position of the Constitutional Court in its judgment of 18 July 2007, namely that judicial members of the NCJ were to be elected by judges, was not accompanied by any cogent explanation. Rather, the reasons given were, in effect, limited to the 'disagreement' of that particular bench with the previous case-law of the Constitutional Court and, therefore, such reasons should be regarded as insufficient (see, in the same vein, *Reczkowicz v. Poland*, no. 43447/19, § 238, 22 July 2021). The Court is also of the view that the Constitutional Court's findings in the judgment of 20 June 2017 did not give consideration to the constitutional mandate of the NCJ to safeguard judicial independence."

I agree that the reasons provided by the Constitutional Court were unsatisfactory, but it is incorrect to say they were limited to the expression of "disagreement" of that particular bench with that court's previous case-law. The reasoning contains quite extensive – though controversial – considerations about the constitutional mandate of the National Council of the Judiciary to safeguard judicial independence. The court's findings in the judgment of 20 June 2017 did give consideration to the constitutional mandate of the National Council of the Judiciary, although it is possible to say that they did not give **due** consideration to it. For the sake of providing a more complete picture, I would add that the Constitutional Court, in the same judgment, stated in respect of several other issues that it agreed with the views expressed in its earlier case-law.

I would also add, in this context, that the Grand Chamber, in the instant case, tacitly departs from the Court's earlier case-law which emphasised that Article 6 does not grant access to a court with the power to invalidate legislation. Not only is this tacit overruling not accompanied by any cogent

explanation, the disagreement with the previous case-law has not even been stated.

4.5. Other specific legal arguments

4.5.1. The majority characterise the impugned legislation in the following terms in paragraph 299:

> "Section 6 of the 2017 Amending Act cannot be regarded as such an instrument since it was directed at a specific group of fifteen clearly identifiable persons – judicial members of the NCJ elected under the previous regulation, including the applicant – and its primary purpose was to remove them from their seats on that body. It was a one-off statutory amendment that terminated *ex lege* the constitutionally prescribed tenure of the NCJ's judicial members."

The question of laws applying to single cases is of high complexity (see for instance: J. Lege, "Verbot des Einzellfallgesetzes", in D. Merten, H.-J. Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, C.F. Müller Verlag, Heidelberg, 2009, pp. 439-492). The problem with the approach adopted by the majority is that any transitional provisions usually apply to a set of clearly identifiable persons. The critique that is developed in the reasoning without any further qualification or nuance undermines any transitional provisions. It is interesting to note, in this context, the views expressed by the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, adopted in respect of draft legislation in Moldova (Urgent Joint Amicus Curiae Brief of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Three Legal Questions Concerning the Mandate of Members of Constitutional Bodies, Opinion No. 1003/2020, § 36):

> "The [Venice] Commission has pointed out that the laws whose effects are directed against a specific person (so called '*ad hominem* laws') are contrary to the rule of law [footnote omitted] A similar approach has been maintained by the ECtHR [footnote omitted]. Indeed, *ad hominem* means related to a person, addressed directly to a person, related to or associate [*sic*] with or against a particular person. Turning to the current context and the question raised by the Constitutional Court, it appears that the proposed amendment is not directed against a specific person (A or B), but only deal [*sic*] with the members who are in office in the circumstances of the transition, regardless of their individual personality; it does not refer to a reason connected to a specific person. This is confirmed by the fact that the possibility for the current lay members to remain in office is explicitly provided, subject to their endorsement by a larger majority than the ruling one."

4.5.2. The majority, in paragraph 270, argue further in the following way:

> "In this connection, the Government's argument that under Polish law there is no right to exercise public authority does not carry much weight, as the applicant is not claiming such a right. Rather, he claims the right to serve the term of office for which he was lawfully elected."

The Government's argument would have required a different answer. The distinction between exercising public authority and serving the full term of office does not make sense in the context of the instant case, because the two are intrinsically linked. Membership in the National Council of the Judiciary goes hand in hand with the exercise of public power. The members of the National Council of the Judiciary are not there for the purpose of serving the full term of office but for the purpose of exercising public power. Had Parliament chosen to deprive the serving members merely of the right to vote without revoking them from the Council, this would not have solved the problem raised by the applicant.

4.5.3. The view (expressed in paragraph 279) that judicial members of the National Council of Judiciary could be elected for a term of less than four years is problematic from the viewpoint of the Constitution, which states that its members must be elected for four years. Anyone elected for such a shorter term of office could try to claim, invoking the instant judgment, that the limitation is not compatible with the Constitution.

5. The *Eskelinen* test as applied in the instant case

5.1. In the instant case, the majority decided to approach the case upon the basis of the *Eskelinen* test. This approach warrants several objections.

5.2. Firstly, as mentioned above, the most important legal issue arising in the instant case, namely the question whether Article 6 grants access to a court empowered to invalidate primary legislation has been left unaddressed. The whole reasoning evolves as if the case were about access to a court empowered to apply legislation.

Secondly, the *Eskelinen* criteria were devised to assess limitations on access to a court empowered to adjudicate upon disputes concerning the application of the law, not its content. These criteria are not at all adapted to the resolution of issues concerning judicial review of primary legislation. Both the pleadings of the parties and the reasoning entertain an ambiguity concerning the scope of the powers of the court which has to be accessed. In particular, it is not clear how access to a court empowered to review law-applying measures is articulated with the right of access to a court empowered to review legislation and why the exclusion of access to the first should be relevant for assessing exclusion of access to the latter. Under these circumstances, it is very difficult to understand and follow the logic of the reasoning.

Thirdly, the answer to the second question under the *Eskelinen* test presupposes that access has been excluded. It does not make sense to verify whether an exclusion is justified if it is not certain that there is an exclusion at all.

Fourthly, as mentioned above, limitations on access to a court empowered to address the grievances raised by the applicant were put in place well before

the reforms of the judiciary, which began in 2015. The whole assessment of the subsequent reforms is completely irrelevant for the purpose of answering the question whether these limitations are justified. The legitimacy of previous general limitations upon access to a court cannot depend upon the legitimacy of the subsequent reforms of the judiciary. Had the subsequent reforms been compliant with the rule of law, the assessment of the legitimacy of limitations upon access to a court would have been the same. Moreover, the issue which matters for the public is the general question whether such limitations upon access to a court are permissible under the Convention and under what conditions, not the specific question the majority try to answer, namely the question whether the limitations upon access to a court put in place in Poland before 2015 were still permissible in the narrow context of the reforms of the judiciary carried out from 2015 onwards.

Fifthly, the majority express the following views in paragraph 264:

> "It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching upon their individual independence and impartiality (see *Bilgen*, § 79, and *Broda and Bojara*, § 120, both cited above)."

And further in paragraph 302:

> "The Court reiterates that judges can uphold the rule of law and give effect to the Convention only if domestic law does not deprive them of the guarantees required under the Convention with respect to matters directly touching upon their individual independence and impartiality (see paragraph 264 above)."

Then in paragraph 327:

> "Members of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of the legality of a measure such as removal from office is able to render such protection effective (see, *mutatis mutandis*, *Kövesi*, § 124, and *Bilgen*, § 79, both cited above)."

It appears from these quotations that – on the one hand – the majority apply the *Eskelinen* test and – on the other – they explain that the *Eskelinen* test is not applicable to matters directly touching upon judicial independence, because in any event limitations on access to a court in this domain are *per se* not permissible. In other words, the whole *Eskelinen* test becomes pointless in respect of judges. If so, any considerations about the legitimacy of judicial reforms in Poland become even more irrelevant for resolving the instant case. These considerations may nonetheless create confusion as to the extent to which the general principles relied on in the instant case are universally applicable and the extent to which they apply in the specific context of the reforms carried out in Poland from 2015 onwards.

6. The legal consequences of the judgment

6.1 Given the conditional nature of the violation of the Convention found in the instant case, based upon the pleadings of the Government, and given that the Grand Chamber is unsure whether access to a court has really been excluded in the domestic law, it is not clear whether the respondent State has to take any general measures whatsoever to implement this judgment.

6.2. The judgments of the Court produce *erga omnes* effects. The instant judgment is based upon the implicit assumption that Article 6 grants access to a court empowered to review and invalidate legislative measures touching upon judicial independence and impartiality. If I understand the reasoning correctly, all High Contracting Parties should then put in place not only a mechanism of judicial review of primary and secondary legislation in matters touching upon judicial independence and impartiality but also open access to such review for judges.

7. Conclusion

7.1. Initially, individual rights were understood as entitlements protecting individuals against acts of public authorities. A person could claim individual rights against public power but could not claim individual rights while exercising public power. Under the traditional approach, as stated above, judicial independence is a matter of institutional arrangements: the separation of powers and a system of checks and balances in interinstitutional relations.

Under the Court's case-law, Article 6 has begun to apply to public law disputes between holders of State power, implicitly transforming them into a matter of private interest. Some holders of public power may now cumulate, in respect of the same actions or situations, the advantages of both public power and individual rights, acting as both power-holders and right-holders (see, in particular, my separate opinions appended to the judgments in *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016; *Szanyi v. Hungary*, no. 35493/13, 8 November 2016; *Selahattin Demirtaş v. Turkey (no. 2)*, no. 14305/17, 20 November 2018; and *Broda and Bojara*, cited above). If – with the development of the case-law – judicial independence becomes more and more an individual right of a judge, then the exercise of judicial power and judicial discretion become protected by human rights. The fundamental distinction in modern law between the individual and State organs is blurred and thus the whole concept of individual rights is called into question. As a result, the rule of law is eroded. The instant judgment contributes to enhancing this tendency.

7.2. Secondly, the instant case shows that the erosion of the rule of law at the domestic level may contaminate – in many different ways – the rule of law at the supranational and international level. The instant judgment has been rendered without duly taking into account procedural justice, and the

reasoning fails to comply with the methodological rigour required under the rule of law. Moreover, the Court has avoided addressing overtly the most fundamental issue put forward by the applicant, namely the question whether Article 6 encompasses access to a court empowered to review and invalidate primary legislation.

7.3. This judgment is not an example of best practice in implementing and upholding the rule of law.