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Warsaw, 30 December 2019

1926/2019/PSP/MSZ

Mr Linos-Andre Sicilianos
President of the European Court of Human Rights
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Guðmundur Andri Ástráðsson v. Iceland*
Application no. 26374/18

Pursuant to the letter of Mr Søren Prebensen, the Deputy Grand Chamber Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 5 December 2019, granting leave to make written submission to the Court by 6 January 2020, the Helsinki Foundation for Human Rights (hereinafter also referred to as "HFHR") with its seat in Warsaw, Poland, hereby respectfully presents its written comments on the case of Mr. Guðmundur Andri Ástráðsson against Iceland (application no. 26374/18).

On behalf of the Helsinki Foundation for Human Rights,

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Warsaw, 30 December 2019

Guðmundur Andri Ástráðsson v. Iceland
Application no. 26374/18

WRITTEN COMMENTS
BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

EXECUTIVE SUMMARY:

- The case of *Guðmundur Andri Ástráðsson v. Iceland* provides the Court with an opportunity to clarify the standards concerning the right to have one's case heard by a tribunal established by law. The Grand Chamber's ruling may have a significant impact, not only on Iceland but also on the other Member States, including Poland.
- At the moment, the legal status of the three "double-judges" elected to the Polish Constitutional Tribunal and hundreds of newly appointed judges of other Polish courts is uncertain. The primary cause for this uncertainty is controversial actions taken by the Government, which are widely perceived as driven by partisan interests and unlawful.
- The crisis of the judiciary in Poland shows that violations of domestic law committed in the process of judicial appointments in a context that may suggest highly partisan motives behind measures taken by the executive and the legislature, ultimately threaten human rights and the whole legal system.
- The principle of the rule of law requires that the citizens have objective confidence in the judiciary. Unlawful political interferences with the process of judicial appointments undermine such confidence.
- There are clear links between the right to an independent and impartial court and the right to have one's case heard by a tribunal established by law. The manner in which judges are appointed is a factor guiding an assessment of the independence of courts. Moreover, the people may reasonably fear that an unlawfully appointed person cannot serve as an independent and impartial judge.
- Deficient judicial appointments may also lead to violations of the principle of legal security as judgments issued by judges with an obscure legal status could potentially be challenged with ordinary or extraordinary remedies.

I. INTRODUCTION

1. The Helsinki Foundation for Human Rights ("HFHR") submits these written comments pursuant to the leave granted by the President of the Grand Chamber of the European Court of Human Rights ("ECtHR" or "Court") on 5 December 2019.

2. HFHR is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society in Poland and abroad. As part of its work, the HFHR represents parties and prepares submissions in proceedings before national and international courts and tribunals. The HFHR has long-standing expertise in submitting third party interventions to the ECtHR and in representing victims of human rights violations in proceedings before the Court. We have submitted *amicus curiae* briefs not only in cases brought against Poland (e.g. *A.K. v. Poland*, no. 904/18; *Grzęda v. Poland*, no. 43572/18), but also in cases taken against other states involving legal problems important for the protection of human rights in Poland (e.g. *Levada Centre against Russia*, no. 16094/17; *Baka v. Hungary*, no. 20261/12).

3. The HFHR believes that the *Ástráðsson* case concerns problems of the utmost importance for the protection of the right to a court in Poland. After the extensive and controversial "reforms" enacted by the Polish Parliament in 2015-2018, the legal status of many judges of the Polish

Supreme Court ("SC"), common courts and the Constitutional Tribunal ("CT", or "Tribunal") is now uncertain, also from the perspective of Article 6 § 1 of the European Convention on Human Rights ("ECHR").

4. These written comments are divided into three sections. The first section describes the controversies, currently arising in Poland, over the legality of appointment and election of certain judges. The second one presents selected comments and analyses of the Chamber's judgment circulated in the Polish legal literature, media and court decisions. The last section uses the background of Polish experiences to describe the impact of legal defects in the judicial appointments process on the right to a court.

II. CONTROVERSIES OVER THE LAWFULNESS OF APPOINTMENT AND ELECTION OF JUDGES IN POLAND

5. As already mentioned, concerns are frequently expressed over the legal standing of certain judges in Poland, in particular, the three "double-judges" (the parliamentary nominees assigned to already taken seats in the Constitutional Tribunal) and the judges appointed on the nomination of the National Council of the Judiciary in the composition established after the 2017 "reform" ("the new NCJ").

The lawfulness of the election of three "double-judges" of the CT

6. The origins, course and consequences of the political and legal crisis impacting the CT have been widely discussed in the English-language literature.[1] Therefore, these written comments focus on the key aspects of the crisis.

7. Article 194(1) of the Constitution of the Republic of Poland ("Constitution") provides that "[t]he Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years". The Constitution sets out no details of the election process. Before 2015, this process was governed by the Rules of Procedure of the Sejm, which provided, among other things, that motions proposing a candidate for CT judges must be filed to the Speaker of the Sejm no later than 30 days before the end of the term of the judge to be replaced by the candidate. However, the new 2015 Constitutional Tribunal Act[2] ("CTA") changed certain rules of the election procedure. First, it provided that motions proposing candidates for CT judges must be submitted to the Speaker no later than 3 months before the expiration of the relevant judge's term of office. Second, an intertemporal provision of the CTA, Article 137, set a different deadline for the submission of candidates chosen to replace the five judges whose terms ended in 2015. Such candidates were to be submitted within 30 days from the CTA's entry into force.

8. In order to understand the controversy posed by the above provision, one needs to compare the end date of the parliamentary term with the end dates of the terms of office of the five CT judges. The parliamentary term is 4 years, but the exact duration of each Sejm differs in every case. That is because the term starts on the day of the first parliamentary sitting and continues until the day preceding the first sitting of the "new" Sejm. Both dates are set by the President, who enjoys certain scheduling flexibility. The term of office of three CT judges ("November judges") ended on 6 November 2015, while two others ("December judges") concluded their terms on 2 and 8 December 2015. Since the first sitting of the 7th Sejm took place on 8 November 2011, it was clear that term of office of two "December judges" would inevitably end during the next (8th) Sejm. The three "November judges" were expected to end their terms within four years from the first sitting of the 7th Sejm, but, depending on the President's scheduling of the dates of parliamentary elections and first sitting of the new Sejm, the "November judges" could theoretically end their terms already after the beginning of the new Sejm.

9. Article 137 was criticized by many legal commentators who argued that the 7th Sejm could lawfully elect only three ("November") judges whereas the two "December judges" should have

[1] See in particular: W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019, pp. 58-96.

[2] Ustawa z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym (Journal of Laws [Dz.U.] of 2015, item 1064).

been elected by the new Sejm[3]. Unfortunately, Sejm adopted the CTA and elected all five judges in October 2015. However, the President did not take oath from the new judges awaiting a response of the new Sejm.

10. The term of the 8th Sejm began on 12 November 2015. Almost immediately, the new ruling party took steps to invalidate the election of five judges by the previous Sejm. On 25 November 2015, the Sejm adopted five resolutions in which it declared the election of five judges by the 7th Sejm as devoid of legal force. A week later, the Sejm elected five new judges who gave the oath of office to the President at the night of the day of the election.

11. However, the very next day (3 December 2015), the CT issued a judgment concerning the constitutionality of the CTA.[4] The Tribunal ruled that the controversial intertemporal provision violated the Constitution insofar as it allowed for the election of "December judges", but was constitutional in the part pertaining to the election of the "November judges". Moreover, the CT underlined that the President was constitutionally obliged to immediately take the oath of office from the lawfully elected judges.

12. Unfortunately, the President did not take the oath from lawfully elected CT judges. Instead, he took the oath from the three persons elected by the 8th Sejm. President's actions led to a serious controversy about the legal status of the appointees. Politicians of the ruling party argued that they were fully-fledged CT judges, lawfully elected and sworn. However, in light of the CT judgment, the persons concerned had no legal standing as judges because they were assigned to already taken seats. The latter conclusion was presented as an official position of the then President of the CT, who recognized the lawfulness of election of two judges but refused to allocate cases to the remaining three. The situation changed in December 2016, when the newly appointed President of the CT recognized their appointments. Obviously, CT President's recognition cannot, in itself, dispel the concerns that have arisen about the legal status of "double-judges" or cure the grave violations of law that have occurred in the process of their election. Many legal scholars[5], CT judges in their dissenting opinions[6], the Ombudsman[7] and courts[8] have argued that the three "double-judges" were elected unlawfully and as such have no standing to adjudicate cases pending before the CT.

The lawfulness of judicial appointments made on nomination of the post-reform NCJ

13. The second group of judges with uncertain legal status consists of the judges appointed on nomination of the NCJ in the composition after the 2017 "reform".

14. The NCJ is a constitutional body whose main function is to safeguard the independence of the courts and judges in Poland. The most important responsibility of the NCJ is participation in the process of judicial appointments – according to Article 179 of the Constitution, judges are appointed by the President on the motion of the National Council of the Judiciary, what means that the President cannot appoint a person who is not nominated in the NCJ resolution.

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[3] See, e.g., J. Zajadło, T. Koncewicz, *Jak (nie) wybierać sędziów Trybunału Konstytucyjnego*, Wyborcza.pl, 23.06.2015, https://wyborcza.pl/1,75968,18188072,Jak_nie_wybierac_sedziow_Trybunalu_Konstytucyjnego.html (accessed on: 19.12.2019).

[4] Judgment of the Constitutional Tribunal of 3.12.2015, case no. K 34/15.

[5] See, e.g., P. Radziewicz, *On Legal Consequences of Judgements of the Polish Constitutional Tribunal Passed by an Irregular Panel*, "Review of European and Comparative Law" (4)2017, pp. 46–56; M. Florczak-Wątor, *O skutkach prawnych orzeczeń TK wydanych z udziałem osób nieuprawnionych do orzekania* [in:] R. Balicki, M. Jabłoński (Eds.), *Państwo i jego instytucje: konstytucja, sądownictwo, samorząd terytorialny*, Wrocław 2018, pp. 300-302.

[6] See, e.g., judgment of the Constitutional Tribunal of 16.03.2017, case no. Kp 1/17, dissenting opinion of judge Sławomira Wronkowska-Jaśkiewicz; judgment of the CT of 4.04.2017, case no. P 56/14, dissenting opinion of judge Stanisław Rymar.

[7] See, e.g., the Ombudsman's submission to the Constitutional Tribunal of 9.04.2018 concerning the withdrawal of the Ombudsman's request for a constitutional review in case no. K 27/16.

[8]. See, e.g., the judgment of the Regional Administrative Court in Warsaw of 20.06.2018, case no. V SA/Wa 459/18 (judgment is not yet final).

15. Article 187(1) of the Constitution provides that the NCJ is composed of 25 members, including 15 judges chosen from amongst the judges of the SC, common courts, administrative courts and military courts. The Constitution does not provide explicitly that the judge-members of the NCJ must be elected by the judiciary. However, from the moment of the establishment of the NCJ in 1989 until 2018 the law provided that the judge-members are elected by other judges. This model of electing the NCJ members was consistent with the primary function of the NCJ, that is safeguarding the independence of courts and its role as a forum for exchanging opinions between branches of state power[9].

16. In December 2017, Sejm adopted a law which significantly amended the procedure of electing the judge-members of the NCJ.[10] As from the new law's entry into force, the judge-members are elected by the Sejm from a pool of candidates proposed by groups of 2,000 citizens or 25 judges.

17. The new law has raised a serious controversy. It was argued that it was unconstitutional and threatened the judicial independence.[11] However, the CT, in its judgment of 25 March 2019,[12] ruled that the new law was consistent with the Constitution because the Constitution does not establish any particular model of electing the judge-members of the NCJ. Notably, the judgment in question was entered by a panel of the CT composed of, among others, an unlawfully elected "double-judge" (see above).

18. Nevertheless, the CT judgment did not dispel the concerns over the lawfulness of actions taken by the new NCJ, which were further strengthened by the judgment of the Court of Justice of the European Union ("CJEU") of 19 November 2019[13] concerning the NCJ and the Disciplinary Chamber of the SC. The CJEU underlined that the manner of judicial appointments is a factor to be taken into account while assessing the independence of courts. The mere fact that judges are appointed by the President does not violate the principle of judicial independence, provided that "... the substantive conditions and detailed procedural rules governing the adoption of 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 as to their neutrality with respect to the interests before them, once appointed as judges..." (§§ 133-134). According to the CJEU, the participation of the NCJ in the process of judicial appointments "may contribute to making that process more objective" by limiting discretionary powers of the President, but only if the NCJ is "sufficiently independent" (§§ 137-138).

19. Regardless of the concerns caused by the changes introduced by the 2017 "reform", further controversy has arisen regarding the lawfulness of the election of one of the NCJ members. The controversy results from the non-disclosure of documents with the signatures of judges who support candidates for new NCJ members and also from the fact that some judges stated that they had withdrawn their support for a candidate before the candidate was elected to the NCJ by a vote of the Sejm[14].

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[9] See, e.g., W. Brzozowski, *Niezależność konstytucyjnego organu państwa i jej ochrona*, Warszawa 2016, p. 63.

[10] Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy of Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Journal of Laws 2018, item 3).

[11] See, e.g., K. Grajewski, *Krajowa Rada Sądownictwa w świetle przepisów ustawy z dnia 8 grudnia 2017 r. – zagadnienia podstawowe*, "Krajowa Rada Sądownictwa" (1)2018, pp. 21–34; (last access: 18.12.2019); T. Zalasiński, *Opinia prawna w sprawie oceny konstytucyjności prezydenckiego projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz o zmianie niektórych innych ustaw, zawartego w druku sejmowym nr 2002/VIII kadencja*, http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/KRS-opinia%20dr%20Zalsinskiego.pdf (accessed on: 18.12.2019); W. Sadurski, *Bad Response to a Tragic Choice: the Case of Polish Council of the Judiciary*, "Vefassungsblog", 16 April 2018, https://verfassungsblog.de/bad-response-to-a-tragic-choice-the-case-of-polish-council-of-the-judiciary/ (accessed on: 18.12.2019).

[12] Judgment of the Constitutional Tribunal of 25.03.2019, case no. K 12/18.

[13] Judgment of the CJEU of 19.11.2019 in joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others*.

[14] See, e.g., M. Kryszkiewicz, *Sędziowskie nominacje do podważenia. Przez procedurę wyboru jednego z członków KRS*, Gazetaprawna.pl, https://prawo.gazetaprawna.pl/artykuly/1425714,krs-nawacki-wycofanie-poparcia-dla-kandydatury-nominacje-sedziowskie.html (accessed on: 18.12.2019).

20. There are three additional factors that may serve as a basis for the unlawfulness of certain recent appointments of Supreme Court judges.

21. First, pursuant to the Supreme Court Act, the process of SC judicial appointments is initiated by the publication of the President's notice of a vacancy on the SC bench. In May 2018 the President issued the notice but without counter-signature of the Prime Minister. According to many legal scholars, that was inconsistent with Article 144(2) of the Constitution that provides as follows: "Official Acts of the President shall require, for their validity, the signature of the Prime Minister who, by such signature, accepts responsibility therefor to the Sejm". Some scholars argued that this defect rendered the whole appointment process invalid.[15]

22. Second, in case of certain appointments, the President ignored the decisions of Supreme Administrative Court ("SAC") which suspended the enforceability of the NCJ's resolutions nominating candidates for judicial appointments. A failure to observe SAC decisions may be perceived as inconsistent with Article 179 of the Constitution which provides that the President may appoint only a candidate nominated by the NCJ as this constitutional provision should reasonably be interpreted as requiring the nomination to be expressed in a final and *enforceable* resolution of the NCJ. Nevertheless, in the *K 12/18* judgment (issued after the said appointments to the SC were made), the CT ruled that the SAC had no legal authority to review the legality of the NCJ resolutions concerning nominations for judicial appointments.

23. Third, some legal scholars pointed to the fact that the newly established Disciplinary Chamber of the SC enjoys extraordinary organizational autonomy and is governed by distinct rules of procedure. Based on these factors, it is argued that the Disciplinary Chamber constitutes a *de facto* "extraordinary court", which, according to Article 175(2) of the Constitution, may not be lawfully established in peacetime.[16]

III. RECEPTION OF THE CHAMBER'S RULING IN POLAND

24. Perhaps unsurprisingly, owing to the concerns and controversies described above, there has been great interest in the Chamber's judgment in *Ástráðsson* in Poland.

25. Professor Krystian Markiewicz, a judge and President of IUSTITIA, an association of judges, commented that the *Ástráðsson* judgment is crucial from the Polish perspective because of the relatively similar situation of the newly appointed judges of the Polish SC and that of judges of the Icelandic Court of Appeals. Accordingly, Markiewicz argues that from the moment the *Ástráðsson* case was decided "whenever a Polish citizen challenges a ruling issued by a judge nominated by the new NCJ before the Strasbourg Court, it is virtually certain that the ECtHR will find the ruling defective and in violation of the European Convention on Human Rights". He adds that such a situation may lead to chaos and complete lack of legal certainty, blaming the Government for the ongoing crisis.[17]

26. The Chamber's judgment was also discussed in two papers published in the peer-reviewed journal *Europejski Przegląd Sądowy*.

27. The first paper was written by two SC judges appointed on the nomination of the new NCJ, Professor Leszek Bosek and Professor Grzegorz Żmij. The authors criticized the *Ástráðsson* judgment, agreeing with the arguments presented in the dissenting opinions of judges Valeriu Grițco and Paul Lemmens. In their opinion, the Chamber's judgment was a disproportionate response to the problem at hand and could open a "Pandora's box". According to Bosek and Żmij, a judge should be presumed to be able to exercise their power to adjudicate unless they are

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[15] See, e.g., M. Florczak-Wątor, T. Zalasiński, *Opinia prawna w sprawie zgodności z Konstytucją obwieszczenia Prezydenta Rzeczypospolitej Polskiej z dnia 24 maja 2018 r. nr 127.1.2018 o wolnych stanowiskach sędziego w Sądzie Najwyższym, wydanego bez kontrasygnaty Prezesa Rady Ministrów*, https://www.iustitia.pl/images/2018_09_03_Opinia_prawna.pdf (accessed on: 18.12.2019).

[16] W. Wróbel, *Izba Dyscyplinarna jako sąd wyjątkowy w rozumieniu art. 175 ust. 2 Konstytucji RP*, Palestra (1-2)2019, pp. 17-35.

[17] M. Gałczyńska, *Przełomowy wyrok Trybunału Praw Człowieka w Strasburgu. "W Polsce nikt nie będzie mógł spać spokojnie"*, Onet.pl, 13.03.2019, https://wiadomosci.onet.pl/tylko-w-onecie/wyroki-polskich-sadow-do-uchylenia/3nm79et (accessed on: 18.12.2019).

impeached, removed from office on the basis of a disciplinary court's decision or have their appointment annulled. A different interpretation, argue the authors, may lead to a violation of a number of important legal principles, including the stability of judicial decisions, legal security and the authority of the judiciary, which, in turn, may undermine the principle of a democratic state ruled by law. Bosek and Żmij argue that there are no grounds to question the lawfulness of appointments of Polish judges, noting that any irregularities in the NCJ proceedings would be legally cured by the President's appointment of a given judge. As the authors pointed out, the act of appointment is a presidential prerogative and as such cannot be the subject of a judicial review.[18]

28. The second article was written by Dr Marcin Szwed, a lawyer of the Helsinki Foundation for Human Rights and Assistant Professor of the University of Warsaw. According to the author, the Chamber's ruling should not be perceived as revolutionary, although it constitutes an important development of the Court's case law. A key novelty in the ECtHR's approach, Szwed observes, is the conclusion that Article 6 § 1 ECHR may also be violated if irregularities in the judicial appointments process do not lead to invalidity of the act of appointment. This conclusion, in the author's view, is correct. According to Szwed, any opposite interpretation could weaken the guarantees provided in the Convention as it would enable domestic bodies to abuse the judicial appointments process in an attempt to pursue partisan political goals, putting at risk the independence of the judiciary. On the other hand, the author recognizes that the judgment may prove to be difficult to implement. Szwed then moves to analyse the likely impact of the *Ástráðsson* judgment on Polish cases, referring to the situation in the CT and the SC. He claims that a Polish applicant may successfully argue before the ECtHR that a ruling issued in their case by the CT panel comprising an unlawfully elected judge should be considered made in violation of Article 6 § 1 ECHR. However, as Szwed notes, it would be more difficult to successfully pursue a similar argument in the context of an SC judge appointed on the nomination of the new NCJ.[19]

29. Even more importantly, the significance of the Chamber's ruling was also noted in the jurisprudence of Polish courts, and in particular in a number of SC decisions.

30. First and foremost, references to the *Ástráðsson* case have been made in the SC's decisions and preliminary references to the CJEU concerning the legal status of the newly appointed SC judges. In that context, the relevant ECtHR and EU standards were jointly analysed.

31. Already in March 2019, a three-judges panel of the Criminal Chamber of the SC referred a legal question to a panel of seven judges, asking whether a judge appointed to the SC on the nomination of the new NCJ in a defective procedure is a "person unauthorized to adjudicate" and whether the panel on which this judge sits is an "improperly constituted court" within the meaning of the Polish Code of Criminal Procedure.[20] In the statement of reasons for the reference in question, the three-judge panel described in detail the standard set by the Chamber's judgment. It is also worth noting the SC's decision of 21 May 2019 concerning the submission of a preliminary reference to the CJEU[21]. In the question referred for a preliminary ruling, the SC asked the CJEU whether a one-judge panel, composed of a person appointed to the judicial office in a flagrant breach of domestic law, constitutes an "an independent and impartial tribunal previously established by law within the meaning of EU law". The SC underlined that a violation of the judicial appointments procedure may undermine the guarantees of judicial independence and impartiality. That is particularly true in the context of a flagrant breach of the law, a concept defined by the SC by reference to the *Ástráðsson* case. Moreover, according to the SC, strict adherence to the rules governing judicial appointments has an impact on the public

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[18] L. Bosek, G. Żmij, *Uwarunkowania prawne powoływania sędziów w Europie w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r., 26374/18, Guðmundur Andri Ástráðsson przeciwko Islandii*, Europejski Przegląd Sądowy (7)2019, pp. 30-41.

[19] M. Szwed, *Orzekanie przez wadliwie powołanych sędziów jako naruszenie prawa do sądu w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r., 26374/18, Guðmundur Andri Ástráðsson przeciwko Islandii*, Europejski Przegląd Sądowy (7)2019, pp. 42-51.

[20] Decision of the Supreme Court of 28.03.2019, case no. III KO 154/18.

[21] Decision of the Supreme Court of 21.05.2019, case no. III CZP 25/19.

confidence in the independence and impartiality of the courts. Different aspects of the legal status of newly appointed SC judges and the appointment procedure itself were also raised in a question submitted to the CJEU for a preliminary ruling on 12 June 2019.[22] Also in that submission, the SC referred to the *Ástráðsson* judgment.

32. Representatives of the judiciary have made similar references to the Chamber's judgment in the disputes over the status of judges appointed on the nomination of the new NCJ. For instance, many local representative bodies of the judicial profession (assemblies of representatives of judges) decided to suspend the evaluation of candidates for judges until the CJEU answers the preliminary questions about the status of the new NCJ and the reformed model of judicial appointments. Some assemblies relied in that context also on the *Ástráðsson* case.[23] Moreover, an important public statement was made by the Chief Justice of the SC, Professor Małgorzata Gersdorf, on 10 December 2019[24] following a ruling of a three-judge panel of the SC according to which in light of the CJEU judgment on the NCJ and the SC Disciplinary Chamber, the Disciplinary Chamber should not be considered a "court" within the meaning of the EU and national law.[25] The Chief Justice urged the judges of the Disciplinary Chamber to refrain from adjudicating, emphasizing that based on the reasoning given in *Ástráðsson,* any further performance of their judicial duties may lead to a violation of the Convention.

33. On the other hand, the *Ástráðsson* case was also cited by the "new" judges of the SC. For instance, the Disciplinary Chamber of the SC (sitting *en banc*) issued a resolution of 10 April 2019 (case no. II DSI 54/18) and ruled that adjudication by judges appointed on the nomination of the new NCJ and in the procedure described above, does not violate the right to have one's case heard by an independent and impartial tribunal established by law. The court concluded that the procedure of judicial appointments was fully consistent with Polish domestic law and so the requirement of it being "establishment by law" within the meaning affirmed in *Ástráðsson* was fulfilled. Similarly, in the decision of 9 May 2019, a three-judge panel of the Disciplinary Chamber rejected a party's motion to assign the case to the Criminal Chamber of the SC (case no. II DSI 37/18). According to the Disciplinary Chamber, there were no grounds for an assignment because judges of the Disciplinary Chamber had been lawfully appointed.

34. Furthermore, in 2019 Professor Kamil Zaradkiewicz, a judge of the Civil Chamber of the SC appointed on the nomination of the new NCJ, referred a legal question about the legal status of judges appointed by the President on the nomination of the NCJ before 2017 reform to the CT. The question was based on the judgment of the CT of 20 June 2017 (case no. K 5/17) in which the provisions regulating the procedure of electing the judge-members of the NCJ and their term of office were declared unconstitutional[26]. In the reasons for submitting the legal question, Zaradkiewicz made a reference to the *Ástráðsson* case.

35. However, one should keep in mind that the "new" judges of the SC, while resolving the validity of their appointments or disputing the validity of appointments of other judges, cannot be perceived as fully impartial[27]. Therefore, the references to ECtHR case-law that appear in their decisions may be considered as serving primarily the purpose of self-legitimization.

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[22] Decision of the Supreme Court of 12.06.2019, case no. II PO 3/19.

[23] See: Resolution 1 of the General Assembly of Judges of the Słupsk Judicial Circuit, 19.09.2019, http://slupsk.so.gov.pl/container/SSO_podz_czynnosci/uchwala-nr-1-z-dn.-19.09.2019.pdf (accessed on: 19.12.2018); Resolution 1 of the General Assembly of the Representatives of Judges of the Rzeszów Appeal Circuit, 15 April 2019, https://www.iustitia.pl/2994-uchwaly-zgromadzenia-ogolnego-przedstawicieli-sedziow-apelacji-rzeszowskiej-z-dnia-15-kwietnia-2019-r (accessed on: 18.12.2019).

[24] The statement is available at http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/2019.12.10%20-%20Oświadczenie%20PPSN.pdf (accessed on: 18.12.2019).

[25] Judgment of the Supreme Court of 5.12.2019, case no. III PO 7/18.

[26] Importantly, the CT ruling in the case *K 5/17* was issued with the participation of an unlawfully elected judge. Also, the CT did *not* hold that the NCJ, in its previous composition, was unable to carry out its duties independently, posed a threat to judicial independence or acted in a manner devoid of legal force.

[27] For example, in the abovementioned decision *III CZP 25/19,* the SC held that a resolution of the Disciplinary Chamber violated the principle of *nemo iudes in causa sua.*

IV. THE IMPACT OF LEGAL DEFECTS IN THE JUDICIAL APPOINTMENTS PROCESS ON THE RIGHT TO A COURT

36. The current state of Polish courts arguably shows a direct relationship between defects in the judicial appointments process and individuals' right to a court.

37. According to the standards developed in the case-law of the ECtHR and accepted in the jurisprudence of, among others, the CJEU, a manner in which judges are appointed is a factor guiding the assessment of judicial independence. Many national legal systems have created rules ensuring that the process of judicial appointments is objective and de-politicized. Any violations of such rules leading to the increased impact of political bodies on the appointments process may eliminate an important guarantee of the independence of the judiciary.

38. A link between the lawfulness of judicial appointments and the independence and impartiality of the judiciary was noted in the SC's preliminary reference to the CJEU of 21 May 2019. According to the SC, there are serious doubts as to whether judges appointed in "a flagrant breach of domestic law" are able to maintain their independence and impartiality. Independence of a defectively appointed judge may be questioned by members of the public, as proven by a substantial number of motions to recuse "post-reform" judges submitted by parties to pending proceedings. Moreover, defectively appointed judges may also be susceptible to the pressure exerted by the body that violated the law in the course of their appointment. All of such circumstances, according to the SC, may create a relation of dependence between the judge and the external body. Furthermore, judges appointed in "a flagrant breach of domestic law" may not be impartial, especially if the validity of their appointment is challenged by a party to the proceedings.

39. However, the negative effects associated with legal defects in the judicial appointments procedure may arguably have an impact also beyond the sphere of independence and impartiality of judges. Such defects may have an equally devastating (and dangerous) impact on the judiciary's legitimacy to perform its functions in a democratic state, given that in a democracy, the legitimacy of judges relies on the public confidence in their neutrality, objectivity and apoliticism. If it is proven that political bodies have interfered with the judicial appointments process to pursue their particularist goals, public confidence may be effectively destroyed. In such a situation, the courts and judges would no longer be considered impartial and professional bodies legitimately authorized to resolve legal disputes but rather parties to a political dispute. The negative consequences of such a perception may be shown on the example of Poland.

40. The legal violations in the process of election of CT judges led to an almost complete collapse of the Tribunal's authority. Its controversial judgments concerning, for example, the Assemblies Act[28], issued by panels comprising unlawfully elected judges, are widely perceived as politically biased and based on a doubtful interpretation of the Constitution.[29] In some cases, the Ombudsman had to withdraw his motions for a constitutional review in order to prevent the delivery of a judgment by without proper authority.[30] The overall effectiveness of the CT's work has since significantly decreased, as reflected by a decreasing number of judgments delivered after the "constitutional breakdown", as compared to the pre-reform period.[31] In such circumstances, the courts, quite understandably, no longer trust the CT and, given the context of organizational changes to the judicial system, prefer to use the preliminary reference procedure rather than to challenge the constitutionality of domestic legislation by submitting legal questions to the CT.

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[28] *Kp 1/17* (see above).

[29] Sadurski, *Poland's...*, pp. 152-153.

[30] See, e.g., the Ombudsman's submission to the CT of 14.03.2018 concerning the withdrawal of the motion for a constitutional review in case no. K 9/16; or the Ombudsman's submission to the CT of 30.04.2018 concerning the withdrawal of the motion for a constitutional review in the case no. K 35/16.

[31] See, e.g., T. Koncewicz, *From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court*, https://reconnect-europe.eu/blog/koncewicz-polish-constitutional-court/ (accessed on: 18.12.2019).

41. The irregularities in the appointments of the SC judges (and judges of other courts appointed on the nomination of the new NCJ) are even more alarming. They caused a serious, and still unresolved, crisis of the judiciary, which threatens the principle of legal security. The most problematic is the situation of the SC. A three-judge panel of the Labour Law and Social Security Chamber of the SC has recently ruled that the Disciplinary Chamber is not a court within the meaning of the EU and domestic law.[32] The judgment implemented a standard developed by the CJEU in its decision concerning the NCJ and the Disciplinary Chamber. It is probable that the same conclusion will soon be reached with regard to another newly created chamber, the Extraordinary Control and Public Affairs Chamber. At the same time, judges of the new Chambers do not consider themselves bound by such rulings and continue to perform their judicial functions, what may contribute to the further escalation of legal chaos.

42. But the crisis of the judiciary has also a wider dimension as concerns appear over the legal status of several hundred[33] persons appointed as judges of various courts on the nomination of the new NCJ. Throughout the country, attorneys submit motions to recuse such judges and challenge the validity of judgments issued by them via ordinary or extraordinary remedies, invoking the abovementioned judgments of the SC and CJEU. Some lawyers even point to the existence of legal grounds for the re-opening of final proceedings based on the lack of proper authority of the issuing judges.[34] What is more, judges themselves publicly raise doubts regarding the lawfulness of appointments made on the nomination of the new NCJ. A judge refused to sit on a panel with a judge considered to be unlawfully appointed.[35] The ensuing legal chaos manifests in a high (and still growing) number of preliminary references to the CJEU[36] and legal questions to the SC, in which different courts inquire about the legal status of the "new" judges and legal consequences of finding that they have been appointed unlawfully or are not sufficiently independent[37]. At the same time, judges who submit preliminary references or refuse to sit on the same panel with nominees of the new NCJ face disciplinary charges.[38]

43. Even more worryingly, the Government not only fails to resolve the crisis but also is likely to escalate it by introducing severe restrictions of judicial independence. In particular, in December 2019, a group of the ruling party's parliamentarians presented a bill amending the various laws on the organization of the judiciary.[39] The bill is reportedly a response to the actions of judges challenging the legal authority of the new NCJ's nominees. Among other things, the bill explicitly

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[32] III PO 7/18 (see above).

[33] *Ujawniamy listę 543 sędziów nominowanych przez neo-KRS. Ich wyroki mogą być podważane w przyszłości*, "OKO.press", 4.07.2019, https://oko.press/ujawniamy-liste-543-sedziow-nominowanych-przez-neo-krs-ich-wyroki-moga-byc-podwazane-w-przyszlosci/ (accessed on: 19.12.2019).

[34] See, e.g., the statement of the Polish Judges Association IUSTITIA of 19.11.2019, https://www.iustitia.pl/3413-oswiadczenie-zarzadu-stowarzyszenia-sedziow-polskich-iustitia-w-sprawie-wyroku-tsue (accessed on: 19.12.2019); the common position of civil society organisations on the CJEU judgment of 19.11.2019, http://www.hfhr.pl/wp-content/uploads/2019/11/Wsp%C3%B3lne-stanowisko_final.pdf (accessed on: 19.12.2019), para. 34. However, the Supreme Administrative Court has recently refused to re-open proceedings on such grounds (see the decision of the Supreme Administrative Court of 26.11.2019, case no. I OZ 550/19).

[35] M. Gałczyńska, *Sędzia odmawia orzekania z rzecznikiem dyscyplinarnym Przemysławem Radzikiem. Rozprawa odwołana, możliwe pytanie do TSUE*, Onet.pl, 30.08.2019, https://wiadomosci.onet.pl/kraj/sedzia-odmawia-orzekania-z-rzecznikiem-dyscyplinarnym-przemyslawem-radzikiem-rozprawa/0p3lsj7 (accessed on: 19.12.2019).

[36] See, e.g., the preliminary references registered by the CJEU as C-487/19, C-508/19, C-824/18; decision of the Court of Appeals in Kraków of 7.10.2019, case no. I ACa 649/19.

[37] See, e.g., K. Sobczak, *Katowicki SA pyta Sąd Najwyższy o status sędziego wskazanego przez nową KRS*, Prawo.pl, 11.12.2019, https://www.prawo.pl/prawnicy-sady/status-sedziego-powolanego-z-udzialem-nowej-krs-pytanie-do-sn,496526.html (accessed on: 19.12.2019).

[38] See, e.g., the official statements of the Disciplinary Counsel of Judges of Common Courts: of 15.12.2019, http://rzecznik.gov.pl/wp-content/uploads/2019/12/Komunikat-Katowice-2.pdf, (accessed on: 19.12.2019) and of 6.12.2019, http://rzecznik.gov.pl/wp-content/uploads/2019/12/Komunikat-Anna-BC.pdf, accessed on: 19.12.2019).

[39] Projekt ustawy o zmianie ustawy - Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw, Parliamentary Paper no. 69 of the 9th Sejm).

prohibits the courts from reviewing the validity of judicial appointments and provides that a failure to comply with this rule would be considered professional misconduct giving rise to the disciplinary liability of a judge. The bill was adopted by the Sejm on 20 December 2019 and at the time of submitting of these written comments was the subject of legislative works in the Senate.

44. All the above circumstances clearly show that violations of rules of the judicial appointments process by the legislature and the executive seeking to achieve their partisan political objectives can cause serious disruption to a national justice system. Such a disruption may (and will) lead to violations of individual rights. Only a strict adherence to the rules governing the judicial appointments process, and in particular the safeguards against the improper political interferences of other branches of state power, may ensure that that the right to have one's case heard by an independent and impartial tribunal is respected. An individual cannot be certain that their case is lawfully resolved if they have no confidence that a judge who decides their case has been lawfully appointed instead of being a subject of unlawful political manoeuvrings. What is more, parties to the proceedings concluded with a final judgment issued by an unlawfully appointed judge may experience legal insecurity as the binding force of this judgment may be questioned or the proceedings can be re-opened. Such insecurity is inconsistent with the principle of legal certainty, which must be taken into account also in the context of interpretation of Article 6 § 1 ECHR[40].

45. It would be incorrect to assume that the negative consequences of judicial appointments made in violation of law can be prevented if such consequences are considered irrelevant as long as they do not result in the total invalidity of the act of appointment. Such an interpretation would give an unreasonably broad discretion to political bodies who could abuse the appointments process in order to subordinate the judiciary, especially where the domestic law precludes any review of the lawfulness of appointments and is based on the assumption that the official act of appointment is capable of curing any violations appearing in earlier stages of the appointments process. Moreover, any tolerance for violations in such an important area of the legal system seems to be incompatible with the principle of the rule of law, which is a part of the common European heritage and a cornerstone of the European Convention human rights system. Last but least, such an interpretation would not contribute to the advancement of public confidence in the judiciary, which, according to the Court, "guarantees the very existence of the rule of law"[41]. On the contrary, such a "tolerant interpretation" approach leading to unlawful acts being considered effective and legally binding would most likely encourage political authorities to engage in further procedural violations.

V. CONCLUSIONS

46. In the opinion of the HFHR, any flagrant violations of domestic law appearing in the process of judicial appointments, and especially those objectively perceivable as politically motivated, pose a serious threat to the right to a court. The above holds true also in the situation where the domestic law provides that such violations do not lead to the invalidation of the act of appointment. In a democratic state based on the principle of the rule of law, citizens must have a confidence that their cases are resolved by independent and impartial judges appointed in a lawful procedure free from any undue interference of the executive and the legislature. Serious violations of domestic law undermine this confidence and damage the legitimacy of the judiciary. The recent crisis of the judiciary in Poland shows that such a situation may ultimately lead to legal chaos, dangerous for both parties to given proceedings and the legal system as a whole.

This amicus curiae brief was drafted by Dr Marcin Szwed, a lawyer of the Strategic Litigation Programme of the Helsinki Foundation for Human Rights.

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[40] See, e.g., *Brumarescu v. Romania* [GC], 28 October 1999, no. 28342/95, § 61.

[41] *Ramos Nunes de Carvalho e Sá v. Portugal*, 6 November 2018, nos. 55391/13 57728/13 and 74041/13, § 196.