

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application no. 39650/18**

**BETWEEN:**

**Waldemar ŻUREK**

**Applicant**

**and**

**Poland**

**Respondent**

**and**

**Amnesty International  
International Commission of Jurists**

**Interveners**

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**WRITTEN SUBMISSIONS ON BEHALF OF THE  
INTERVENERS**

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## Introduction

1. These submissions are made by Amnesty International and the International Commission of Jurists (the 'Interveners') pursuant to the leave to intervene granted by the President of the Section in response to an application dated 2 July 2020 under Rule 44 § 3 of the Rules of Court.
2. The present case is situated within the context of the "reform" of the judiciary in Poland, which involves a set of policy measures and legislative changes adopted by the parliament and implemented by the authorities between 2016 and 2020. Drawing on the Court's own jurisprudence, EU law, the work of UN Special Procedures of the Human Rights Council and their own research into the situation within the judiciary in Poland, the Interveners focus on three main issues:
  - The scope of application of Article 6.1 in cases relating to the role of an independent judiciary and its members through self-governance mechanisms (such as the National Council of the Judiciary) in light of international standards on judicial councils, judicial appointments, and the judicial career and security of tenure; of the Court's Convention jurisprudence; and of general principles on the rule of law and the role and independence of the judiciary.
  - The role of the NCJ in safeguarding the independence of the judiciary in Poland; and the situation of the independence of the judiciary in Poland as the context in which to assess the application of Article 6.1.
  - The scope of Article 10 as applied to judges, including those engaged in the administration of the judiciary.
3. It will be argued that in many European jurisdictions (and elsewhere), judicial councils play an important role in the self-governance, independence and impartiality of the judiciary. Respecting and upholding the independence of the judiciary requires, *inter alia*, that in the discharge of these functions and during their term, members of judicial councils enjoy independence from the executive and the legislative powers, as well as from pressures and interferences from other powerful interests.

### **I. The scope of application of Article 6.1 in cases relating to the role of self-governance mechanisms**

#### ***Judicial independence and self-governance***

4. An independent judiciary, operating within a system that respects the separation of powers, is an essential element of the rule of law, which is a necessary condition for the effective protection of human rights and the establishment and operation of which is an inherent in Convention obligations.<sup>1</sup> Judicial independence, as affirmed by the jurisprudence of the Court, encompasses both an institutional and systemic dimension;

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<sup>1</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the 7<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 1985, and endorsed by General Assembly Res 40/32 of 29 November 1985 and 40/146 of 13 December 1985; UN Human Rights Council, *Resolution 35/12 on independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers*, UN Doc. A/HRC/35/12, 10 July 2017; UN General Assembly, *Resolution 67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, UN Doc. A/RES/67/1, 30 November 2012, para. 13; ICJ, *Declaration of Delhi*, 10 January 1959; *Stafford v. UK*, ECtHR, Application no. 46295/99, Judgment of 28 May 2002, para. 78, which states that: "the notion of separation of powers between the executive and the judiciary has assumed growing importance in the caselaw of the Court"; Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), UN Docs. E/CNA/Sub2/1988/20/AddI and AddIICorr1, Articles 4 and 74; Bangalore Principles, Value 1.

and a personal dimension relating to the situation and conduct of an individual judge.<sup>2</sup> The former may be characterised as the independence of the judicial branch as a whole from interference by the other branches of government and the public. The latter aspect, of equal importance, refers to the independence of individual judges, including their independence within the judicial system.<sup>3</sup>

5. Those responsible for judicial self-governance play an important role in upholding both aspects of judicial independence. To maintain the institutional independence of the judiciary, they must perform their role independently from the executive, the legislature and other powerful external entities.
6. In many European jurisdictions, members of judicial councils play a significant role in the self-governance of the judiciary. They typically, *inter alia*, hold powers relating to judicial appointments, evaluations, promotions and disciplinary proceedings.<sup>4</sup> International standards explicitly recognise all of these functions as potentially having an impact on the independence and impartiality of individual judges and the independence and impartiality of the judiciary as a whole.<sup>5</sup>
7. The Committee of Ministers Recommendation 2010/12 defines "Councils for the judiciary [as] 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."<sup>6</sup> The Universal Charter of the Judge promulgated by the International Association of Judges provides that "[i]n order to safeguard judicial independence a Council for the Judiciary, or another equivalent body, must be set up, save in countries where this independence is traditionally ensured by other means. The Council for the Judiciary must be completely independent of other State powers. It must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation."<sup>7</sup>
8. International standards on the independence of the judiciary enshrine the principle that the political powers – legislative and executive – should not be responsible for or otherwise interfere with the appointment, functioning, or removal of members of judicial councils.<sup>8</sup> Because of their central function in ensuring the independence of the judiciary, the Consultative Council of European Judges ('CCJE') has asserted that "[m]embers of the Council for the Judiciary (both judges and non-judges) should be granted guarantees for their independence and impartiality."<sup>9</sup> The CCJE has affirmed that "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"<sup>10</sup> It has clearly stressed that "the Council for the

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<sup>2</sup> *Parlov-Tkalcic v. Croatia*, ECtHR, Application no. 24810/06, Judgment of 22 December 2009, para. 86; *Agrokompleks v. Ukraine*, ECtHR, Application no. 23465/03, Judgment of 6 October 2011, para. 137.

<sup>3</sup> UNODC, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007, paras. 23 and 39, that states that: "judicial independence requires not only the independence of the judiciary as an institution from the other branches of government; it also requires judges being independent from each other. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence that might come from the actions or attitudes of other judges".

<sup>4</sup> ICJ, *Serbia's Judges and Prosecutors: The Long Road to Independent Self-Governance, A Mission Report*, 2016.

<sup>5</sup> See for instance, UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principles 11, 13, 14, 17-20; Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles*, 21-22 January 2010, paragraphs 3.1-3.3, 4.1, 10.1(h), 12.1-12.7, 13.5, 14.1-14.2, 15.1-15.8, 17.1-17.4; UN Human Rights Council, *Resolution 35/12*, *op. cit.*, para. 3.

<sup>6</sup> CMCE, *Judges: independence, efficiency and responsibilities*, Recommendation CM/REC(2010)12, 17 November 2010, para. 26.

<sup>7</sup> International Association of Judges, *Universal Charter of the Judge, Adopted by the IAJ Central Council in Taiwan on November 17<sup>th</sup> 1999, Updated in Santiago de Chile on November 14<sup>th</sup> 2017*, Articles 2 and 3.

<sup>8</sup> CCJE, *Opinion no.10(2007) of the Consultative Council of European Judges (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*, 23 November 2007, para. 44.

<sup>9</sup> *Ibid.*, para. 36.

<sup>10</sup> *Ibid.*, para. 19.

Judiciary should be “depoliticised”.<sup>11</sup>

9. In his 2018 report outlining the role of judicial councils, the UN Special Rapporteur on the independence of judges and lawyers advised that “[i]n order to insulate judicial councils from external interference, politicization and undue pressure, international standards discourage the involvement of political authorities, such as parliament, or the executive at any stage of the selection process. The interference of the judicial hierarchies in the process should also be avoided.”<sup>12</sup> Echoing the views of the CCJE, the Special Rapporteur found that “[o]ne of the responsibilities of judicial councils is to protect judges from external political influence. In order to guarantee the continuity of a council’s functions, its members should not be replaced at the same time or renewed following parliamentary elections. In particular, it would be inconsistent with the principle of the independence of the judiciary to allow for a complete renewal of the composition of a judicial council following parliamentary elections.”<sup>13</sup>

### **International standards on security of tenure of judges – members of judicial self-governance bodies**

10. The Interveners consider that the independence of judicial councils, as the competent authority tasked with making recommendations on judicial appointments and playing a significant role in the disciplinary proceedings of judges, is directly linked to the security of tenure of judges. The UN Basic Principles on the Independence of the Judiciary state, in principle 12, that “judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. At the Council of Europe level, the Committee of Ministers Recommendation 2010/12 states that “security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.”<sup>14</sup>
11. Appointment as a member of a judicial council differs from appointment as a judge in the role of independence of the judiciary in that it is for a short, fixed term of office to carry out a range of functions, many or all of which may be of quasi-judicial, rather than judicial, character. However, the necessity of independence is similarly applicable because the “underlying rationale for [the] creation [of a judicial council] was the need to insulate the judiciary and judicial career processes from external political pressure, mainly from the executive branch of power.”<sup>15</sup> The interveners submit that a substantial

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<sup>11</sup> *Ibid.*, para. 21.

<sup>12</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, 2 May 2018, A/HRC/38/38, para. 76.; <https://undocs.org/en/A/HRC/38/38>

<sup>13</sup> *Ibid.*, para. 83. He actually referred in that paragraph to “Poland, the Special Rapporteur expressed the view that the early termination of all the judicial members of the Council would lead to the creation of a new National Council of the Judiciary dominated by political appointees, in breach of existing standards on the independence of the judiciary and the separation of powers (see A/HRC/38/38/Add.1, para. 70)”.

<sup>14</sup> CMCE, *Judges: independence, efficiency and responsibilities*, *op. cit.*, Chapter VI, para. 49. See further international and regional standards: Universal Charter of the Judge, Article 8: “A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered”; International Bar Association’s Minimum Standards of Judicial Independence, Article 1(b): “Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control” and Article 22; Paris Minimum Standards of Human Rights Norms in a State of Emergency, principle B.3(c); Burgh House Principles on the Independence of the International Judiciary, principle 3.1; Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, Principles A(4)(n)(2) and A(4)(p); Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, Principle IV; Latimer House Guidelines for the Commonwealth, *Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles*, 19 June 1998, Section II, para. 1; Magna Carta of Judges, Principles 4 and 19; European Charter on the Statute for Judges, Principle 3.4. Within the jurisprudence of the ECtHR, see, among others, *Campbell and Fell v. UK*, Application nos. 7819/77 and 7878/77, Judgment of 28 June 1984, para. 80; *Incal v. Turkey*, Application no. 22678/93, Judgment of 9 June 1998, para. 65. See also, Leandro Despouy, Special Rapporteur on the Independence of Judges and Lawyers, *Annual Report to the Human Rights Council*, UN Doc. A/HRC/11/41, 24 March 2009, para. 57; Venice Commission, *Report on the Independence of the Judicial System, Part I: the Independence of Judges*, CDL-AD(2010)004, para. 38.

<sup>15</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, *op. cit.*, para. 10

degree of security of tenure for the designated term of office in a judicial council is as necessary to guarantee the independence of the Council and, thereby, the independence of the judiciary.

**12. The Interveners submit that the principle of independence of the judiciary requires a substantial degree of security of tenure in the members of a judicial council, for the duration of his or her term of office. In order to ensure such security of tenure and to maintain the independence both of individual members of judicial councils, and the overall capacity of the Council to uphold the independence of individual judges and the independence of the judiciary, proceedings for the removal from the position of member of a judicial council during their term of membership should provide guarantees of independence and fairness of the proceedings.**

### ***Special considerations in the application of Article 6.1 to dismissal of members of judicial councils***

13. The Interveners submit that 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 it affords. As has been reiterated by the Court's Grand Chamber in *Baka v. Hungary*, the existing "presumption of applicability of Article 6" encompasses cases of employment disputes concerning employees of the State, including judges.<sup>16</sup> Following *Eskelinen and Others v. Finland*, in order for protection under Article 6.1 to be excluded in such cases, two conditions must be met: the national law must expressly exclude access to a court for the post or category of staff; and the exclusion must be justified on objective grounds in the State's interest.<sup>17</sup> Under this doctrine, it is presumed that Article 6.1 applies to employment disputes involving public sector workers, in the absence of convincing reasons put forward by the State.<sup>18</sup> Applying the *Eskelinen* test, this Court has, in a number of cases, found Article 6.1 to be applicable to questions regarding the judicial career and removal of judges from office,<sup>19</sup> disputes on suspension<sup>20</sup> or dismissal<sup>21</sup> from judicial office, and removals from a senior administration position within the court<sup>22</sup> or as Court President,<sup>23</sup> even when the person retained their underlying judicial position.

14. The Court held in *Baka* that the need to respect the full term of a judge in charge of court administration functions is "supported by constitutional principles regarding the independence of the judiciary and the irremovability of judges."<sup>24</sup> The termination *ex lege* of this term could not disengage the judge's right under Article 6.1 and was found to have "impaired the very essence of the applicant's right of access to a court."<sup>25</sup> Any law excluding access to a court "should be compatible with the rule of law."<sup>26</sup> Regard is to be given to "the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies

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<sup>16</sup> *Baka v. Hungary*, ECtHR, Application no. 20261/12, Judgment of 23 June 2016, paras. 103-105.

<sup>17</sup> *Vilho Eskelinen and Others v. Finland*, ECtHR, Application no. 63235/00, Judgment of 19 April 2007, para. 62.

<sup>18</sup> *Ibid.*, para. 62.

<sup>19</sup> *Olujic v. Croatia*, ECtHR, Application no. 22330/05, Judgment of 5 February 2009; *G v. Finland*, ECtHR, Application no. 33173/05, Judgment of 27 January 2009; *Juricic v. Croatia*, ECtHR, Application no. 58222/09, Judgment of 26 July 2011; *Dzhidzheva-Trendafilova v. Bulgaria*, ECtHR, Application no. 12628/09, Decision of 9 October 2012; *Volkov v. Ukraine*, ECtHR, Application no. 21722/11, Judgment of 9 January 2013.

<sup>20</sup> *Paluda v. Slovakia*, ECtHR, Application no. 33392/12, Judgment of 23 May 2017, para. 34.

<sup>21</sup> See for example, *Volkov v. Ukraine*, *op. cit.*, paras. 91 and 96; *Kulikov and Others v. Ukraine*, ECtHR, Applications nos. 5114/09 and 17 others, Judgment of 19 January 2017, paras. 118 and 132; *Sturua v. Georgia*, ECtHR, Application no. 45729/05, Judgment of 28 March 2017, para. 27; and *Kamenos v. Cyprus*, ECtHR, Application no. 147/07, Judgment of 31 October 2017, para. 88.

<sup>22</sup> *Denisov v. Ukraine*, ECtHR, Application no. 76639/11, Judgment of 25 September 2018.

<sup>23</sup> *Baka*, *op. cit.*, paras. 34 and 107-11.

<sup>24</sup> *Ibid.*, para 108.

<sup>25</sup> *Ibid.*, para 121

<sup>26</sup> *Ibid.*, para. 117

attach to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge".<sup>27</sup>

15. In the context of *ex lege* termination of a term of judge (from a judicial or non-judicial function), the interveners also wish to highlight the historical experience of Latin American countries and the observation of the Inter-American Commission on Human Rights that "formally valid" decisions are sometimes used to accomplish "unstated ends" and amount in fact to a sanction imposed for purposes other than those prescribed by law.<sup>28</sup> The Commission concluded that in cases where "separation from service" may in fact be a disguised attempt to impose a sanction, the true reason for the removal from office "must be examined to determine whether it constituted a misuse of power calculated to punish".
- 16. 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 of upholding the role, independence and integrity of the judiciary in a democratic society under the rule of law. The Interveners submit that it can never be in the legitimate interests of the State to deprive judges who are members of judicial councils, of access to court or of due process protection in disputes capable of affecting their institutional or individual independence, including in cases that concern their security of tenure or conditions of service relative to their discharge of judicial governance functions.**
- 17. The Interveners further submit that 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. Although the individual judge may be an immediate beneficiary of the full protection of their Article 6.1 rights, the protection ultimately benefits all persons entitled under Article 6.1 to the "independent and impartial tribunal" of which the individual judge is part.**

## **II. The role of the NCJ in safeguarding the independence of the judiciary in Poland; and the situation of the independence of the judiciary in Poland**

18. The NCJ of Poland is a professional governance body, expressly provided for in the Polish Constitution, and responsible for safeguarding the independence of the judiciary.<sup>29</sup> The NCJ assesses candidates for judicial offices; drafts the rules of judicial ethics; and has competency, but not exclusive competency, to initiate disciplinary proceedings against judges.<sup>30</sup> Crucially, the NCJ elects the judicial members of two new Supreme Court chambers: Extraordinary and Disciplinary. The independence of the Disciplinary Chamber is already compromised by virtue of also having non-judicial lay members appointed by the Senate, and its President being appointed by the President of Poland. The Disciplinary Chamber is a court of second instance in disciplinary proceedings against judges. The disciplinary proceedings initiated by the disciplinary prosecutor upon a motion of the NCJ

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<sup>27</sup> *Ibid.*, para. 121.

<sup>28</sup> IACHR, Guarantees for the independence of justice operators, op cit, para. 230.

<sup>29</sup> Polish Constitution, Article 186(1).

<sup>30</sup> European Commission, *Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland, 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) 835, 20 December 2017, para. 137; Dariusz Mazur, Themis, Association of Judges, *Judges under special supervision, namely 'The Great Reform' of the Polish justice system*, 5 April 2019, p. 9.

(among other authorised bodies),<sup>31</sup> heard by the first instance disciplinary courts and reviewed by the Disciplinary Chamber of the Supreme Court, can result, among other sanctions, in the removal of a judge from office. The NCJ plays a substantial role in relation to the process for removing judges from office or their transfers between the respective divisions within a court.<sup>32</sup> Amnesty International interviewed judges in 2018 who feared that once the new Disciplinary Chamber was established, a series of disciplinary proceedings would commence against judges who have ruled or would rule against the government in politically sensitive cases.<sup>33</sup>

19. The UN Special Rapporteur on the independence of judges and lawyers has affirmed 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.”<sup>34</sup>

20. Since late 2015, the government of Poland has adopted and implemented a set of legislative and policy measures that have undermined the independence of the judiciary.

21. In July 2017, the President of Poland signed an amendment to the Law on the System of Common Courts. The amendment entered into force in August 2017 and empowered the Minister of Justice to dismiss and appoint presidents and vice-presidents of courts. There are 377 courts in Poland<sup>35</sup> and the government has acknowledged that the Minister has replaced some 18% of presidents and vice-presidents of these courts.<sup>36</sup> The powers of the presidents of courts include transferring judges between divisions within a court, which, pursuant to the amendment of the Law on Common Courts of 2017, can be challenged only before the NCJ.<sup>37</sup> Amnesty International has documented cases in which the NCJ (appointed pursuant to the reform described below) has dismissed judges’ complaints alleging that their transfers had been punitive and/or effectively amounted to demotions, without any or adequate justification.<sup>38</sup>

22. The authorities politicised the process of appointments to the NCJ with the amendment of the Law on the NCJ, which came into force in January 2018. The NCJ comprises 25 members: 15 judges and 10 non-judge members. The law gave the Parliament the power to appoint the 15 judge-members who serve as members of the NCJ,<sup>39</sup> despite the fact that the Polish Constitution expressly limits to six the number of members of the NCJ which are appointed by Parliament. On 5 March 2018, the Parliament appointed the new NCJ judge members, eight of whom were the new presidents or vice-presidents of courts

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<sup>31</sup> The other bodies that can request the disciplinary prosecutor to start an investigation of a judge are the Minister of Justice, president of a regional or appeal court, the board of a regional or an appeal court and the Disciplinary Prosecutor for Common Courts.

<sup>32</sup> The power to review a complaint of a judge concerned about a substantive change of their post – including a transfer to a different division – sits with the National Council of the Judiciary. See Amnesty International, *Poland 2019: The State of the Judiciary*, November 2019, p. 11.

<sup>33</sup> Amnesty International, “Reform” of the judiciary in Poland poses risk to the right to fair trial, Briefing by Amnesty International ahead of the General Affairs Council Meeting, March 2018, p. 7.

<sup>34</sup> Special Rapporteur on the independence of judges and lawyers, *Report on his mission to Poland*, UN Doc. A/HRC/38/38/Add.1, 5 April 2018, para. 68.

<sup>35</sup> Sonar, Wyborcza, *PiS zapowiada “reformę reformy” sądownictwa. Władza idzie na ustępstwa wobec Komisji Europejskiej?*, <http://sonar.wyborcza.pl/sonar/7,156422,22492032,sonarwsadach-pis-poprawia-ustawy-ziobro-powoluje-prezesow.html> (accessed on 25 November 2019).

<sup>36</sup> Polish Government, *White Paper on the Reform of the Polish Judiciary, Executive summary*, March 2018, p. 5, available at [https://www.premier.gov.pl/files/files/white\\_paper\\_en\\_-\\_executive\\_summary.pdf](https://www.premier.gov.pl/files/files/white_paper_en_-_executive_summary.pdf).

<sup>37</sup> USTAWA z dnia 27 lipca 2001 r., available at <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>.

<sup>38</sup> Article 22a.5 and 6; Amnesty International, *Poland 2019: The State of the Judiciary*, November 2019. See also, Wyborcza, *Decyzja KRS o umorzeniu sprawy odwołania złożonego przez sędziego Żurka bez uzasadnienia*, 18 October 2018, available at <https://krakow.wyborcza.pl/krakow/7,44425,24061190,decyzja-krs-o-umorzeniu-sprawy-odwolania-zlozonego-przez-sedziego.html> (accessed on 25 November 2019).

<sup>39</sup> Law on the National Council of Judiciary adopted on 8 December 2017, Article 9a.

appointed since August 2017 by the Minister of Justice.<sup>40</sup> In December 2017, the European Commission of the EU concluded that “[t]he new rules on appointment of judges-members of the National Council of the Judiciary significantly increase the influence of the Parliament over the Council and adversely affect its independence in contradiction with the European standards.”<sup>41</sup>

23. The amendment of the Law on the NCJ prematurely terminated the tenure of sitting NCJ members in March 2018. According to the new procedure provided for in the amendment, the mandate of the “old” members expired when the new members were appointed.<sup>42</sup> Such termination raised concerns over the breach of Article 187(3) of the Polish Constitution which affords a full four-year term of office to NCJ members,<sup>43</sup> as underlined in the opinions of the NCJ, of the Supreme Court and of the Ombudsman.<sup>44</sup>

24. On 17 September 2018, the General Assembly of the European Network of Councils for the Judiciary (ENCJ) suspended the membership of Poland’s NCJ. It concluded that, due to the 2017 “reforms”, the NCJ could no longer be considered independent of the executive and legislature because of the Parliament’s role in the process for the election of NCJ members.<sup>45</sup> On 27 May 2020, the Board of ENCJ adopted a proposal to expel the NCJ.<sup>46</sup>

25. In June 2019, the Advocate General of the CJEU concluded that “the manner of appointment of the members of the NCJ itself discloses deficiencies which appear likely to compromise its independence from the legislative and executive authorities,” because a majority of 21 of 25 members had been selected by the legislative authorities.<sup>47</sup>

26. On 19 November 2019, the Court of Justice of the European Union (CJEU) ruled that the new Disciplinary Chamber of the Polish Supreme Court, whose members were selected by the *new* NCJ, can only be competent to rule on cases relating to the retirement of Supreme Court judges if its independence and impartiality are guaranteed. As the decision was issued in response to preliminary questions submitted to the CJEU by Poland’s Supreme Court,<sup>48</sup> the assessment of whether the Disciplinary Chamber of the Polish Supreme Court meets the requirements of judicial independence currently rests with the Supreme Court.<sup>49</sup>

27. The CJEU’s ruling draws on the earlier advisory opinion of the same court’s Advocate General, who stated that:

- the mission of judicial councils is to safeguard the independence of courts and judges, which means that they must be free from any influence from the legislative and executive authorities;
- in order to guarantee the continuity of functions, the mandates of the members of judicial councils should not be replaced at the same time or renewed following parliamentary elections;

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<sup>40</sup> Wyborcza, “Krajowa Rada Ziobrownictwa”. *Zobacz, kim są nowi sędziowie KRS*, 6 March 2018, available at <http://wyborcza.pl/7,75398,23108831,krakowa-rada-ziobrownictwa-zobacz-kim-sa-nowi-sedziowie.html?disableRedirects=true> (accessed 25 November 2019).

<sup>41</sup> European Commission, *Reasoned Proposal*, *op. cit.*, para. 142.

<sup>42</sup> Law on the National Council of Judiciary, Article 6.

<sup>43</sup> Opinion of Advocate General Tanchev, *op. cit.*, para. 61.

<sup>44</sup> European Commission, *Reasoned Proposal*, *op. cit.*, para. 140.

<sup>45</sup> European Network of Councils for the Judiciary (ENCJ), *ENCJ Suspends Polish National Judicial Council – KRS*, available at <https://www.encj.eu/node/495> (accessed on 25 November 2019).

<sup>46</sup> ENCJ “ENCJ Executive Board Proposes to Expel KRS” <https://www.encj.eu/node/556>

<sup>47</sup> The other ten are lay members: six are elected by parliament, one is appointed by the President and three are sitting in the NCJ *ex officio*. See, Venice Commission, *Opinion on the Draft Law on the National Council of the Judiciary*, 11 December 2017, para 15; Opinion of Advocate General Tanchev, *op. cit.*, para. 132.

<sup>48</sup> *A.K. v. Krajowa Rada Sądownictwa and CP and DO v. Sąd Najwyższy*, CJEU, Judgment in Joined Cases C-585/18, C-624/18 and C-625/18, 27 June 2019, paras. 154 and 166.

<sup>49</sup> *Ibid.*, para. 172.2

- selection, appointment and/or promotion of judges are among the most widely recognised functions of judicial councils, and the procedures must be carried out by judicial councils which are independent of the legislative and executive authorities.<sup>50</sup>
28. In January 2020, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) concluded that: "The reform of the National Council of the Judiciary had brought this institution under the control of the executive, which is incompatible with the principle of independence. This, in turn, creates the risk that this institution and a number of others whose composition depends on it, will be in violation of EU law and other European Rule of Law and Human Rights mechanisms, including the European Convention on Human Rights."<sup>51</sup>
29. Under the amendment of the Law on the Supreme Court, the judges – members of the new Disciplinary Chamber -<sup>52</sup> were to be elected by the "new" NCJ and "lay judges" were to be elected by members of the Senate.<sup>53</sup> In February 2019, the President of Poland appointed the heads of the two new chambers of the Supreme Court: Disciplinary and Extraordinary.<sup>54</sup> On 8 April 2020, the CJEU granted the request of the European Commission (EC) for interim measures to suspend the application of the national law on the powers of the Disciplinary Chamber of the Supreme Court of Poland holding, *inter alia*, that the arguments of the EC concerning the lack of a guarantee as to the independence and impartiality of the Disciplinary Chamber are *prima facie* not unfounded.<sup>55</sup>
30. In its 2020 Rule of Law Report, Country Chapter on Poland, the EC concluded that the National Council for the Judiciary is composed mainly of politically appointed members.<sup>56</sup>
31. Various laws adopted and implemented in Poland between 2015 and 2020 have severely undermined the independence of the judiciary. Amendments to the laws governing all arms of the judiciary – the Constitutional Tribunal, NCJ, common courts and the Supreme Court – have rendered courts, judges and judicial institutions vulnerable to political influence.<sup>57</sup>
32. **The Interveners submit that the functioning of the NCJ – without pressure or improper influence from the executive and legislative branches or other outside forces – is essential to the overall independence of the judiciary in Poland. The NCJ plays an essential role in defending and promoting judicial independence, which is the cornerstone of the rule of law and the protection of human rights in Poland. One of the safeguards protecting the independence of the NCJ is the constitutionally protected tenure of their members. If judges who are members of the NCJ are at risk of arbitrary removal from the NCJ, its overall functioning as a defender of judicial independence will be impaired to the detriment of**

<sup>50</sup> A.K. v. Krajowa Rada Sądownictwa and CP and DO v. Sąd Najwyższy, Opinion of Advocate General Tanchev, 27 June 2019, paras. 125, 127, 128.

<sup>51</sup> PACE, *The functioning of democratic institutions in Poland*, 133, page 30

<sup>52</sup> The Chamber has two divisions: one serves as the first and the other as the second instance for disciplinary proceedings against judges, prosecutors, attorneys and notaries (see Article 3 (Article 27) of the Law on the Supreme Court, available at <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/T/D201800005L.pdf>).

<sup>53</sup> Under Article 61 para. 2 of the Law on the Supreme Court, the Senators will elect the lay members of the Supreme Court.

<sup>54</sup> Rzeczpospolita, *Andrzej Duda powołał prezesów nowych izb Sądu Najwyższego*, 27 February 2019, available at [https://www.rp.pl/Sedziowie-i-sady/302269952-Andrzej-Duda-powolal-prezesow-nowych-izb-Sadu-Najwyzszego.html?fbclid=IwAR1jCoP9NUtqscf2gjlfdtLWWjPA\\_RO6yO9qoshPAa15Qz8cGFS06p\\_VPBU](https://www.rp.pl/Sedziowie-i-sady/302269952-Andrzej-Duda-powolal-prezesow-nowych-izb-Sadu-Najwyzszego.html?fbclid=IwAR1jCoP9NUtqscf2gjlfdtLWWjPA_RO6yO9qoshPAa15Qz8cGFS06p_VPBU) (accessed on 25 November 2019).

<sup>55</sup> Commission v. Poland, CJEU, Grand Chamber Order of the Court in Case C-791/19 R, 8 April 2020, para. 78.

<sup>56</sup> European Commission, 2020 Rule of Law Report, Country Chapter: Poland, 30 September 2020, p. 4 [https://ec.europa.eu/info/sites/info/files/pl\\_rol\\_country\\_chapter.pdf](https://ec.europa.eu/info/sites/info/files/pl_rol_country_chapter.pdf)

<sup>57</sup> Amnesty International, *Poland: Free courts, free people, judges standing for their independence*. 4 July 2019. Index number: EUR 37/0418/2019.

**individual judges, the judiciary as an equal branch of government, and to the public, which has a compelling interest in an independent and impartial justice system.**

### **III. The scope of Article 10 as applied to judges, including those engaged in the administration of the judiciary.**

#### *1. Freedom of expression of judges and the public interest*

33. Poland has an obligation to ensure Judges, like all individuals have the right to freedom of expression.<sup>58</sup> In addition to be guaranteed under international treaty, this right is expressly recognised in international standards on the judiciary including for example the UN Basic Principles,<sup>59</sup> the Bangalore Principles,<sup>60</sup> the Singhvi Declaration,<sup>61</sup> the Burgh House Principles,<sup>62</sup> and the Code of Judicial Ethics for the International Criminal Code.<sup>63</sup>

34. This Court has held that the protection of freedom of expression under article 10 ECHR extends to judges, including judges at senior levels. In *Baka v. Hungary*, the Grand Chamber has ruled that "it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question [and] has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties".<sup>64</sup> However, at the same time, the Court has stressed that, "having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court".<sup>65</sup>

35. With regard to the freedom of expression of judges on issues pertaining to the justice system, the Court has held that these questions "fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 .... Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter."<sup>66</sup>

#### *2. Judges have a right and a duty to speak out in defence of the rule of law*

36. Any assessment of the necessity and proportionality of restrictions on the right to freedom of expression of judges must be seen in light of the role of the judiciary under the principle of separation of powers, and the judiciary's "mission to guarantee the very existence of the Rule of Law".<sup>67</sup> International standards recognize that each judge is "responsible for

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<sup>58</sup> ECHR, article 10; ICCPR, article 19. See also, Human Rights Committee, General Comment no. 34, paras. 34-36 and 38.

<sup>59</sup> UN Basic Principles, principle 8, reads that "...members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

<sup>60</sup> Bangalore Principles, value 4.6.

<sup>61</sup> Singhvi Declaration, principle 8.

<sup>62</sup> Burgh House Principles, principle 7.1.

<sup>63</sup> Code of Judicial Ethics of the International Criminal Court, ICC-BD/02-01-05, Article 9.

<sup>64</sup> *Baka v Hungary*, para. 164. See also, *Guz v. Poland* (no. 965/12; *Vogt v. Germany* [GC], Application no. 17851/91, Judgment of 26 September 1995, para. 53; *Poyraz v. Turkey*, Application no. 15966/06, Judgment of 7 December 2010, para. 56; *Kudeshkina v. Russia*, Application no. 29492/05, Judgment of 26 February 2009, para. 85; *Albayak v. Turkey*, Application no. 38406/97, Judgment of 31 January 2008, paras. 39-42; *Harabin v. Slovakia*, Application no. 58688/11, Judgment of 20 November 2012, para. 149; *Wille v. Liechtenstein* [GC], Application no. 28396/95, Judgment of 28 October 1999, para. 42.

<sup>65</sup> Para 165.

<sup>66</sup> Para. 165

<sup>67</sup> Magna Carta of Judges, para. 1.

promoting and protecting judicial independence."<sup>68</sup>

37. As the Court has acknowledged, in certain contexts, judges may therefore have a responsibility as well as a right to exercise their freedom of association and expression. This arises in particular when the public debate concerns matters affecting the judiciary, such as issues related directly to the operation of the courts, the independence of the judiciary including salaries and benefits, fundamental aspects of the administration of justice or on matters relating to the personal integrity of the judge.<sup>69</sup>
38. In *Baka*, the Grand Chamber added that in assessing the proportionality of an interference to freedom of expression of a judge, it "must take account of the circumstances and overall background against which the statements in question were made ..., attaching particular importance to the office held by the applicant, his statements and the context in which they were made."<sup>70</sup> In this regard, it has found that a President of the Supreme Court and National Judicial Council as well as anti-corruption prosecutors were entitled to criticise the reforms or shortcomings in the judicial systems in their countries.<sup>71</sup>
39. As the maintenance of the impartiality and independence of the judiciary may on occasion demand a judge's exercise of their right to freedom of expression or association, the possibility to effectively exercise this right in the light of a correlating duty must be guaranteed. As this Court has recognised several times, if judges fear they will face sanctions for speaking in defence of judicial impartiality and independence, the threat of sanction would inevitably have a "chilling effect" that would stand in direct contradiction to the duties and responsibilities of judges to uphold the independence of the judiciary.<sup>72</sup> In any assessment of whether an interference with a judge's freedom of expression is necessary in a democratic society and proportionate to a legitimate aim, therefore, the responsibility of the judge to uphold and defend judicial independence should be a significant consideration.

### 3. Conclusions

40. **The interveners submit that the possible scope for limitations to the right of freedom of expression must, when applied to judges, be interpreted in light of the specific role of the judiciary as an independent branch of State power, in accordance with the principles of the separation of powers and the rule of law. Any restriction on the right to freedom of expression must not impair the right and the duty of the judge to protect and enforce without fear or favour and resist any encroachment on their independence as judges. This right becomes an imperative when judges speak from a position where they have a duty to voice certain concerns, such as where they are designated as a representative or spokesperson for a judicial institution. Provided that the dignity of judicial office is upheld and the essence and appearance of independence and impartiality of the judiciary are not undermined, the executive authorities must respect and protect the right and duty of judges to express their opinions, particularly in matters concerning the administration of justice and the respect and protection of judicial independence and of the rule of law.**

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<sup>68</sup> Magna Carta of Judges, para. 3. Universal Charter of the Judge, article 1.

<sup>69</sup> *Baka*, Para. 165

<sup>70</sup> *Baka*, 167, 171.

<sup>71</sup> *Baka*, Kovesi

<sup>72</sup> *Baka*, 167, 173; *Wille* para. 50 and *Kudeshkina* paras. 98-100.