

BEFORE THE FIRST SECTION  
EUROPEAN COURT ON HUMAN RIGHTS

## ***Reczkowicz and Others v. Poland***

**Application no. 43447/19, 49868/19, 57511/19**

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WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENER

*pursuant to the Registrar's notifications dated 7 October 2020 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights*

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30 October 2020

## **I. Introduction**

1. These submissions are made by the International Commission of Jurists (ICJ) pursuant to the leave to intervene granted by the President of the Section in response to an application dated 27 August 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.
3. Drawing on the Court’s own jurisprudence, EU law, the work of UN Special Procedures and its own research into the situation within the judiciary in Poland, the ICJ will focus on the independence of the Supreme Court, and in particular of its Disciplinary Chambers, in light of international law and standards on the independence of the judiciary, including those of the Council of Europe, as well as relevant EU law and jurisprudence.
4. In this regard, 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, including of their apex courts, and that a lack of independence of these self-governance bodies affects the independence of adjudicating bodies in the judiciary.

## **II. The independence of the Supreme Court in light of international law and standards on the independence of the judiciary**

### ***a) International standards of independence of courts and of national judicial councils***

5. There is a consistent body of caselaw through which the Court has made a link between the two requirements of Article 6.1 ECHR, namely: 1) a tribunal must be established by law; and 2) the judiciary must be independent and impartial. Such a link is important to secure society’s confidence in the courts.<sup>1</sup> With regard to the requirement of independence, this Court has held in *Volkov v. Ukraine* that, “when at least half of the membership of a tribunal was composed of judges, including the chairman with a casting vote, this would be a strong indicator of impartiality.”<sup>2</sup> Another indicator of independence is “the manner in which judges were appointed to that body, having regard to the authorities which delegated them and the role of the judicial community in that process”<sup>3</sup>.

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<sup>1</sup> *Morice v. France*, ECtHR, Application no. 29369/10, Judgment of 23 April 2015, para. 78.

<sup>2</sup> *Denisov v. Ukraine*, op. cit., para. 68.

<sup>3</sup> *Denisov v. Ukraine*, op. cit., para. 68. Other factors include: “Third, it was relevant to establish whether the members of the disciplinary body worked on a full-time basis or continued to work and receive a salary outside; given that the latter case would inevitably involve their material, hierarchical and administrative dependence on their primary employers, this would endanger their independence and impartiality (ibid., para. 113). Fourth, attention had to be paid to the participation of representatives of the prosecution authorities in the composition of the disciplinary body for judges; the inclusion of the Prosecutor General ex officio and the other members delegated by the prosecution authorities raised concerns as to the impartiality of the disciplinary body of judges in view of the functional role of prosecutors in domestic judicial proceedings

6. An independent judiciary, operating within a system that respects the separation of powers, is an essential element of the rule of law, as well as an inherent part of the Convention and a necessary condition for the effective protection of human rights.<sup>4</sup> Judicial independence, as affirmed by the jurisprudence of the Court, comprises both an institutional, systemic dimension and a personal dimension relating to the situation and conduct of an individual judge.<sup>5</sup> The former may be characterised by the independence of the institution of the judiciary from other branches of government, as well as the public, in other words: structural independence. The latter, which is of equal importance, refers to the independence of an individual judge, including his or her independence within the judicial system.<sup>6</sup>
7. The authorities and bodies 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 and the legislative powers, and other outside pressures and interests.
8. In many European jurisdictions, members of judicial councils are central to the self-governance of the judiciary. They typically, *inter alia*, hold powers relating to judicial appointments, evaluations, promotions and disciplinary proceedings.<sup>7</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>8</sup>
9. The Magna Carta of Judges provides that “[t]o ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competencies for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers.”<sup>9</sup> Specifically, as

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(*ibid.*, para. 114). Fifth, where the members of the disciplinary body played a role in the preliminary inquiry in a disciplinary case and subsequently participated in the determination of the same case by the disciplinary body, such a duplication of functions could cast objective doubt on the impartiality of those members (*ibid.*, para. 115).”

<sup>4</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the 7th 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 AddIICorrI, Articles 4 and 74; Bangalore Principles, Value 1.

<sup>5</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>6</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>7</sup> ICJ, Serbia’s Judges and Prosecutors: The Long Road to Independent Self-Governance, A Mission Report, 2016.

<sup>8</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>9</sup> CCJE, Magna Carta of Judges, CCJE(2010)3 Final, 17 November 2010, para. 13.

stated in the explanatory memorandum, “[j]udicial councils play an essential role in guaranteeing the independence and the autonomy of the judiciary. The underlying rationale for their creation is the need to insulate the judiciary and judicial career processes from external political pressure, mainly from the executive branch. In addition to their primary function of safeguarding judicial independence, a growing number of judicial councils have been entrusted with far-reaching powers to promote the efficiency and quality of justice and rationalize the administration of justice, court management and budgeting”.<sup>10</sup> The Universal Charter of the Judge affirms 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>11</sup> 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>12</sup> The Kyiv Recommendations on Judicial Independence assert that “Judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence.”<sup>13</sup>

10. The UN Special Rapporteur on the independence of judges and lawyers affirms that “[j]udicial councils play an essential role in guaranteeing the independence and the autonomy of the judiciary. The underlying rationale for their creation is the need to insulate the judiciary and judicial career processes from external political pressure, mainly from the executive and parliament. In addition to their primary function of safeguarding judicial independence, a growing number of judicial councils have been entrusted with far-reaching powers to promote the efficiency and quality of justice and rationalize the administration of justice, court management and budgeting.”<sup>14</sup>
11. 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>15</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

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<sup>10</sup> Ibid., para. 84.

<sup>11</sup> International Association of Judges, Universal Charter of the Judge, Adopted by the IAJ Central Council in Taiwan on November 17th 1999, Updated in Santiago de Chile on November 14th 2017, Articles 2 and 3.

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

<sup>13</sup> OSCE Office for Democratic Institutions and Human Rights & Max Planck Minerva Research Group on Judicial Independence, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 23-25 June 2010, Part I, para. 2.

<sup>14</sup> UN Special Rapporteur on the independence of judges and lawyers, Annual Report, Judicial Councils, UN Doc. A/HRC/38/38, 2 May 2018, para. 84.

<sup>15</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.

Council for the Judiciary (both judges and non-judges) should be granted guarantees for their independence and impartiality.”<sup>16</sup> For that, it recommended that “members of the Council for the Judiciary should not all be replaced at the same time.”<sup>17</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>18</sup> while assuming the problem would not subsist in all-judge councils. It has clearly stressed that “the Council for the Judiciary should be “depoliticised”.”<sup>19</sup>

12. In a report outlining the role of judicial councils, the UN Special Rapporteur on the independence of judges and lawyers found 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>20</sup> Echoing 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>21</sup>
13. In its 2019 judgment *A.K. v. Poland*, the Court of Justice of the European Union has ruled that “guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it... Moreover, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive.”<sup>22</sup>
14. One of the criteria identified by the Court of Justice to assess a court’s independence is that “the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they

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<sup>16</sup> *Ibid.*, para. 36.

<sup>17</sup> *Ibid.*, para. 35.

<sup>18</sup> *Ibid.*, para. 19.

<sup>19</sup> *Ibid.*, para. 21.

<sup>20</sup> UN Special Rapporteur on the independence of judges and lawyers, *op. cit.*, para. 76.

<sup>21</sup> UN Special Rapporteur on the independence of judges and lawyers, *op. cit.*, 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>22</sup> CJEU, *A.K. v. Poland*, para. 123-124, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=220770&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10867740>

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.”<sup>23</sup> Hence, the degree of independence of the appointing body “may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality.”<sup>24</sup>

15. With regard to the general criteria to assess the independence of a court within the European Union’s Member States, the Court of Justice, taking inspiration from the jurisprudence of this Court, has found that a court may not be considered as independent and impartial when “the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law.”<sup>25</sup>

***b) The situation of the Supreme Court and its Disciplinary Chamber and that of the National Judicial Councils***

16. In the present case, it is important to take account of the broader context of attacks on judicial independence in Poland to recognise the connection between the individual rights of the applicant and their structural consequences, in this case for the right to fair trial of others, and more fundamentally for the rule of law as a whole, i.e. “one of the fundamental principles of a democratic society [...] inherent in all the Articles of the Convention”.<sup>26</sup>
17. Since late 2015, the government of Poland has adopted and implemented a set of legislative and policy measures that have severely undermined the independence of the judiciary. Amendments to the laws governing all arms of the judiciary – the Constitutional Court – have rendered courts, judges and judicial institutions vulnerable to political influence.
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>27</sup> The NCJ assesses candidates for judicial offices; drafts the rules of judicial ethics; and can initiate disciplinary proceedings against judges.<sup>28</sup>

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<sup>23</sup> *Ibid.*, para. 134.

<sup>24</sup> *Ibid.*, para 139.

<sup>25</sup> *Ibid.*, Ruling 1.

<sup>26</sup> *Káracsony and Others v. Hungary*, ECtHR, Application no. 37494/02, Judgment of 18 April 2006.

<sup>27</sup> Polish Constitution, Article 186(1).

<sup>28</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

19. 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 having also lay members appointed by 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 (among other authorised bodies),<sup>29</sup> heard by the first instance disciplinary courts and reviewed by the Disciplinary Chamber of the Supreme Court, can result 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>30</sup>
20. 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 law gave parliament the power to appoint the 15 judge-members who serve as members of the NCJ, despite the fact that the Polish Constitution expressly limits to six the number of members of the NCJ appointed by Parliament. On 5 March 2018, Parliament appointed the new NCJ judge members, eight of whom were the new presidents or vice-presidents of courts appointed since August 2017 by the Minister of Justice.<sup>31</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>32</sup>
21. 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>33</sup>
22. The Advocate General of the CJEU has 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 are elected by the legislative authorities.<sup>34</sup>

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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.

<sup>29</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>30</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>31</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 22 October 2020).

<sup>32</sup> European Commission, Reasoned Proposal, op. cit., para. 142.

<sup>33</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>34</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.

23. The amendment of the Law on the NCJ also 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>35</sup> Such termination raised concerns over the breach of Article 187(3) of the Polish Constitution affording a full four-year term of office to NCJ members,<sup>36</sup> as underlined in the opinion of the NCJ, of the Supreme Court and of the Ombudsman.<sup>37</sup> The CJEU Advocate General concluded that “the immediate replacement of the currently sitting members of the NCJ in tandem with the new regime for appointment of the NCJ may be considered to further impair the NCJ’s independence from the legislative and executive authorities.”<sup>38</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.<sup>39</sup> The ENCJ concluded that, due to the 2017 “reforms”, the NCJ could no longer be considered independent of the executive and legislature because of parliament’s role in the process for the election of NCJ members. The ENCJ also noted that the amendment of the Law on the NCJ “is part of an overall reform to strengthen the position of the executive, infringing very seriously on the independence of the judiciary”.<sup>40</sup>
25. The “reform” of the judiciary also empowered the Minister of Justice to dismiss and appoint presidents and vice-presidents of Courts, to force Supreme Court judges to retire, and to employ disciplinary proceedings to target judges for their decision making or for their exercise of the right to freedom of expression. The “reform” enabled the government to interfere with the operation of the judicial system in breach of the principle of separation of judicial, executive and legislative powers.
26. 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. Within the first six months of the law entering into force, the Minister was empowered to replace the presidents or vice-presidents without providing any justification. Between September 2017 and February 2018, the Minister of Justice dismissed and subsequently appointed at least 130 presidents and vice-presidents of common courts.<sup>41</sup> There are 377 courts in Poland<sup>42</sup> and the government has

<sup>35</sup> Law on the National Council of Judiciary, Article 6.

<sup>36</sup> Opinion of Advocate General Tanchev, op. cit., para. 61.

<sup>37</sup> European Commission, Reasoned Proposal, op. cit., para. 140.

<sup>38</sup> Opinion of Advocate General Tanchev, op. cit., para. 135.

<sup>39</sup> ENCJ, ENCJ Suspends Polish National Judicial Council – KRS, available at <https://www.ency.eu/node/495> (accessed on 22 October 2020).

<sup>40</sup> ENCJ, Position Paper of the Board of the ENCJ on the membership of the KRS of Poland, 16 August 2018, p. 4.

<sup>41</sup> The estimate is of 130-160 presidents and vice-presidents as reported by Helsinki Foundation of Human Rights in *Od Kadr Sie Zaczyna, Zmiana prezesów i wiceprezesów sądów powszechnych w okresie od sierpnia 2017 r. do lutego 2018 r.* 2018, p. 16, available at <http://www.hfhr.pl/wp-content/uploads/2018/04/HFPC-Od-kadr-sie-zaczyna.pdf>. See also, *Iustitia, Ostatecznie 130 prezesów i wiceprezesów zostało odwołanych przez Ministra Sprawiedliwości w trybie spec ustawy z lipca 2017 roku*, 13 February 2018, available at <http://www.iustitia.pl/informacja-publiczna/2100-ostatecznie-130-prezesow-i-wiceprezesow-zostaloo-dwolanych-przez-ministrasprawiedliwosci> (accessed 22 October 2020). The changes in the posts of presidents and vice-presidents of common courts continued even after February 2018. According to information published by the association of judges *Iustitia*, by May 2018 the total number of replaced presidents and vice-presidents was of 195 (150 were removed by the Minister of Justice and 45 resigned). The list is available at <http://monitorkonstytucyjny.eu/archiwa/3982> (accessed on 22 October 2020).



acknowledged that the Minister has replaced about 18% of presidents and vice-presidents of these courts.<sup>43</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>44</sup> Amnesty International has documented cases in which the NCJ has dismissed judges' complaints that claim that their transfers were punitive and/or effectively amounted to demotions, without any or adequate justification.<sup>45</sup>

27. The amendment of the Law on the Supreme Court also included provisions that permitted the reopening of closed disciplinary proceedings against judges.<sup>46</sup> The law established a new Disciplinary Chamber<sup>47</sup> whose members were to be elected by the "new" NCJ and whose "lay judges" were to be elected by members of the Senate.<sup>48</sup> In February 2019, the President of Poland appointed the heads of the two new chambers of the Supreme Court: Disciplinary and Extraordinary.<sup>49</sup>
28. The UN Special Rapporteur on the independence of judges and lawyers visited Poland in 2017 and concluded that the early termination of all members of the NCJ "decided by the legislative branch constitutes an additional interference with the independence of the Council and a breach of the principles of separation of powers and security of tenure. Coupled with the early termination of all the judicial members of the Council, the implementation of the new Act will lead to the creation of a 'new' NCJ dominated by political appointees, in contravention of existing standards on the independence of the judiciary and the separation of powers."<sup>50</sup>
29. In a decision in *Commission v. Poland* (Independence of the Supreme Court) from 24 June 2019, the Court of Justice of the European Union (CJEU) held that the 2017 amendment of the Law on the Supreme Court had undermined the principle of irremovability of Supreme Court Judges, which is essential for their independence.<sup>51</sup>
30. On 19 November 2019, the CJEU clarified that in order for a court to meet the EU law independence requirements, it must: a) be able to function

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<sup>42</sup> Sonar, Wyborcza, PiS zapowiada "reformę reformy" sądownictwa. Władza idzie na ustępstwa wobec Komisji Europejskiej?, available at <http://sonar.wyborcza.pl/sonar/7,156422,22492032,sonarwsadach-pis-poprawia-ustawy-ziobro-powoluje-prezesow.html> (accessed on 22 October 2020).

<sup>43</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>44</sup> USTAWA z dnia 27 lipca 2001 r., available at <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>.

<sup>45</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 22 October 2019).

<sup>46</sup> Article 124.1. The amendment of the Law on the Supreme Court entered into force in April 2018.

<sup>47</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/D20180005L.pdf>).

<sup>48</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>49</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=IwAR1jCoP9NUtqscf2g1fdtLWWjPA\\_RO6yO9qoshPAa15Qz8cGFS06p\\_VPBU](https://www.rp.pl/Sedziowie-i-sady/302269952-Andrzej-Duda-powolal-prezesow-nowych-izb-Sadu-Najwyzszego.html?fbclid=IwAR1jCoP9NUtqscf2g1fdtLWWjPA_RO6yO9qoshPAa15Qz8cGFS06p_VPBU) (accessed on 22 October 2020).

<sup>50</sup> Special Rapporteur on the independence of judges and lawyers, Report on his mission to Poland, op. cit., para. 68.

<sup>51</sup> *European Commission v. Republic of Poland*, CJEU, Case C-619/18, Judgment of 24 June 2019., para. 96.

autonomously without taking orders or instructions from any source;<sup>52</sup> b) be objective and its work must strictly apply the rule of law.<sup>53</sup> The operation of the rule of law necessitates that the judiciary is independent from the legislative and executive powers.<sup>54</sup> Under the Constitution, the body that is supposed to ensure the independence of judicial appointments is the National Council of the Judiciary. Therefore, the CJEU clarified, the degree of independence of the NCJ is a precondition for the independence of judicial nominations and appointments.<sup>55</sup>

31. The CJEU's ruling draws on the earlier advisory opinion of the 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;
- 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>56</sup>

32. Following the CJEU decision on 19 November 2019, the panel of the Labour Chamber of the Supreme Court of Poland ruled on 5 December 2019 that the new National Council of the Judiciary was appointed in a manner that does not guarantee its independence. As a result, the Disciplinary Chamber of the Supreme Court appointed by the NCJ does not meet the criteria of an independent court.<sup>57</sup>

33. On 23 January 2020, the Parliament (Sejm), adopted an amendment to the Law on the Common Courts, as well as the Law on the Supreme Court.<sup>58</sup> The President signed the amendment on 4 February.<sup>59</sup> The amendment effectively prevents the courts in Poland from implementing the decision of the CJEU from 19 November 2019, as Article 42a.1 expressly prohibits questioning the legitimacy of Polish judicial institutions.

34. On 8 April 2020, the Court of Justice of the EU issued interim measures against Poland, in a case brought by the European Commission for infringement by Poland of its EU Treaties' obligations on judicial independence with regard to the Disciplinary Chamber and the Extraordinary Chamber of the Supreme Court. In these interim measures,

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<sup>52</sup> *A.K. and Others v. Sąd Najwyższy*, CJEU, Case C-585/18, Judgement of 19 November 2019, para. 121.

<sup>53</sup> *A.K. and Others v. Sąd Najwyższy*, 19 November 2019. para. 122.

<sup>54</sup> *Ibid.*, para. 124.

<sup>55</sup> *Ibid.*, para. 139.

<sup>56</sup> *A.K. and Others v. Sąd Najwyższy*, Case C-585/18, Opinion of Advocate General Tanchev of 27 June 2019, paras. 125, 127, 128.

<sup>57</sup> The Decision of the Supreme Court, 5 December 2019 (in Polish), para. 88

[http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty\\_o\\_sprawach/AllItems/III-PO-0007\\_18.pdf](http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty_o_sprawach/AllItems/III-PO-0007_18.pdf).

<sup>58</sup> <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000190/T/D20200190L.pdf>.

<sup>59</sup> <https://www.prezydent.pl/prawo/ustawy/podpisane/art.54,luty-2020-r.html>.

the Court reiterated its jurisprudence from the case *A.K. v Poland* and ordered to suspend the activities of these Chamber until it could pronounce a ruling on the case.<sup>60</sup>

## Conclusions

35. **In light of the observations presented above, the ICJ submits that a court cannot be considered as independent whenever the body that has appointed its members lacks guarantees of independence from the executive and legislative powers as enshrined in standards of the Council of Europe and the United Nations, including that at least half of its members be judges elected by their peers.**
36. **It follows that a court composed by judges appointed by a non-independent body or via a non-independent procedure will not be capable of constituting an independent and impartial tribunal under article 6 ECHR.**

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<sup>60</sup> Interim measures available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=225141&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=9998088>