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ARTICLE

Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR

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Abstract

This article seeks to answer the question of how to deal with the problem of unlawful judicial appointments in Poland in a way consistent with the European Convention on Human Rights (ECHR). According to the Polish Constitution, appointments of judges are made upon the request of the National Council of the Judiciary (NCJ). After controversial reforms in 2017, this body lost its independence from politicians. In the four judgments issued so far, the European Court of Human Rights (ECtHR) ruled that appointments of Supreme Court judges made upon the request of politicised NCJ were burdened with manifest violation of domestic law and, as a result, panels of courts composed of persons appointed in this way were not 'tribunal established by law'. Arguably, this conclusion may be extended to other judges appointed in the same way. The question remains, however, what to do with persons appointed with violation of law; in particular, whether such persons can simply be removed from the judiciary. This article argues that even though the domestic authorities have some discretion with regards to choosing the proper measures to fix the problem of unlawfully appointed judges, this is limited by the need to comply with the standards stemming from the ECHR. In particular, it is important to respect unlawfully appointed persons' right to court. This means that instead of removing all of them without any judicial review, a more individualised approach would be preferable.

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1 Introduction

Since March 2018, Poland has been experiencing a crisis around the appointment of judges to ordinary courts, administrative courts, military courts, and the Supreme Court. Its genesis was connected to a new law changing the rules for the election of members of the NCJ,[1] resulting in this body being deprived of its independence.[2] As the NCJ holds exclusive competence to apply to the President with motions for the appointment of judges,[3] a reform to it inconsistent with the European and constitutional standards must necessarily impact on the assessment of the status of judges appointed under this procedure. The evolving case law of the Court of Justice of the EU (CJEU) and the ECtHR has confirmed that the participation of unlawfully appointed judges in the adjudication of individual cases may lead to a violation of the individual's right of access to justice.

It is clear that the crisis cannot be ended without reform to restore the independence of the NCJ. However, it will be equally important to resolve the status of the judges appointed in violation of law, as their continued involvement in the adjudication of cases may lead to further violations. In this respect, the question arises whether these persons are judges at all and whether they are protected by the guarantees of judicial independence, including the constitutional requirement to remove or transfer judges only by a court decision.

The purpose of this article is to answer the question of whether, and to what extent, the possible actions of future Polish ruling authorities aimed at restoration of the rule of law in the sphere of the judiciary will be limited by the need to respect the rights of unlawfully appointed persons guaranteed under the ECHR. In particular, the question is whether the Convention precludes the removal of such persons from their positions without providing them with access to court. On the other hand, the question of the legal effects of judgments issued by defectively appointed judges is outside the scope of this article.

Given the research objective, the scope of this article is limited exclusively to the issue of standards arising from the Convention. There is no doubt that the process of restoring the rule of law in Poland will also have to take into account the requirements of the EU law. However, a full analysis of the problem of the status of defectively appointed judges and the admissibility of their removal from office from the perspective of EU law would require either further expansion of an already lengthy article or the use of excessive simplification.

The research problem is important for several reasons. Firstly, without regulating the status of defectively appointed judges, it will not be possible to fully implement the judgments of the ECtHR. Secondly, the number of defectively appointed judges

[1] The Act of 8 December 2017 amending the Act on the National Council of the Judiciary and some other acts (Journal of Laws of 2018, item 3).

[2] See e.g. Filipek (2018), p. 177.

[3] Article 179 of the Constitution of Poland.

has already exceeded 2000,[4] and therefore the way their status is regulated will be of significant importance from the point of view of the functioning of the judiciary in Poland. Thirdly, given the de facto inability of the Polish Constitutional Court to fulfil its functions effectively and independently,[5] it is highly likely that the burden of evaluating future Polish regulations aimed at solving the crisis around the judiciary will rest primarily on the ECtHR. Fourthly, ECtHR case law is one of the primary sources from which European standards of the rule of law are derived, and it will be a natural point of reference in the discussion of what is allowed and what is not in the process of restoring the rule of law in Poland.

In terms of structure, the article is divided into several sections. The first focuses on an overview of ECtHR case law concerning the irregularities in the appointments of Polish judges. The second discusses the possible ways of implementing ECtHR judgments. The third analyses the legal status of persons appointed illegally, taking into account case law of international and domestic courts, as well as Polish legal scholarship. The fourth and fifth are devoted to solving the main research problem; that is, to consider whether the ECHR protects, at least to some extent, defectively appointed judges from being removed from office. The final section presents the conclusions.

2 Unlawful Appointments of Polish Judges in the Case Law of the ECtHR

So far the ECtHR has issued four judgments in cases concerning adjudication by defectively appointed judges in Poland: *Reczkowicz v. Poland*,[6] *Dolińska-Ficek and Ozimek v. Poland*,[7] *Advance Pharma sp. z o.o. v. Poland*[8] and *Juszczyszyn v. Poland*.[9] In all of these cases the Court applied the test developed by the Grand Chamber in *Ástráðsson v. Iceland*[10] to assess whether irregularities in the procedure for the appointment of judges led to violation of the right to tribunal established by law. The test is composed

[4] According to the information available on the website of the President of Poland, between 2018 and March 2023 the President appointed 2164 judges, 555 assessors of ordinary courts and 90 assessors of administrative courts (https://www.prezydent.pl/kancelaria/statystyki/statystyki-nominacji-sedziowskich-i-asesorskich). Even though one can assume that some of them, especially those appointed in 2018, could be nominated by the lawful NCJ, vast majority were nominated by the reorganised NCJ.

[5] See e.g. Sadurski (2019a), p. 25; Pyziak-Szafnicka (2020).

[6] European Court of Human Rights, Reczkowicz v. Poland, application no. 43447/19, judgment, 22 July 2021.

[7] European Court of Human Rights, Dolińska-Ficek and Ozimek v. Poland, applications nos. 49868/19 and 57511/19, judgment, 8 November 2021.

[8] European Court of Human Rights, Advance Pharma sp. z o.o. v. Poland, application no. 1469/20, judgment, 3 February 2022.

[9] European Court of Human Rights, Juszczyszyn v. Poland, application no. 35599/20, judgment, 6 October 2022.

[10] Grand Chamber of European Court of Human Rights, Guðmundur Andri Ástráðsson v. Iceland, application no. 26374/18, judgment, 1 December 2020.

of three steps.[11] In the first one, the Court assesses whether there was a manifest breach of domestic law and in the second – whether identified violations concerned 'the fundamental rules of the procedure for appointing judges'. Finally, in the third step, the Court considers whether allegations concerning violation of the right to tribunal established by law 'were effectively reviewed and remedied by domestic courts'.

Chronologically, the first of the abovementioned Polish cases was *Reczkowicz*. This concerned a ruling issued in proceedings against a lawyer by the Disciplinary Chamber of the Supreme Court, which, in the opinion of the applicant, did not constitute an 'independent and impartial tribunal established by law' because all the judges on the panel were appointed upon the request of the non-independent NCJ. In examining the allegation of a violation of ECHR Article 6(1), the ECtHR used the test developed in *Ástráðsson*. The Court, relying on the previous findings of the Polish Supreme Court, concluded that the judges of the Disciplinary Chamber had been appointed in manifest violation of domestic law. Although the ECtHR did not explicitly indicate which norms of national law had been violated,[12] it is clear from the judgment that the issue concerned the provisions of the Constitution for the composition of the NCJ and its independence. The ECtHR also found that the violated norms were fundamental to the entire appointment process. Under the reforms, the legislative and executive authorities gained decisive influence over the NCJ's staffing and thus also the possibility to directly or indirectly influence the judicial appointment procedure. With this in mind, as well as the absence of any appeal procedure in which the irregularities in the appointment of the judges adjudicating the applicant's case could be 'reviewed and remedied', the ECtHR found a violation of the right to a 'tribunal established by law' guaranteed by Article 6(1).

The Court's findings on the unlawfulness of the appointment of the Disciplinary Chamber's judges were later confirmed in the case of *Juszczyszyn v. Poland*. The case line initiated in *Reczkowicz* was also applied by the ECtHR in its judgments concerning newly appointed judges of other chambers of the Supreme Court: *Dolińska-Ficek and Ozimek v. Poland*, concerning the Chamber of Extraordinary Control and Public Affairs, and *Advance Pharma sp. z o.o. v. Poland*, concerning the Civil Chamber. In these two judgments, the ECtHR, in addition to the flawed composition of the NCJ, took into account also another problem, namely that the authorities had prevented an effective review of the NCJ's resolution on the nomination of candidates for judicial appointment. Moreover, in *Dolińska-Ficek and Ozimek* the ECtHR additionally took note of the jurisdiction of the Extraordinary Control and Public Affairs Chamber, which covered, inter alia, cases concerning the validity of elections and referendums. Regardless of this, however, it was the problems related to the composition of the NCJ that the ECtHR paid the most attention to.

[11] Ástráðsson, *supra* n. 10, §§ 243–290.

[12] See also: Reczkowicz, *supra* n. 6, dissenting opinion by judge Krzysztof Wojtyczek, § 1.9.

The Court has not yet considered any case dealing with other courts than the Supreme Court; in particular, ordinary courts.[13] One may therefore wonder whether it will treat newly appointed judges of such courts in the same way as new judges of the Supreme Court.[14] Even though the Polish Supreme Court differentiates between the legal effects of participation in adjudicating benches of 'new' judges of the Supreme Court and those of the ordinary courts (see below), one should not automatically assume that the Court will take similar approach.[15] On the hand, the *Dolińska-Ficek and Ozimek* and *Advance Pharma* judgments contain passages in which the ECtHR clearly indicated that the identified problem actually went beyond the Supreme Court and may also affect the legality of the appointment of other judges in Poland.[16] On the other hand, however, in the *Ástráðsson* judgment, the Court pointed out that'the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be'[17]. This statement may be seen as the basis for differentiating the assessment of the status of various categories of judges in Poland.

3 Possible Solutions to the Issue of Defectively Appointed Judges

In the *Advance Pharma* judgment, the ECtHR underlined that the Polish authorities are obliged under Article 46 of the Convention to 'draw the necessary conclusions from the present judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violation found by the Court and to prevent similar violations from taking place in the future'.[18] The decision of the Committee of Ministers, issued in December 2022, contains more precise guidelines on the implementation of the ECtHR judgments. The Committee urged Polish authorities 'to introduce legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ, thus securing the independence of the NCJ; and to address the status of all judges appointed in deficient procedures upon a motion of the NCJ as constituted after March 2018 and of decisions issued with their participation'[19]. The Committee reiterated these recommendations in the decision issued in June 2023.[20]

[13] At the time of the submission of this article there were a number of proceedings pending before the ECtHR concerning irregularities in the appointment of judges of ordinary courts, see: D.C. v. Poland, application no. 41,335/21; Brodowiak and Dżus v. Poland, applications nos. 28122/20 and 48599/20; Zielińska and others v. Poland, application no. 48534/20 and 11 others.

[14] Szwed (2021).

[15] Szwed (2022a).

[16] Dolińska-Ficek and Ozimek, *supra* n. 7, § 368; Advance Pharma sp. z o.o., *supra* n. 8, §§ 364–365.

[17] Ástráðsson, *supra* n. 10, § 222.

[18] Advance Pharma, *supra* n. 8, § 366.

[19] Committee of Ministers of the Council of Europe, Ministers' Deputies' decision of 8 December 2022, H46-25 Reczkowicz group (Application No. 43447/19), Broda and Bojara (Application No. 26,691/18) v. Poland, no. CM/Del/Dec(2022)1451/H46-25, https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2022)1451/H46-25E.

[20] Committee of Ministers of the Council of Europe, Ministers' Deputies' decision of 7 June 2023, H46-18 Reczkowicz group (Application No. 43447/19), Broda and Bojara (Application No. 26,691/18) and

Unfortunately, thus far, the independence of the NCJ has not been restored and defectively appointed judges continue to participate in the adjudication of cases. To prevent violations of EU law and to safeguard the rights of individuals, in January 2020 the Supreme Court adopted a resolution on the effects of the participation of a judge appointed at the request of the reorganised NCJ on the validity of the proceedings.[21] According to the Supreme Court, when a judge appointed at the request of the reorganised NCJ is sitting in the panel of the Supreme Court, the composition of court is always defective, rendering the proceedings invalid. The participation of newly appointed judges in panels of ordinary courts may also lead to invalidity, provided that the irregularities in the appointment led to a violation of the standards of the right to an independent and impartial court. This must be assessed using criteria specified by the Supreme Court. Thus, the mode of appointment of the 'new' judges and their independence and impartiality are to be examined by courts on a case-by-case basis. The current government does not recognise this resolution, citing a judgment of the Constitutional Court which found, in extremely controversial circumstances, that it violated the Constitution.[22] Instead, an alternative test for the impartiality and independence of judges was introduced in an amendment to the Supreme Court Act passed in 2022.[23] However, this is framed in such a way that it can hardly be considered an effective tool to protect the individual's right to a 'tribunal established by law'.[24]

The Supreme Court's resolution, although important, does not constitute a way to fully and permanently resolve the problem of defectively appointed judges. Preventing defectively appointed judges from ruling on a particular case, or quashing their rulings, could help to avoid a violation of Article 6; however, a situation where the status of newly appointed judges is not fixed, but is subject to review in each individual case, poses a threat to legal security. Moreover, there is no guarantee that the test adopted by the Supreme Court will always be applied or that it will be applied correctly, especially given that it is relatively complicated and requires courts to analyse various factors. It would therefore be preferable to solve the problem by means of statute.

When regulating the status of irregularly appointed persons, national authorities may consider several options. One would include preventing unlawfully appointed judges from adjudicating in individual cases, without depriving them of their status as judges. Such solution would be similar to the manner of implementation of the Grand Chamber's ruling in *Ástráðsson* by the Icelandic authorities. According to

Footnote 20 (continued)
Grzeda (Application No. 43572/18) v. Poland, no. CM/Del/Dec(2023)1468/H46-18, https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2023)1468/H46-18E.

[21] Supreme Court, resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, 23 January 2020, case ref.: BSA I-4110-1/20, https://forumfws.eu/bsa-i-4110-1_20_english.pdf, http://www.sn.pl/sites/orzecznictwo/orzeczenia2/bsa%20i-4110-1-20.pdf

[22] Constitutional Tribunal judgment of 20 April 2020, case ref.: U 2/20.

[23] Act of 9 June 2022 amending the Supreme Court Act and some other acts (Journal of Laws, item 1259).

[24] Szwed (2022a).

the information submitted by the Government of Iceland to the Council of Europe's Committee of Ministers,[25] after the Court's judgment three out of four unlawfully appointed judges were reappointed in procedure fully compliant with domestic law. The last judge, however, did not apply for reappointment. According to the Government, he could not be legally removed from his position as a judge because his status was protected by the Constitution. Therefore, he remained in the office of judge but did not participate in adjudication. On 9 March 2022 the Committee decided to close the examination of execution of the *Ástráðsson* judgment.[26]

However, the adoption of such a solution in the Polish context would be much more difficult. The *Ástráðsson* case concerned the unlawful appointment of just four judges to one Court of Appeal; in Poland, more than 2000 judges have been appointed by the President to various courts upon the motion of the reorganised NCJ. Respecting the judicial status of all of them, and consequently respecting their right to remuneration, would generate huge costs to the budget, especially since new judges would have to be appointed to fill the vacancies created by their inability to participate in adjudication. One can assume that many of the unlawfully appointed judges would compete for such vacancies; the law might even provide some incentives for them to do so. Nevertheless, there is a risk that some unlawfully appointed judges simply would not obtain a nomination from the independent NCJ and so would remain as judges not allowed to adjudicate.

One may therefore expect that the process of 'restoring the rule of law' in the Polish judiciary will involve removal of at least some of the defectively appointed judges; but what should this process of removal look like? In principle, two approaches to the problem can be imagined. The first, more radical, would be based on the assumption that unlawfully appointed persons have never actually become judges, so they could be simply removed from their positions by the virtue of law. The second solution would be more moderate and would involve the introduction of a procedure aimed at individualised verification of the status of defectively appointed judges. Two recently published draft laws, prepared by the Association of Judges 'Iustitia'[27] and the Senate,[28] provide interesting examples of such divergent approaches to the problem at hand.

The draft published by Iustitia is based on the premise that since unlawfully appointed persons are not and never have been judges, they are also not covered by guarantees of independence, including irremovability. According to the draft, the resolutions of the reorganised NCJ concerning appointments to judicial posts

[25] Action Plan of the Government of Iceland for the case of Guðmundur Andri Ástráðsson v Iceland, DH-DD(2021)700, 7 July 2021, https://hudoc.exec.coe.int/eng?i=DH-DD(2021)700E⟩.

[26] Committee of Ministers, Resolution CM/ResDH(2022)48, Execution of the judgment of the European Court of Human Rights Guðmundur Andri Ástráðsson against Iceland, 9 March 2022, https://hudoc.exec.coe.int/eng?i=001-216610.

[27] Draft Act amending the Act on the National Council of Judiciary, the Supreme Court Act and some other acts, https://www.iustitia.pl/images/A/projekt_IUSTITII_o_przywracaniu_praworz%C4%85dno%C5%9Bci-1_-_do_sejmu_plus_zakaz_wznowienia.pdf.

[28] Senate of the Republic of Poland, Resolution of 8 June 2022 on the submission to the Sejm of the Draft Act amending the Act on the National Council of Judiciary, the Supreme Court Act and some other acts, https://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-72-2020/$file/9-020-72-2020.pdf.

(with the exception of those involving appointment of assessors[29] to the first judicial position in ordinary courts) would be deemed 'null and void by the virtue of law', and the posts filled on the basis of such resolutions would be declared vacant. Moreover, the draft provides that the remuneration received by the defectively appointed judges of the Supreme Court is undue to the extent exceeding the remuneration received in the previously held position.[30] This would allow the State to request that defectively appointed judges return such undue payments. At the same time, defectively appointed persons would be entitled to return to the judicial positions they occupied before the unlawful appointment.[31]

The draft prepared by the Senate represents a different approach. Interestingly, the initial version of the draft[32], presented in January 2020, was more radical but it was eventually significantly modified under the influence of criticism formulated by various entities. In its final version submitted to the Sejm[33], the draft stipulates that resolutions on judicial appointments made by the reorganised NCJ are burdened with a 'significant legal defect'. However, in contrast to Iustitia's draft, this does not mean that they would be automatically invalidated. Instead, resolutions would be subject to re-examination by a new, independent composition of the NCJ. Following this procedure, the NCJ might conclude that the case was decided in violation of the principle of judicial independence. In such a situation, the judge affected by the resolution could not participate in adjudication and the NCJ would apply to the disciplinary court to impose the penalty of removal from office. However, the NCJ might also decide that the appointment had been made correctly, in which case no such consequences would occur.

There are therefore various ways to address the problem of defectively appointed judges.[34] The question, however, is whether and to what extent the State's discretion in choosing the means to do so is constrained by the need to respect the rights of the defectively appointed persons themselves. This is a legitimate issue, as eliminating the underlying causes of one violation of the ECHR with a simultaneous breach of

[29] Assessors are persons who, after a period of judicial training and passing the judicial examination, can perform judicial functions for a limited period of time before being appointed to a 'full' judicial position for an indefinite period.

[30] The provision would apply to the salaries of the judges of the Disciplinary Chamber received for their entire period of service, and to the other judges of the Supreme Court – only to salaries received after the date of announcement of the aforementioned Supreme Court resolution of 23 January 2020.

[31] The Iustitia's draft was submitted to the Sejm by a group of MPs at the beginning of 2022. The Sejm rejected it in the first reading, but this does not prevent it from being brought again in the future.

[32] Senate of the Republic of Poland, Draft Act amending the Act on the National Council of Judiciary, the Supreme Court Act and some other acts, 17 January 2020, https://www.senat.gov.pl/download/gfx/senat/pl/senatdruki/10670/druk/050.pdf?r10670.

[33] Senate of the Republic of Poland, Resolution on the submission to the Sejm of a bill amending the Act on the National Council of Judiciary, the Supreme Court Act and certain other acts, 8 June 2022, https://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-72-2020/$file/9-020-72-2020.pdf.

[34] Apart from the two options discussed above, mixed concepts are also being formulated. For example, Pech and Jaraczewski propose that improperly appointed Supreme Court judges be removed from their positions, while the rest should undergo a more individualized verification procedure involving the independent NCJ and courts – see: Pech and Jaraczewski (2023), pp. 60, 76.

other Convention rights could hardly be considered a proper implementation of the ECtHR judgments.

4 The Status of Unlawfully Appointed Persons

Before proceeding to the analysis of the main research problem, it is necessary to consider the legal status of persons appointed at the request of the reorganised NCJ in the light of domestic law. In particular, it should be considered whether the appointments made at the request of the reorganised NCJ have any legal force at all. The consequence of declaring them to be devoid of legal force would be that persons appointed in such a way to their first judicial post are not judges at all, while those who have been promoted from court of a lower rank to court of a higher rank continue to be judges of the courts in which they were sitting before the defective promotion. This issue is of fundamental importance from the perspective of the Polish Constitution, since if these persons, despite all the defects of their appointment, are considered to be judges, their removal or involuntary transfer will require a court decision (Article 180 Sect. 2 of the Constitution). As will be shown later in the article, this problem is also relevant from the perspective of the interpretation of the ECHR, in particular for determination of applicability of Article 6.

Undoubtedly, participation of defectively appointed persons in courts' panels may violate the individual's right to a 'tribunal established by law'. However, the question arises as to whether this fact alone amounts to a complete negation of their judicial status, and thus to a recognition that no official relationship has been established with them, and that they are not entitled to any rights in relation to their continued holding of office.

The ECtHR has not yet unequivocally concluded that all judges appointed at the request of the reorganised NCJ are not judges at all. It is worth to reiterate that all ECHR rulings issued to date have concerned directly only Supreme Court judges and even in these rulings the ECtHR has not examined the legal existence of the acts of appointment of such persons. The examination of this issue was not strictly necessary to review it under Article 6: as the ECtHR made clear in *Ástráðsson*, a finding of a violation of the right to a 'tribunal established by law' does not depend on whether the defects in the process of appointing a judge were so serious as to render the act of appointment invalid or non-existent.[35]

Nor can the conclusion that defectively appointed persons are not judges at all be derived unequivocally from the case law of the CJEU. As in the case of the ECtHR, the judgments issued so far by the CJEU concerned directly only the Supreme Court judges. In addition, the CJEU considered the problem of judges appointed at the request of the reorganized NCJ mostly through the prism of the right to an independent and impartial court, which implies the need to take into account other

[35] Ástráðsson, *supra* n. 10, §§ 280–286. See also: Szwed (2022b), p. 142.

circumstances, apart from the mere manner of appointing a judge.[36] However, it must be noted that in the Case C-487/19 CJEU referred also to the right to a 'tribunal established by law' and even ruled that, in the specific circumstances defined in this judgment, a ruling of unlawfully appointed judge must be declared null and void.[37] Nevertheless, when the CJEU received preliminary references from the Polish Supreme Court regarding the problem of the non-existence of irregular judicial appointments, it declared them inadmissible[38], contrary to the opinion of the Advocate General.[39]

Similarly, the complete lack of judicial status of all persons appointed on the proposal of the reorganised NCJ has not yet been confirmed by the case law of the Polish courts. The Supreme Court's resolution of 23 January 2020 did not directly address the problem of the legal existence of the acts of appointment of the persons appointed upon the request of the reorganised NCJ. On the one hand the Supreme Court held that 'Persons named in the lists of recommendations drawn up in a defective procedure of appointment for judicial positions cannot be considered to have been candidates for office duly presented to the President of the Republic of Poland whom the President of the Republic of Poland is competent to appoint to the office'. On the other hand, however, it admitted that 'there is no doubt that, formally, they have acquired the status of a judge', pointing out that assumptions about the judicial status of these persons may be negatively verified in the future, depending in particular on the case law of the CJEU. Still, the essence of the Supreme Court's resolution – that is, the differentiation of the legal effects of the participation of unlawfully appointed judges in adjudicating panels – strongly suggests that, at the very least, some of the irregularly appointed persons are in fact judges. Importantly, despite the development of the case law of the ECtHR and the CJEU, the Supreme Court has not yet formally abandoned the interpretation provided in the resolution – on the contrary, its recent rulings present the same approach to the problem. For example, in the resolution of 2 June 2022 (case ref. I KZP 2/22), the Supreme Court ruled that although the current NCJ is not the same organ as the NCJ regulated in the Constitution, there is 'no basis to a priori assume that every judge of the ordinary court who obtained a nomination after participating in a competition before the National Council of the Judiciary after 17 January 2018, does not meet the minimum standard of impartiality, and each court with their participation is improperly staffed within the meaning of Article 439 § 1 point 2 of the Code of Criminal Procedure. Such a situation only occurs in relation to judges of the Supreme Court who received nominations under such conditions.' Similarly, also the Supreme Administrative Court does not take the position that all persons appointed upon the request of the reorganised NCJ are deprived of the status of judge. Although in a series of judgments issued

[36] See in particular: Joined Cases C-585/18, C-624/18 et C-625/18, A.K. et al., §§ 119–153, EU:C:2019:982. See also: Krajewski and Ziółkowski (2020).

[37] Case C-487/19, W.Ż., EU:C:2021:798.

[38] Case C-508/19, M.F. v. J.M., EU:C:2022:201; Joined Cases C-491/20, C-492/20, C-493/20, C-494/20, C-495/20, C-496/20, C-506/20, C-509/20, C-511/20, W.Ż. et al., EU:C:2022:1046.

[39] Opinion of A.G. Tanchev in Case C-508/19, M.F. v. J.M., EU:C:2021:290.

in 2021, the Supreme Administrative Court quashed resolutions of the new NCJ regarding the nomination of candidates for appointment as judges to the President, citing irregularities in the composition of this body, it also noted that the effects of these judgments 'do not relate to the constitutional validity and effectiveness of presidential acts appointing judges to the Supreme Court based on recommendations presented by the NCJ in the challenged resolution. In the current legal state, these acts are not subject to judicial review and cannot be invalidated.'[40] When considering requests to recuse judges appointed upon the recommendation of the new NCJ, the Supreme Administrative Court emphasizes the 'need for an individual approach to judgments rendered by judges appointed to the ordinary or administrative courts, as well as issues related to their recusal,' and highlights that irregularities in the judge appointment procedure do not constitute an independent basis for their recusal – 'there must also be a specific circumstance that leads to a violation of the standard of independence and impartiality.'[41]

Views that completely negate the judicial status of newly appointed persons are, however, presented in the legal literature. For example, Kappes and Skrzydło argue that, since 'the neo-NCJ was appointed in clear violation of Article 187(1) of the Constitution, it is not a National Council of the Judiciary within the meaning of the Polish Constitution'.[42] In these circumstances, the new judges must be considered to have been appointed by the President without a motion of the NCJ, and therefore in violation of a clear constitutional requirement.[43] At the same time, the authors admit that the resolution of the Supreme Court did not resolve this issue.[44] Similar arguments have been made by Wrzołek-Romańczuk[45] and Stefański.[46] However, not all scholars agree. Roszkiewicz, for example, assesses the views on the non-existence of judicial appointments as 'too radical' and argues out that the appropriate solution to the problem at hand would be to 'establish a mechanism to cure the legal defects accompanying judicial appointments'.[47]

In my opinion, when assessing the status of the defective appointees, it should be borne in mind that any individual act – for example, a decision or an order – may be vitiated by legal defects, causing different legal effects. Clearly, not every violation of the law in the proceedings leading to the issuance of a given decision will be grounds for its annulment, let alone for considering it a so-called non-act, which is invalid ab initio and do not produce any legal effects. This is no different in the case

[40] See: Supreme Administrative Court, judgment of 6 May 2021 r., case ref. II GOK 2/18; Supreme Administrative Court, judgment of 6 May 2021 r., case ref. II GOK 3/18; Supreme Administrative Court, judgment of 6 May 2021 r., case ref, GOK 5/18; Supreme Administrative Court, judgment of 6 May 2021 r., case ref. II GOK 6/18; Supreme Administrative Court, judgment of 6 May 2021 r., case ref. II GOK 7/18; Supreme Administrative Court, judgment of 6 May 2021 r., case ref. II GOK 4/18.

[41] Supreme Administrative Court, decision of 10 August 2022, case ref. I GSK 2156/18.

[42] Kappes and Skrzydło (2020), p. 136 (translation – Author).

[43] Kappes and Skrzydło (2020), p. 136.

[44] Kappes and Skrzydło (2020), p. 135.

[45] Wrzołek-Romańczuk (2021).

[46] Stefański (2021), p. 9.

[47] Roszkiewicz (2022), p. 75–96 (translation – Author).

of defects in judicial appointment acts; they too will produce different legal effects depending on the gravity and nature of the violations.

Legal defects in acts of appointment can be divided into two groups: insignificant defects, which will not lead to the court being deprived of the attribute of being 'established by law'; and significant defects, which will. The distinction should be made using the test developed in *Ástráðsson v. Iceland*. Within the category of significant defects, a further distinction can be made between defects leading to the non-existence of the act of appointment and defects not having this effect. Even though the adjudication of all judges appointed in significant violation of the law may lead to a violation of the right to a 'tribunal established by law', only those 'appointed' on the basis of a legally non-existent act of appointment will be completely devoid of judicial status, without necessity to remove them by court in a formalised procedure.

In the Polish legal science, the concept of non-existence of legal acts of state authorities has been analysed mostly by administrative law scholars.[48] In this context, the non-existence of acts of appointment of administrative bodies was also considered. According to some scholars, such act may be considered non-existent if the appointment is made by an unauthorised body; if the appointment act itself is deprived of necessary elements such as the signature; or if it has not been delivered to the appointed person.[49]

Certainly, concepts developed in the administrative law science cannot be easily applied to the appointment of judges. Even leaving aside the differences between administrative organs, which exercise executive power, and judges who hold judicial power, in the Polish legal system, the act of appointing a judge is not a typical administrative act. While legality of regular administrative acts may be subject to review, including the review by administrative courts, which may lead to their eventual invalidation, currently the Polish law does not provide for any analogous procedure for examining the validity of acts of appointments of judges. Nevertheless, irrespective of these differences, the principle of legal certainty require that individual acts of constitutional state bodies may be deemed non-existent only in exceptional circumstances, in the event of the most serious legal defects.[50] The dangers of declaring the non-existence of judicial appointments too easily are evidenced, inter alia, by the crisis surrounding the Polish Constitutional Tribunal, which began, after all, with the declaration of the Sejm in November 2015 that the resolutions on the election of judges of the Constitutional Tribunal adopted by the Sejm of the previous term of office were 'devoid of legal force'.[51] It is worth noting, moreover, that in its case law preceding the current constitutional crisis, the Polish Supreme Court approached the issue of the non-existence of individual acts affecting the status of a judge quite cautiously. In a resolution of the full bench dated 28 January 2014 (case ref. BSA I-4110-4/13), the Supreme Court stated that a decision by the

[48] See, for example: Gajewski and Jakubowski (2013).

[49] Górnicz-Mulcahy (2018), p. 273–274.

[50] See, for example: Constitutional Tribunal, decision, 7 January 2016, no. U 8/15.

[51] Sadurski (2019b), p. 62–63.

Minister of Justice to transfer a judge to another position without their consent can only be signed by the Minister of Justice and not by some other officials authorised by him. However, it also ruled that all decisions issued before the resolution, signed by secretaries or undersecretaries of state at the Ministry of Justice, remain effective. Therefore, the Supreme Court did not deem those decisions as non-existent, although the fact that they were signed by an unauthorized entity appears to be an obvious and significant flaw.

It follows, that an act of judicial appointment should only be deemed non-existent in the event of glaring and obvious defects apparent at first glance.[52] Such defects could include, for example, lack of the President's signature under the act of appointment, or issuing the act of appointment in complete disregard of procedural requirements – that is, without a request from the NCJ.

In my view, there are no sufficiently convincing arguments to conclude that the appointments of judges made at the request of the reorganised NCJ are non-existent. Undoubtedly, persons meeting the statutory criteria were appointed by the President, a competent body. Moreover, the President acted on the basis of a motion of the NCJ. To establish the non-existence of the act of appointment, it would therefore be necessary to show that this motion did not legally exist, but this in turn would require several assumptions which are by no means obvious. Firstly, that the unconstitutionality of the provisions regulating the procedure for the election of judges-members of the NCJ means that the NCJ is not a body referred to in the Constitution and that all its acts are non-existent. Secondly, that these determinations can be made without a judgment of the Constitutional Tribunal which would formally establish the unconstitutionality of the challenged regulations and determine their legal consequences. This would require considering the theoretical question of when the unconstitutionality of a law is so obvious that it can be concluded, without a judgment of the Constitutional Tribunal, that it is ab initio invalid. In this respect, one could note the view of Podkowik, according to whom what matters for the assessment of whether a normative act is a legally non-existent 'non-act' is not its content (even if it is manifestly inconsistent with the Constitution), but whether it was issued in gross violation of the rules of competence and procedure.[53] In the case of law reforming the NCJ, however, no such blatant procedural violations of the Constitution have occurred.[54]

A view based on the non-existence of the NCJ appointment proposals could also have very far-reaching consequences as it could lead to negation of the status of all the newly appointed judges. This group is not homogeneous: there are differences between judges of the Supreme Court (especially – former judges of the Disciplinary Chamber which, according to some, was an unconstitutional extraordinary court[55]), judges of ordinary courts who where promoted in suspicious circumstances

[52] See also: Ziółkowski (2020), p. 78.
[53] Podkowik (2010), p. 16–28.
[54] See also: Ziółkowski (2020), p. 78.
[55] Wróbel (2019).

and those who simply started their professional careers in unfortunate times.[56] It should also be taken into account that in case of some of the appointments, breaches of domestic law are not limited to the problem of composition of the NCJ. Appointments to the Supreme Court are tainted also with another legal defect, namely the lack of the Prime Minister's countersignature on the act of the President announcing vacant positions in this court.[57] Moreover, some of the appointments to the Supreme Court were made by the President despite suspension of the enforceability of a the NCJ's resolutions by the Supreme Administrative Court. And what is more, despite the fact that all appointments made upon the motion of the reorganised NCJ are flawed, certainly not all the defectively appointed judges lack internal independence and impartiality. It is true that the aforementioned draft by Iustitia recognizes differences between various categories of judges by giving a different status to persons appointed to their first judicial post after a period of assessorship, but this may be regarded as a sign of inconsistency. Notwithstanding the fact that the mode of appointment of such judges differs in some respects from other appointments, formally, it still requires an appointment by the President on the proposal of the NCJ. The President cannot appoint any judge without a proposal from the NCJ, whether the person in question is a judge of the Supreme Court or a former assessor appointed to a first judicial post in a District Court. If, therefore, the current NCJ is incapable of passing a legally effective resolution, the appointments of former assessors would also have to be considered non-existent. It seems, therefore, that the differences between various categories of newly appointed judges could be better taken into account in a more individualised review procedure, without resorting to the concept of non-existent acts.

Furthermore, a declaration that the appointments of judges are legally non-existent would arguably also have an impact on the legal effects of rulings issued by them. Generally, all of these rulings would have to be considered as capable of being challenged via ordinary or extraordinary legal remedies.[58] In the case of persons who had not exercised any judicial functions prior to the defective appointment, one might even wonder whether 'rulings' issued by them would have any legal effect at all. Since, if such persons are not and have never been judges, they should not be able to issue a legally binding decision. Such consequences, however, would go much further than those set out in the Supreme Court's resolution and could even lead to legal chaos, given the huge number of rulings issued by defectively appointed judges over the past five years.

[56] See also: Pech (2020), p. 23–29.

[57] The problem of lack of countersignature, which was required under Article 144 of the Constitution, was discussed in the Reczkowicz case, nevertheless ultimately the Court held that given the manifest violation of domestic law on account of participation of politicised NCJ in the process of judicial appointments was already established, it was not necessary to deal with this potential second breach of law separately (Reczkowicz, *supra* n. 6, § 265).

[58] Iustitia's draft regulates only the issue of the effects of judgments of the Supreme Court and the Supreme Administrative Court in formations with defectively appointed judges, leaving the problem of judgments issued by other courts to be decided in individual court proceedings.

In light of the above arguments, the view that judges appointed upon the recommendation of the reorganized NCJ are completely devoid of judicial status seems unfounded. These individuals are formally judges, albeit appointed in violation of the law. Consequently, their removal from office by virtue of a law would contradict Article 180(2) of the Constitution, which, as already indicated, unequivocally links the permissibility of removing a judge to the issuance of a court judgment. The same observation applies to the transfer of judges to positions in other courts without their consent. The inconsistency of such actions with the Constitution is also relevant for assessing their permissibility in light of the provisions of the Convention. One of the fundamental conditions for permissible interference with rights protected under the Convention is the requirement of legality, which includes also compliance with the national constitution. Nevertheless, the main subject of this article is the analysis of measures regarding the removal or transfer of improperly appointed judges in terms of the requirements arising from the ECHR and the case law of the ECtHR, rather than the Polish Constitution.

In the two sections below, the issue of measures that can be applied to remedy the situation in the Polish judiciary will be analysed in light of two provisions: Article 6 and Article 8 of the Convention. As explained further in this article, these two provisions that are most frequently applied in cases concerning the rights of judges pending before the ECtHR. It should be noted that, thus far, the ECtHR has never assessed the procedures for removing improperly appointed judges from office. Nevertheless, this article proceeds on the assumption that when evaluating measures taken against improperly appointed judges, the standards developed by the ECtHR in cases concerning properly appointed judges must be applied. The application of these standards, however, must take into account the margin of appreciation afforded to the state, which undoubtedly needs to be broader in procedures aimed at verifying or removing improperly appointed judges. Firstly, the situation in which thousands of improperly appointed judges operate within the judiciary is harmful from the perspective of individual rights. The process of addressing this systemic and extraordinarily complex problem could even be compared to transitional justice measures. Secondly, the existing standards have been developed mainly in cases where specific sanctions were imposed on judges in circumstances indicating improper motives on the part of those in power, which undoubtedly posed serious threats to judicial independence. However, the need to regulate the status of improperly appointed judges arises from the case law of the CJEU, the ECtHR, and Polish courts, and thus such process must be distinguished from purely politically motivated purge in the judiciary.

Nevertheless, the margin of appreciation of Polish authorities would not be unlimited. The case law of the Court clearly shows that even in the process of addressing complex systemic problems, certain minimum standards must be observed. This conclusion stems from, among others, the judgment in the case of Ovcharenko and Kolos v. Ukraine, which concerned the dismissal of the judge of the Constitutional Court as part of the lustration process following the period of President V. Yanukovych's

rule[59]. The Court highlighted that it 'is mindful of the particular context in which the applicants were dismissed. The massive popular protests and violent events leading to the extraordinary change of State power in Ukraine must have influenced the decisions taken by Parliament in that period'[60]. Nevertheless, it held that these circumstances 'did not justify the failure by the authorities to respect the basic Convention requirements of lawfulness and foreseeability.'[61] It is therefore important to consider what minimum standards must be observed and which boundaries should not be crossed even when pursuing a legitimate goal of improving the situation in the Polish judiciary.

5 Removal of Unlawfully Appointed Judges and Article 6 of the ECHR

In the following section the measures that could be taken against defectively appointed persons will be examined under Article 6 of the Convention, which guarantees everyone the right to a court. In this regard it will be first analysed whether cases concerning removal or involuntary transfer of unlawfully appointed judges could fall within the scope of this provision at all. To address this issue it will be necessary to establish whether unlawfully appointed persons have any 'rights' protecting them against removal or transfer and if so, whether such rights have civil character within the meaning of the Convention. Subsequently, the two abovementioned theoretical approaches to the problem of unlawfully appointed judges (see Sect. 3) will be discussed from the perspective of requirements stemming from Article 6. The analysis begins with examining the permissibility of ex lege removal of the mentioned group of judges, followed by exploring the concept that entails a more individualized verification of appointments.

5.1 Applicability of Article 6

Article 6 applies to two categories of cases – criminal and those involving 'civil rights and obligations'. Certainly, the removal of a defectively appointed judge from office cannot be described as a 'penalty'.[62] The issue of classifying it as a case involving 'civil rights and obligations' is more complex. According to the ECtHR, determining whether Article 6 in its civil aspect may be applied to a case requires an assessment of whether it involves a 'genuine and serious dispute over right' and, if so, whether that right is civil in nature.[63]

[59] European Court of Human Rights, Ovcharenko and Kolos v. Ukraine, applications nos. 27276/15 and 33692/15, judgment, 12 January 2023.

[60] Ovcharenko and Kolos, *supra* n. 59, § 109.

[61] Ovcharenko and Kolos, *supra* n. 59, § 109.

[62] The ECtHR has repeatedly held that the various disciplinary or quasi-disciplinary proceedings concerning judges do not constitute criminal proceedings within the meaning of Article 6 of the ECHR, see e.g. Grand Chamber of the European Court of Human Rights, Ramos Nunes de Carvalho e Sá v. Portugal, applications nos. 55391/13, 57728/13 and 74041/13, judgment, 6 November 2018, §§ 124–128.

[63] See e.g. Grand Chamber of the European Court of Human Rights, Grzęda v. Poland, application no. 43572/18, judgment, 15 March 2022, § 257.

With regards to the existence of 'right' the Court underlines that 'although there is in principle no right under the Convention to hold a public post in the administration of justice', some rights related to holding the position of a judge may arise out of the domestic law.[64] Therefore, the starting point in assessing whether the applicant (including the judge) has any 'rights' within the meaning of the ECHR in a given case must always be national law.[65] In this regard, it should be noted that the Polish Constitution provides that, 'judges are appointed for an indefinite period' (Article 179) and that they may be recalled from office or transferred to another bench or position against their will only 'by virtue of a court judgment and only in those instances prescribed in statute' (Article180[2]). The Polish Constitutional Tribunal holds the view that the constitutional guarantees of judicial independence do not confer any constitutionally protected subjective rights on judges,[66] nevertheless this fact alone does not exclude the possibility of asserting that such provisions constitute a source of 'rights' for judges within the meaning of the ECHR. For example, in the cases of Broda and Bojara v. Poland, concerning the dismissal of court presidents by the Minister of Justice, and Grzęda v. Poland, regarding the termination of the term of office of members of the NCJ, the ECtHR recognized that the complainants had 'rights' within the meaning of Article 6 of the ECHR, mainly because the national law regulated the duration of their tenure and protected them against premature dismissal.[67] Therefore, since the Constitution expressly protects judges from removal and transfer to other positions against their will, even more strongly than court presidents or members of the NCJ, such actions could be perceived as interfering with their 'rights'. Moreover, even apart from the provisions of the Constitution and the possibility of deriving subjective rights of judges from them, it is beyond doubt that judges have certain rights related to their employment relationship, including, above all, the right to remuneration (which is also protected by the Constitution). The possibility of categorizing disputes related to the involuntary transfer[68] or removal of a judge from judicial office[69] as pertaining to the 'rights' of judges is further confirmed by judgments of the Court in cases against other European states.

There is therefore no doubt that Polish judges are entitled to certain 'rights' that protect them from being removed from office or transferred to other positions against their will. However, the question arises whether these rights also apply to judges appointed in violation of the law. In this context one could theoretically argue

[64] European Court of Human Rights, Gumenyuk and others v. Ukraine, application no. 11423/19, judgment, 22 July 2021, § 49.

[65] See e.g. Grzęda, *supra* n. 63, § 259.

[66] See e.g. Constitutional Tribunal judgment of 7 November 2005, case ref. P 20/04; Constitutional Tribunal judgment of 30 November 2015, case ref. SK 30/14.

[67] European Court of Human Rights, Broda and Bojara v. Poland, applications nos. 26691/18 and 27367/18, judgment, 29 June 2021, §§ 104–109; Grzęda, *supra* n. 63, §§ 266–286. See also: European Court of Human Rights, Żurek v. Poland, application no. 39650/18, judgment, 16 June 2022, § 131.

[68] European Court of Human Rights, Bilgen v. Turkey, application no. 1571/07, judgment, 9 March 2021, §§ 53–64.

[69] See e.g. Ovcharenko and Kolos, *supra* n. 59, § 113.

that domestic law does not protect this group of judges against removal from office because, due to fundamental legal flaws in their appointment, they have never been judges. However, as we have seen, such arguments are problematic because it is not clear that unlawfully appointed persons are not judges. On the contrary, it is easier to argue that, despite legal defects in their appointment, formally they are judges whose participation in court panels may, at least in some cases, lead to violation of a right to 'tribunal established by law'. Moreover, their professional status is respected by the state, as they receive salary or enjoy other benefits related to their employment status. They may therefore reasonably claim that they have certain 'rights' the removal of which should be reviewed by courts. Nor does the applicability of Article 6 depend on finding with certainty that a person actually enjoyed a particular right. It is sufficient to establish that there was a 'genuine and serious' dispute over the existence of the right in question, or the scope of that right and the manner of its exercise.[70] According to the ECtHR, 'In determining whether there was a legal basis for the right asserted by the applicant, the Court needs to ascertain only whether the applicant's arguments were sufficiently tenable, not whether he would necessarily have been successful had he been given access to a court'.[71] Therefore, mere doubts about the judicial status of unlawfully appointed persons would not be sufficient to discard Article 6.

Likewise, potential attempts to justify disapplication of Article 6 on the basis that judges acquired their 'rights' connected to their judicial office unlawfully (*Ex injuria jus non oritur*[72]) do not seem entirely convincing. Of course, the principle of the irremovability of judges or legal certainty cannot justify infringing an individual's right to a 'tribunal established by law'. Nevertheless, I do not consider the principle of *ex injuria* to be a sufficient basis for removal of incorrectly appointed persons without providing them with access to court. The principle of *ex injuria* is not absolute – not every entitlement acquired by an individual in breach of the law can be easily withdrawn, especially if such breach was committed by the State rather than by individuals concerned. Authorities must be guided not only by the formally interpreted principle of legalism, but also by other important values, such as legal certainty or protection of individuals' trust to the State. One may ask, of course, whether 'upholding an illegal judicial appointment facilitates legal certainty'.[73] Nevertheless, in my opinion in the Polish context the importance of legal certainty cannot be easily ignored. It is worth recalling once again that, at the moment, there are

[70] See e.g. Grand Chamber of the European Court of Human Rights, Regner v. Czech Republic, application no. 35289/11, judgment, 19 September 2017, § 99.

[71] Grzęda, *supra* n. 63, § 268.

[72] In the context of the crisis around the judicial appointments in Poland, the principle of *ex injuria jus non oritur* was referred to, inter alia, in Advocate General Tanchev's opinion in the case C-508/19: "It must be recalled that law does not arise from injustice (*ex iniuria ius non oritur*). If a person was appointed to such an important, institution in the legal system of a Member State as is the Supreme Court of that State in a procedure which violated the principle of effective judicial protection, then he or she cannot be protected by the principles of legal certainty and irremovability of judges." (§ 54); See also: Markiewicz (2022).

[73] Karlsson (2022), p. 1067.

more than 2000 judges appointed at the request of the reorganised NCJ. Over the last 5 years, they have issued millions of rulings in individual cases. According to the resolution of the Supreme Court, not all of these rulings can be challenged and thus they could be enforced. Furthermore, the judicial status of all these individuals has not yet been unequivocally negated by the Polish courts and is recognised by the Polish State. It would not be easy to ignore all these changes and consequences simply by referring to the *ex injuria* principle. Finally, it must be underlined that the mere conclusion that Article 6 can be applied to the issue of the removal of defectively appointed persons does not completely invalidate the principle of *ex injuria*. Applicability of Article 6 does not mean that such persons can never be removed from office. This could still be permissible, but only in a fair procedure.

Establishing that there is a 'genuine and serious dispute over a right' in a given case is not sufficient to determine that it falls within the scope of Article 6. For this, it must be shown that the right at issue is of a civil nature. In the past, the ECtHR has recognised that employment disputes, including those over the dismissal or removal from office of public officials, also concern civil rights.[74] It appears that, since the defectively appointed judges were recognised by the state authorities as judges, their possible removal from office or involuntary transfer to a lower court may constitute a case concerning their civil rights.

However, in line with the interpretation in *Vilho Eskelinen*,[75] Article 6 may not apply to cases involving public officials if domestic law precludes access to court for certain disputes, and this exclusion is objectively justified by State interests. In *Vilho Eskelinen* the Court held that such exclusion must be formulated 'expressly', however in the more recent judgment in *Grzęda* the Grand Chamber departed from that view[76] and stated that the exclusion may be also of 'an implicit nature, in particular where it stems from a systemic interpretation of the applicable legal framework or the whole body of legal regulation.'[77] At the same time, however, the ECtHR holds that 'it had to determine whether access to a court had been excluded under domestic law prior to the time, rather than at the time, when the impugned measure concerning the applicant was adopted.'[78] Regardless of the modification of the standard in *Grzęda*, it would be very difficult to prove that the Polish law excluded access to court for disputes over the removal of unlawfully appointed judges. Article 180(2) of the Constitution stipulates unequivocally that 'Recall of a judge from office, suspension from office, transfer to another bench or position against his will, may only occur by virtue of a court judgment'. Therefore, to successfully prove that the domestic law effectively exclude access to court, one would have to establish that incorrectly appointed judges are not judges at all, what, in the light of the above-mentioned considerations, would not be an easy task.

[74] See e.g. Grand Chamber of the European Court of Human Rights, Baka v. Hungary, application no. 20261/12, judgment, 23 June 2016, § 105.

[75] Grand Chamber of the European Court of Human Rights, Vilho Eskelinen and others v. Finland, application no. 63235/00, judgment, 19 April 2007, § 62.

[76] See also: Leloup and Kosař (2022), p. 761–762.

[77] Grzęda, *supra* n. 63, § 292.

[78] Grzęda, *supra* n. 63, § 290.

Even assuming that such a hypothetical exclusion from access to court actually existed, it would have to be justified by the public interest. According to the ECtHR, such a justification might exist where there is a 'special bond of trust and loyalty' between the officer and the State, or where the dispute concerns the exercise of state authority. In cases involving duly appointed judges, the ECtHR has drawn attention to the specificity of the status of judges and the tasks they perform. For this reason, it has stated that 'it would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching their individual independence and impartiality'.[79] As Leloup aptly pointed out, in these circumstances 'it will be very difficult – if not near impossible – for any of the Contracting Parties to make sure that both Eskelinen-criteria are still fulfilled when Judges are at issue'[80]. Obviously, there are differences between the status of lawfully and unlawfully appointed judges, so the standards developed by the Court in cases concerning the former cannot be automatically applied to the latter. Nevertheless, it would be difficult to prove that a special bond between a judge and the state had arisen as a result of violations of law in the process of appointment. Consequently, in my view, as a rule, the removal from office of defectively appointed judges would constitute a case concerning their 'civil rights and obligations', and thus would fall within the scope of Article 6.

5.2 Permissibility of the Removal of Unlawfully Elected Judges *ex lege*

As I have already indicated, one proposal to solve the problem of defective appointees would be to enact a law which would remove them from office *ex lege*, possibly allowing them to return to their previously held positions. Such a solution would at first sight appear to conflict with Article 6, since the removal from office would be made without individualised judicial proceedings. Moreover, due to the limitations of the Polish constitutional complaint, the dismissed judges would be unable to challenge the constitutionality of the law before the Constitutional Court.[81] In assessing the admissibility of such a solution, however, two issues must be considered.

Firstly, in its case law, the ECtHR has repeatedly presented the view that 'Article 6 of the Convention does not guarantee a right of access to a court with power to invalidate or override a law enacted by the legislature'.[82] Theoretically, this principle could apply to removal of judges *ex lege* as all legal effects would be produced by the virtue of law, without needing any individualised decisions. Therefore,

[79] Bilgen, *supra* n. 68, § 79.

[80] Leloup (2023), p. 34.

[81] Constitutional complaint complaint is formally inadmissible in cases where the rights or freedoms of individuals were limited *ex lege*, without carrying out any proceedings before court or non-judicial bodies, see: Constitutional Tribunal decision of 24 November 2004, case ref.: Ts 57/04; see also: Trzciński and Wiącek (2016), p. 907. This problem was raised also in Grzęda, *supra* n. 63, § 293.

[82] European Court of Human Rights, Posti and Rahko v. Finland, application no. 27824/95, judgment, 24 September 2002, § 52; European Court of Human Rights, Sakskoburggotski and Chrobok v. Bulgaria, applications nos. 38948/10 and 8954/17, 7 September 2021, § 272.

to challenge their removal, a dismissed judge would have to challenge the act of legislation.

The problem, however, is that in recent case law, the ECtHR has repeatedly found violations of Article 6 in cases where judges or presidents of courts were removed from their positions by a general act of legislation. The best example here is the case of *Grzęda v. Poland*, concerning the shortening of the terms of office of members of the National Council of the Judiciary. Their terms were shortened *ex lege*, so the dismissed members of the NCJ had no legal remedy. In its ruling, the Grand Chamber of the Court did not refer to the abovementioned principle of impossibility to derive from Article 6 a right of access to a court equipped with the power to override or invalidate a law; it simply applied the test developed in the *Vilho Eskelinen* case. This approach adopted by the Court was criticised also in the dissenting opinion of Judge K. Wojtyczek, who considered that in doing so, the Grand Chamber 'tacitly departs from the Court's earlier case-law which emphasised that Article 6 does not grant access to a court with the power to invalidate legislation'[83]. According to Wojtyczek, the consequence of the judgment is the recognition of a right of 'access to a court empowered to review and invalidate legislative measures touching upon judicial independence and impartiality'.[84] The lack of clarity of the interpretation of Article 6 adopted by the Court was criticised also in the literature. According to Leloup and Kosař, one, although unsatisfactory, explanation of the Court's position presented in *Grzęda* could be found in para. 299 of the judgment where the ECtHR argues that the law which shortened the term of office of the applicant (and other judicial members of the NCJ) cannot be regarded as an instrument of general application because 'it was directed at a specific group of fifteen clearly identifiable persons – judicial members of the NCJ elected under the previous regulation, including the applicant – and its primary purpose was to remove them from their seats on that body. It was a one-off statutory amendment that terminated *ex lege* the constitutionally prescribed tenure of the NCJ's judicial members'.[85] However, as Leloup and Kosař noted, the Court did not provide any meaningful criteria for the distinction 'between permissible acts of a general nature and impermissible ad hominem legislation.'[86] Moreover, they argue, other recent judgments suggest that the Court developed 'a right for judges to challenge legislation when it affects their independence', without acknowledging it explicitly.[87]

At present, therefore, the ECtHR's case law is highly unclear, and it is difficult to formulate clear-cut conclusions on the permissibility or impermissibility of applying Article 6 to challenge legislative acts of a type analysed here. A clarification of the standard by the Court would be highly advisable. Such a clarification could involve clear recognition of the right of judges to challenge legislative acts that interfere with their judicial independence, as suggested by the authors cited above. However,

[83] Grzęda, *supra* n. 63, § 4.4.2 of the dissenting opinion of judge Wojtyczek.

[84] Grzęda, *supra* n. 63, § 6.2 of the dissenting opinion of judge Wojtyczek.

[85] Leloup and Kosař (2022), p. 776.

[86] Leloup and Kosař (2022), p. 777.

[87] Leloup and Kosař (2022), p. 777–778.

even if such a right were indeed explicitly declared, legitimate doubts could arise as to its detailed scope and content and, in the particular context discussed here, whether it could be exercised by judges appointed unlawfully. Questions could also arise as to why such a right to challenge acts of legislation should be limited to judges only? For example, would not a law dismissing all (or only some) civil servants or academic teachers *ex lege*, without providing them with an access to court, also be a threat to the rule of law? The Court could therefore go even further and recognise that the Convention does guarantee the right to a court equipped with the power to annul or derogate from the provisions of a law, as suggested by Wojtyczek in his another separate opinion.[88] This could however lead to further problems, especially given that not all European states permit judicial review of legislative acts.[89] Perhaps, then, the Court could take an alternative approach and conclude that the right of access to a court, protected under Article 6[90], simply precludes imposition of certain restrictions with the rights of individuals *ex lege*, without individualized review. Of course, the devil is in the details, and it would be very difficult to determine precisely which interferences can be introduced *ex lege* and which not.

Leaving aside the issue of review of legislative acts, the second problem which should be analysed in the context of *ex lege* removal of judges is connected to the fact that the right to court is not absolute and so it may be subject to certain limitations.[91] However, to be compatible with Article 6, such limitations must not impair the essence of the right to court and must serve a legitimate aim. Moreover, there must be 'a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[92] A complete deprivation of access to court is the most serious restriction of a right guaranteed in Article 6, and requires particularly convincing reasons to be justified.[93] The Court underlines, in the context of protection of rights of judges, that 'Restriction of the right of a member of the judiciary to contest premature dismissal or a measure which amounts to constructive dismissal may be incompatible with the independence of the judiciary, where such measure is taken without any specific reason'[94]. In the case analysed here, I see no such compelling reasons which could justify complete exclusion of access to court. Moreover, there are less restrictive alternatives[95] by which the state may achieve the

[88] European Court of Human Rights, Xero Flor w Polsce sp. z o.o. v. Poland, application no. 4907/18, judgment, 7 May 2021, § 16 of the partly concurring, partly dissenting opinion of judge Wojtyczek.

[89] Leloup and Kosař (2022), p. 778.

[90] See e.g. European Court of Human Rights, Golder v. the United Kingdom, application no. 4451/70, judgment, 21 February 1975, §§ 35–36.

[91] See e.g. Grand Chamber of the European Court of Human Rights, Zubac v. Croatia, Application no. 40160/12, judgment, 5 April 2018, § 78.

[92] Grand Chamber of the European Court of Human Rights, Markovic v. Italy, Application no. 1398/03, judgment, 14 December 2006, § 99.

[93] See e.g. Broda and Bojara, *supra* n. 67, § 148.

[94] Gumenyuk, *supra* n. 64, § 72.

[95] The availability of alternative means of redress was one the factors taken into account when assessing the proportionality of restricting access to court; for example, in Grand Chamber of the European Court of Human Rights, Waite and Kennedy v. Germany, Application no. 26083/94, judgment, 18 February 1999, § 68–70; European Court of Human Rights, A. v. the United Kingdom, Application no. 35373/97, judgment, 17 December 2002, § 86.

legitimate aim of safeguarding the individual's right to a 'tribunal established by law'. I am not convinced by the argument of the authors of the Iustitia draft that without invalidating the appointments *ex lege* and opening the competitions anew, it would not be possible to cure violations of law made at the stage of proceedings before the reorganised NCJ due to a violation of constitutional rights of persons who could not have been required to participate in procedures before unlawful NCJ.[96] It seems that robust verification procedures before independent organs could effectively eliminate problems arising from defective appointments. It is worth to note that, as already mentioned, the Committee of Ministers urged Polish authorities to 'address the status of all judges appointed in deficient procedures involving the NCJ', without specifying that this must involve removal of defectively appointed persons. Moreover, memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights explicitly mentions 'introduction of mechanism for verification of deficient judicial appointments' as one of possible general measures that the Polish authorities may consider implementing in order to execute Court's judgments.[97]

Consequently, it would be impermissible to completely exclude access to court in cases concerning the removal from office of defectively appointed judges. The same conclusion applies to the compulsory transfer of such judges to the judicial positions they held prior to their unlawful appointments.[98] At the same time, I do not rule out completely that some future developments may change these conclusions. This could happen, in particular, if the Supreme Court developed a settled case law according to which defective appointments are devoid of legal force and as a result incorrectly appointed persons have never become judges. However, as already mentioned, at the moment the arguments justifying complete exclusion of access to court in such cases are simply not strong enough.

5.3 Access to Court in the Procedure for Verification of Unlawful Judicial Appointments

Given that the removal of defectively appointed judges *ex lege* could interfere with Article 6 rights, it would be reasonable to introduce a procedure for the individual verification of the status of this group of judges; a procedure which should respect their right to a fair trial. This could be achieved via different mechanisms, and, in accordance with the principle of subsidiarity, the national authorities will have certain discretion in choosing the most adequate means. One such mechanism could involve initiation of disciplinary proceedings against unlawfully appointed judges

[96] Explanatory memorandum to the Draft Act amending the Act on the National Council of Judiciary, the Supreme Court Act and some other acts, pp. 15–16, https://www.iustitia.pl/images/A/UZASADNIENIE_DO_PROJEKTU_USTAWY_o_zmianie_ustawy_o_Krajowej_Radzie_S%C4%85downictw2-1po_popr.pdf.

[97] Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights, H/Exec(2022)17, https://hudoc.exec.coe.int/eng?i=HEXEC(2022)17-POL-RECZKOWICZ-GROUP-BRODA-BOJARA-ENG.

[98] Bilgen, *supra* n. 68, §§ 92–97.

who violated the principles of judicial ethics.[99] Such a solution would allow the permanent removal from the judiciary of persons guilty of the most serious violations of independence and impartiality; however, it would not resolve the problem of all unlawfully appointed judges.

From this perspective, the more effective solution would be to introduce a procedure for the verification of individual appointments, which could end either with the removal of a defectively appointed judge from office (or their transfer to a previously held position) or some form of validation of their appointment, by which the original defects would be legally cured.[100] It is worth noting that the Convention does not require that the entire proceedings take place before a body satisfying the criteria of Article 6; it is also permissible for the decision to be taken by a non-judicial body whose decision would then be subject to judicial review.[101] In the light of ECtHR case law, it would even be permissible to establish a new body whose sole purpose would be to carry out a procedure for the verification of defectively appointed judges. If this body fulfilled the Convention requirements for independence and impartiality, it could even be considered a 'court', as, in the Court's view, this concept is not limited to bodies that are part of a country's general judicial system.[102] Moreover, it follows from ECtHR case law that even an independent judicial council can be considered a 'court' within the meaning of Article 6.[103] Arguably, this conclusion could also be applied to the Polish NCJ once its independence is restored. Entrusting such a competence to the NCJ or another body that is not a court in the sense of national law may, however, collide with Article 180(2) of the Polish Constitution, which requires any decision to recall or transfer a judge to be taken by a court; the types of courts are enumerated in Article 175(1). Hence, the optimal solution would be to introduce a procedure involving participation of an independent NCJ but reserving the power to remove a defectively appointed judge only for a court satisfying the standards of both the ECHR and the Constitution. Moreover, it goes without saying that the verification of appointments cannot be carried out by judges who themselves were improperly appointed, as their impartiality would certainly be doubtful.

[99] Bogdandy and Spieker (2021) go even further and propose initiation of criminal proceedings for abuse of power against unlawfully appointed judges who gravely violated EU law.

[100] The necessity to introduce such verification procedure was suggested by, among others, the Commissioner for Human Rights (Ombudsman) – see: Commissioner for Human Rights, opinion on the Act of 26 May 2022 amending the Act on the Supreme Court and certain other acts (Senate print no. 722), 1 June 2022, no. VII.510.49.2022/JRO, p. 6–7, https://bip.brpo.gov.pl/sites/default/files/2022-06/RPO_Senat_SN_ustawa_opinia_1.06.2022.pdf. See also: R. Piotrowski (Opinion to the Bill Amending the Act on the National Council of Judiciary and some other acts, 8 February 2020, p. 13–14, https://www.senat.gov.pl/download/gfx/senat/pl/senatinicjatywypliki/898/4/050_krasp.pdf).

[101] Ramos Nunes de Carvalho e Sá, *supra* n. 62, § 132.

[102] See e.g. European Court of Human Rights, Eminağaoğlu v. Turkey, application no. 76521/12, judgment, 9 March 2021, § 90; Leloup (2023), p. 45–46.

[103] See e.g. European Court of Human Rights, Olujić v. Croatia, application no. 22330/05, judgment, 5 February 2009, §§ 37–42.

6 Removal from Office and Article 8 ECHR

The above considerations concerned procedural issues; that is, whether defectively appointed judges who are removed from office should be provided with access to a court and all the associated guarantees stemming from Article 6. However, one should also consider whether the Convention affects the substantive aspects of the removal of defectively appointed judges from office. In this context, Article 8 is of fundamental importance. In jurisprudence to date, proportionality and legality of various measures taken against judges have been frequently considered through the prism of this provision.

6.1 Applicability of Article 8

According to ECtHR case law, disputes concerning various types of measures applied in the context of the employment relationship may fall within the scope of Article 8 when they have been applied for reasons relating to the employee's private life or when they affected the employee's private life.[104] On this basis, the ECtHR has also assessed disciplinary measures, including removal from office, imposed on judges.[105]

The removal of a judge for manifest violations of the law committed in the appointment procedure certainly cannot be regarded as an interference made for reasons relating to the judge's private life. Therefore, to trigger Article 8, it would be necessary to demonstrate that their removal from office had effects in that area. Such effects may concern the so-called 'inner circle' of life (i.e. the sphere in which an individual can conduct their personal life according to their own preferences), one's reputation, and the possibility to make and maintain acquaintances with other people. Also, according to the Court, Article 8 can only apply if the consequences are 'very serious' and affect the applicant's private life 'to a very significant degree'.[106]

It should be noted that often the removal of judges, for example in vetting or disciplinary proceedings, leads to interference with their reputation.[107] In case of the removal of defectively appointed judges, such interference could also occur if, for example, the removal is ordered by a court or other authority declaring that unlawfully appointed judge concerned is incapable of properly performing judicial functions or that they took up a judicial post solely because of their political connections. However, if the grounds for removal were to be based solely on a violation of law in the appointment procedure and not on any ethical misconduct committed by the judge, it would be difficult to speak of reputational interference. The lack

[104] Grand Chamber of the European Court of Human Rights, Denisov v. Ukraine, application no. 76639/11, judgment, 25 September 2018, §§ 115–117.

[105] See e.g. European Court of Human Rights, Xhoxhaj v. Albania, Application no. 15227/19, judgment, 9 February 2021; European Court of Human Rights, Oleksandr Volkov v. Ukraine, application no. 21722/11, judgment, 9 January 2013.

[106] Denisov, *supra* n. 104, § 116.

[107] See e.g. Xhoxhaj, *supra* n. 105, §§ 362–364; Ovcharenko and Kolos, *supra* n. 59, §§ 85–87.

of reputational impact could weaken the severity of the interference, but does not necessarily exclude applicability of Article 8. Removal from office is in itself a serious interference in the life of a judge, as it deprives them of the possibility to continue their previous job. It is worth noting that in the case of Gumenyuk and others v. Ukraine, the mere deprivation of a judge of the possibility to continue their previous work and life in their professional environment was considered sufficiently serious to be classified as an interference in their private life.[108] Removing a defectively appointed judge from office would also deprive them of their main source of income, and in ECtHR case law, financial consequences for the employee and their family are one of the factors taken into account in the context of Article 8.[109]

It follows that the removal of an unlawfully appointed judge arguably could be perceived as an interference with the right to privacy. However, transfer to a position occupied prior to the defective appointment would be a far less restrictive step – after all, the person loses neither a source of income nor the opportunity to continue their career. Still, in some circumstances such a measure may also cause serious implications for the judge's private life; for example, if it entailed them moving from one region of the country to another.

One could argue, however, that unlawfully appointed judges should not be protected by Article 8 because when they accepted appointments made via a procedure which was found to be inconsistent with international standards, they could have reasonably foreseen that their status would be challenged in the future. In this respect, reference could be made to the ECtHR's view that 'where the negative effects complained of are limited to the consequences of the unlawful conduct which were foreseeable by the applicant, Article 8 cannot be relied upon to allege that such negative effects encroach upon private life'.[110] At the same time, the ECtHR emphasises that Article 8 can only be disregarded on this basis if the fact of the unlawful conduct of the applicant is largely undisputed.[111] However, the removal of judges from office because of irregularities in their appointment is not a sanction imposed on a person because of their own unlawful conduct, but due to violation of law by the State. A judge entering a competition before the reorganised NCJ is not breaking the law, and may even claim to be guided by trust in the state and its organs. It is not clear, therefore, whether the principle invoked above applies in this situation. This does not mean, however, that the awareness of a judge of violations of law, and also their good or bad faith, have no importance at all; they could be taken into account when assessing the proportionality of the interference with private life.

[108] Gumenyuk, *supra* n. 64, §§ 87–88.
[109] Xhoxhaj, *supra* n. 105, § 363.
[110] European Court of Human Rights, Gražulevičiūtė v. Lithuania, application no. 53176/17, judgment, 14 December 2021.
[111] Denisov, *supra* n. 104, § 121.

6.2 Legality and Proportionality of Interference

Assuming that the removal from office of an unlawfully appointed judge constitutes an interference with that judge's right to privacy, such interference would have to meet the conditions of legality, legitimate purpose and 'necessity in a democratic society'.

The condition of legality may seem relatively easy to meet, although it must be borne in mind that it encompasses not only the mere existence of a legal basis for a particular interference, but also certain standards as to the quality of such law.[112] In the context of the removal of unlawfully appointed judges from office, it is essential that the national legislation is sufficiently clear and precise and that it provides the persons removed with protection against arbitrariness[113]. With regards to the means of such protection the Court underlines that 'What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question'.[114] Nevertheless, it also notes that 'The concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations'[115] This fact demonstrates even more clearly that the removal of judges *ex lege*, without ensuring their right to a court, would be questionable under the Convention. Indeed, even if we were to consider that Article 6 does not apply in this type of case, the dismissed judges could challenge the lack of access to a court by invoking Article 8 alone or in conjunction with Article 13.

The requirement of a legitimate aim seems easy to fulfil; the removal of a defectively appointed judge could certainly be considered to serve the protection of the rights and freedoms of others (more precisely, their right to a 'tribunal established by law') and the protection of order (by ensuring the proper functioning of the judiciary).

As regards the assessment of 'necessity in a democratic society', the ECtHR takes into account whether the interference is justified by the existence of a 'pressing social need' and whether it is proportionate to the aims it is intended to serve.[116] According to the Court, a certain margin of appreciation is available to States when assessing 'pressing social need' in a given situation.[117]. In cases against Albania, the ECtHR recognized that the introduction of a vetting procedure encompassing judges

[112] See e.g. European Court of Human Rights, Solska and Rybicka v. Poland, applications nos. 30491/17 and 31083/17, §§ 112–113.

[113] See e.g. Ovcharenko and Kolos, *supra* n. 59, § 94.

[114] Oleksandr Volkov, *supra* n. 105, § 170.

[115] European Court of Human Rights, Polyakova and others v. Russia, application no. 35090/09 and 3 others, judgment, 7 March 2017, § 91.

[116] See e.g. Grand Chamber of the European Court of Human Rights, Fernández Martínez v. Spain, Application no. 56030/07, judgment, 12 June 2014, § 124.

[117] See e.g. Grand Chamber of the European Court of Human Rights, S. and Marper v. the United Kingdom, Applications nos. 30562/04 and 30566/04, judgment, 4 December 2008, §§ 101–102.

and prosecutors responded to a 'pressing social need' due to 'alarming levels of corruption in the judiciary, as assessed by the national legislature and other independent observers' and the necessity to combat corruption, highlighted also by the domestic Constitutional Court.[118] Therefore, the Court concluded that systemic threats related to the highly improper functioning of the judiciary can constitute a 'pressing social need' justifying the implementation of a procedure that, under normal circumstances, would be considered a significant interference with judicial independence. Arguably, this conclusion may be applied also to the Polish context. The need to comply with the judgments of the ECtHR and the CJEU, to ensure respect for an individual's right to a 'tribunal established by law' and to eliminate from the judiciary individuals who are incapable of exercising adjudicative powers in an independent and impartial manner may be considered as 'pressing social need'.

The question arises, however, whether the removal of a defectively appointed judge from office will always satisfy the requirement of proportionality. In cases involving judges who have been duly appointed, the ECtHR has emphasised that removal from office should be treated as a measure of last resort, the application of which 'requires the consideration of solid evidence relating to the individual's ethics, integrity and professional competence'.[119] However, in the case of judges appointed in manifest violation of law, this high standard must certainly be relaxed, as they are not, from the perspective of the principles of rule of law and independence of the judiciary, in the same position as lawfully appointed judges. Therefore, the margin of appreciation available to the State must be relatively wider.

Nevertheless, such margin is certainly not unlimited, and it seems that the removal of all judges by virtue of legislation without granting them access to the court could exceed it. It would be difficult to ensure the compliance with the requirement of proportionality of interference in case of implementing such a far reaching measure without any individualization that would allow for the consideration of specific circumstances of each case, as well as without any form of review by an independent body. In the judgment concerning lustration of civil servants in post-Yanukovych Ukraine[120] the Court underlined that dismissals of individuals by operation of law, without any individualised assessment of their conduct, required 'very convincing reasons' to be justified under Article 8 of the Convention.[121] The existence of such reasons in the Polish context could be questioned, particularly since there is no established and clear case law stating that improperly appointed individuals are not judges at all. Therefore, the indiscriminate removal of all of them by the Parliament could be considered arbitrary.

However, a different assessment should be made regarding the compatibility with the Convention of removing a judge from office following an individual verification

[118] Xhoxhaj, *supra* n. 105, § 404; European Court of Human Rights, Nikëhasani v. Albania, Application no. 58997/18, judgment, 13 December 2022, § 115.

[119] Xhoxhaj, *supra* n. 105, § 403.

[120] See: Ovcharenko and Podorozhna (2020).

[121] European Court of Human Rights, Polyakh and others v. Ukraine, applications nos. 58812/15 and others, judgment, 17 October 2019, §§ 290–296. See also: European Court of Human Rights, Samsin v. Ukraine, application no. 38977/19, judgment, 14 October 2021, §§ 50–59.

procedure. ECtHR case law on vetting or lustration procedures shows that the removal of a judge from office through such a procedure does not always lead to a violation of the Convention.[122] Several factors would need to be taken into account when assessing the compatibility of such measures with the Convention.

One of the key factors would undoubtedly be the proper formulation of the substantive criteria used for reviewing judicial appointments. It is crucial for these criteria to be sufficiently clear and reasonable.[123] Moreover, they should be justified in the light of the purpose which such verification would serve. In the context of Poland, the purpose would be to address the consequences of flawed appointments and to remove from the judiciary those persons who were appointed under circumstances suggesting a political motives. Therefore, it is essential to prevent the verification procedure from becoming an arbitrary political purge. It appears that, in the Polish context, the verification should focus on appointment-related aspects, such as the scale of irregularities in the appointment process, the judge's awareness of their involvement in procedures conducted in flagrant violation of the law, and the presence of evident political affiliations between the judge and the executive or legislative branches. However, evaluating contents of decisions of judges would be questionable. According to the case law of the ECtHR, removing a judge from their position based on the content of their rulings would only be permissible in exceptional circumstances.[124] Finally, I would not exclude the possibility of differentiating, to some extent, the criteria and/or procedures based on the level of court in which a judge adjudicates.

Leaving aside the problem of criteria, the assessment of the proportionality of the removal of a judge from office should also take into account the overall fairness of the verification procedure. Removing a judge through an inappropriate procedure could be considered a violation not only of Article 8, but also, as mentioned before, of Article 6 or Article 13 in conjunction with Article 8 of the Convention[125]. Therefore, it is important for the body conducting the verification proceedings to be independent of politicians[126] and, if it does not have a judicial nature itself, for its decisions to be subject to the review of an independent and impartial court established by law, possessing full jurisdiction. Moreover, judge who is the subject of the verification process should have the right to be heard and to defend themselves. Furthermore, all decisions 'should adequately state the reasons on which they are based'[127].

[122] Xhoxhaj, *supra* n. 105; Nikëhasani, *supra* n. 118.

[123] See e.g. Oleksandr Volkov, *supra* n. 105, §§ 174–180.

[124] See e.g. Ovcharenko and Kolos, *supra* n. 59, §§ 104–105; Juszczyszyn, *supra* n. 9, §§ 276–278.

[125] See e.g. European Court of Human Rights, Özpinar v. Turkey, application no. 20999/04, judgment, 19 October 2010, §§ 80–88.

[126] See e.g. European Commission for Democracy through Law (Venice Commission), Amicus curiae brief for the Constitutional Court of Albania on the Law On the Transitional Re-Evaluation of Judges and Prosecutors (The Vetting Law), ref. CDL-AD(2016)036, 12 December 2016, para. 28, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e.

[127] Ovcharenko and Kolos, *supra* n. 59, §§ 120–127.

7 Conclusions

The reform of the NCJ, taking away its independence, has led to the 'tainting' of all judicial appointments made at the request of this body. As a result, participation of newly appointed judges in adjudicating panels of courts may violate the 'right to a tribunal established by law', guaranteed by Article 6(1) of the ECHR. To prevent further violations of the Convention, the Polish authorities must take a number of corrective measures. The most important of these is the restoration of the independence of the NCJ. However, it will also be necessary to regulate the status of improperly appointed judges, as their continued participation in adjudication may lead to further violations of the ECHR.

The authorities have some discretion in deciding how to deal with irregularly appointed persons. This is, however, limited by the need to respect the Convention with regard to the treatment of unlawfully appointed persons. Articles 6 and 8 of the ECHR are of particular importance here. The former requires that defective appointees be given access to the courts in cases concerning their removal from office or transfer to another post. The latter requires that the decision to remove them from office, which can be seen as an interference with their privacy, must meet the requirements of legality and necessity in a democratic state. This includes the need to respect the principle of proportionality of the interference.

This does not mean, of course, that defectively appointed persons are entitled to full protection against dismissal. On the contrary, given that their participation in adjudicating panels poses a threat to individuals' right to a court, they cannot be protected to the same extent as lawful judges. What is important, however, is that any measure aimed at restoration of the rule of law should itself respect the rule of law. One of the fundamental principles of the rule of law is protection against arbitrary actions of authorities; this cannot be ensured without access to court.

Consequently, when regulating the status of unlawfully appointed judges, instead of removing all such judges *ex lege* without access to a court, it will be preferable to take a more moderate and individualised approach. This could involve, for example, a robust verification procedure that would resemble, to some extent, the vetting procedures in transitional democracies or countries with systemic judicial problems.[128] The purpose of such a procedure would be to review appointments in order to exclude from the judiciary persons who have been appointed in circumstances clearly indicating political motives. At the same time, it would confirm or rectify the legitimacy of the appointments of judges whose internal independence should not be questioned. If such a robust review procedure were established, it would be difficult to raise allegations of violations of the Convention. Such a procedure would also make it possible to take into consideration the differences between the various

[128] See e.g. European Commission for Democracy through Law (Venice Commission), Compilation of Venice Commission Opinions and Reports concerning Vetting of Judges and Prosecutors, ref. CDL-PI(2022)051, 19 December 2022, https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)051-e.

categories of judges and the different degrees of legal shortcomings that occurred in the procedure for their appointment.

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