Chapter 5

The Reversed Rule of Law in the Justice System and the Status of Judges

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Abstract

The judiciary in Poland had long been identified as requiring reform, both in terms of its organisational structure and the status of judges. The reform was implemented in 2018. These changes were not accepted by the political opposition or the legal community associated with it, including parts of the judicial community. Opponents of the reform received support from international institutions. As a result, these groups began contesting the reforms in an organised manner, including attempts to obstruct the functioning of the reformed institutions. This Chapter presents the actions of judges opposed to the reform and analyses their judicial activities in light of the standards enshrined in the Constitution of the Republic of Poland and Polish statutes. It also reviews international case law (judgments of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR)) concerning the Polish judicial reform. Since the actions of the judiciary lacked a legal basis in Polish law, judgments of the CJEU and the ECtHR were used as a source of external authorisation and legitimisation. The analysis leads to the conclusion that the Polish judiciary, supported by international tribunals, violates the standards of the rule of law as defined by the Constitution of the Republic of Poland and undermines the legal and political order of the state.

Keywords: judiciary, judicial power, CJEU, ECtHR, National Council of Judiciary, Disciplinary Chamber, judicial independence test

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1. Introduction

The judiciary is one of the two components of the judicial power, which constitutes one of the three constitutional branches of power in Poland. It had long been recognised that reforms were necessary, both regarding its organisational structure and the status of judges. These reforms sought to establish effective mechanisms for social oversight of the courts and to free them from corruption, nepotism, and inappropriate social or business ties. In the legal dimension, this objective was pursued by redefining the powers of the President of Poland and the Minister of Justice in relation to courts and judges, tightening disciplinary policy, reforming access to the office of judge, and restructuring the judiciary. This was also an element of the election manifesto of the United Right (*Zjednoczona Prawica*) before the elections in 2014.[1]

The legislative process concluded in 2017. As a result, the Sejm adopted: (1) the Act of 20 July 2017 on the SC; (2) the Act of 12 July 2017 amending the Act on the National Council of the Judiciary (NCJ) and certain other acts; and (3) the Act of 12 July 2017 amending the Act on the Organisational Structure of Common Courts and certain other acts.

The first two acts were vetoed by the President on 24 July 2017. The President signed only the third act[2] and announced that he would submit his own draft legislation in lieu of the vetoed acts, which he did on 25 September 2017. Consequently, the following acts entered into the legal order: the Act of 8 December 2017 on the SC[3] and the Act of 8 December 2017 amending the Act on the NCJ and certain other acts.[4]

The reforms included, *inter alia*, the election of 15 judicial members of the NCJ, lowering the retirement age of some judges of common courts, the SC and the Supreme Administrative Court (SAC), transferring the power to announce judicial vacancies in the SC from the First President of the Supreme Court (SC) to the President of the Republic of Poland, reforming the procedure for appointing presidents of common courts and the SC, and introducing changes to the disciplinary procedure, including the establishment of the Disciplinary Chamber of the SC.

These reforms were rejected by the political opposition and the legal community associated with it, including parts of the judicial community. As a result, these groups began to contest the reforms in an organised manner, using every available legal and political instrument, including attempts to block the functioning of the reformed institutions. In this way, the judiciary became a sphere of state functioning where the application of the so-called reversed rule of law began even before the change

1 See the 2014 manifesto of Law and Justice (*Prawo i Sprawiedliwość*) 'Project for Poland' (*Projekt dla Polski*), pp. 63–69.
2 Journal of Laws of 2017 item 1452.
3 Journal of Laws of 2018 item 5.
4 Journal of Laws of 2018 item 3.

of government on 13 December 2023. After this turning point, such activities intensified and were framed as 'the restoration of the rule of law'. In practice, however, they entailed judges abusing the law or directly violating constitutional or statutory provisions.

The purpose of this Chapter is to catalogue and discuss the actions undertaken by opponents of the reforms and to assess their impact on the constitutional position of courts and judges. The discussion begins with an outline of the applicable constitutional standards.

2. The Justice System in Poland: Constitutional Principles and Institutional Design

In accordance with Art. 10 of the Constitution of the Republic of Poland (hereinafter: the Constitution), Poland's constitutional system is based on the separation and balance of the legislative, executive and judicial powers. Courts form part of the judicial power;[5] and their task is to administer justice.[6]

The judiciary in Poland comprises common, military, and administrative courts, as well as the SC.[7] Common courts administer justice in all matters (criminal, civil, family and guardianship, labour and social security) except those explicitly reserved by statute for other courts.[8] This entails a presumption of jurisdiction in favour of common courts. If no court has jurisdiction over a particular matter, a common court must hear the case. Common courts also adjudicate cases placed under their jurisdiction by separate statutes.[9] These courts include district, circuit and appellate courts.[10] The SC supervises common courts in matters relating to adjudication.

Military courts administer justice in the armed forces in criminal matters. They adjudicate criminal cases involving military personnel and, exceptionally, may hear cases involving civilians for specified offences.[11]

The Constitution assigns the SC a special role. It is currently composed of five chambers: the Civil, Criminal, Labour and Social Security, Extraordinary Review and Public Affairs, and Professional Liability Chambers.[12] Its primary function is to

5 Art. 10(2) of the Constitution. The Constitution includes also tribunals within the judicial power, yet it clearly distinguishes between them and courts.
6 Art. 175 of the Constitution.
7 Art. 175 of the Constitution. During a time of war, it is allowed to establish extraordinary courts.
8 Art. 177 of the Constitution.
9 See e.g. Art. 20(4) of the Electoral Code of 5 January 2011, Journal of Laws of 2011, No. 21, item 112.
10 Art. 1(1) of the Act of 27 July 2001 on the Organisational Structure of Common Courts, Journal of Laws of 2001, No. 98, item 1070.
11 Grzegorczyk and Tylman, 2011, p. 1099.
12 Art. 183 of the Constitution.

exercise judicial supervision over common and military courts in respect of adjudication. This supervision may be direct (in specific matters), indirect (in the form of abstract interpretation) or substantive (interfering with the content of a determination when procedural circumstances permit).[13] The SC exercises its supervisory role through: (1) extraordinary appeal measures and other instruments in accordance with procedural law; (2) resolutions clarifying questions of law that raise significant interpretative doubts; and (3) resolutions addressing discrepancies in jurisprudence.

Resolutions may be elevated to the status of legal principles,[14] which are binding on relevant levels of the SC depending on the level at which they were adopted. Departure from such a legal principle requires a new resolution adopted at least at the same level.[15] Although a legal principle is not formally binding on common and military courts, it directly influences their jurisprudence. If ignored, it is almost certain that a judgment inconsistent with it will be overturned during appeal proceedings or by the SC through extraordinary appeal measures. The SC also performs other duties provided for in the Constitution and statutes.

Administrative judiciary forms a distinct part of the judiciary. It consists of the voivodeship administrative courts and the SAC.[16] Administrative judiciary is independent of common, military, and SC structures. Its constitutional function is to 'supervise the activity of public administration',[17] thereby safeguarding public order.

This function is generally exercised by annulling unlawful administrative acts. Administrative courts compare public administration acts with the relevant binding legal standards, considering whether the authority was competent, whether a proper legal basis was chosen without violating the hierarchy of norms (except for constitutional review of statutes), procedural compliance, and substantive legality. When appropriate, administrative courts derogate unlawful acts. Additionally, administrative courts may indicate in a judgment how a matter should be handled by a public administration authority or notify that authority or its superior of a breach of law. They may also issue rulings declaring the existence or absence of a right or obligation.

Their powers also include: (1) abstract review of local law, adjudicating on the conformity to statutes of resolutions adopted by local government bodies and normative acts adopted by territorial government administration;[18] (2) review of other types of authoritative acts adopted by local public administration bodies for conformity with statutes, ratified international agreements, and acts of international organisations enacted under Art. 91(3) of the Constitution, as well as regulations;[19] and

13 Judicial supervision does not embrace the jurisprudence of administrative courts, which are subordinated to the SAC.

14 Art. 87(1) Act on the SC, Journal of Laws of 2018, item 5, as amended.

15 See Art. 88 of the Act on the SC.

16 Art. 184, first sentence, of the Constitution.

17 Art. 184 of the Constitution.

18 Art. 184, second sentence, of the Constitution.

19 Garlicki, 2005, p. 9. Cf. the judgment of the SAC of 28 May 2010, II OSK 531/10.

(3) resolving disputes over competence between local government and government administration bodies.[20]

Unlike common courts, the administrative ones are not generally bound by the allegations, requests, or legal basis invoked in administrative appeals when adjudicating.[21]

The SAC plays an exceptional role. Its power is, in principle, identical to that of the voivodeship administrative courts, although a key difference lies in the fact that it is the *supreme* court in that judiciary. It is the SAC that exercises judicial supervision over the voivodeship administrative courts, not only as a body adjudicating cases in the second instance but also in a general capacity,[22] through resolutions that are binding on administrative courts.[23] If any administrative court disagrees with the stance adopted in a resolution, it may only refer the legal issue to the SAC.

The judiciary in Poland enjoys distinctness from, and independence of, the other branches of power.[24] No branch may interfere with the structure, composition or operation of the judiciary except in circumstances explicitly provided for in the Constitution. This position is secured by the principle of judicial independence and the judiciary's exclusive power to administer justice, that is, to issue final determinations on the rights and obligations of individuals and legal persons. However, the constitutional principle of the separation and balance of powers does not remove links between the branches. On the contrary, the mutual influence of the branches is a natural feature of the system and affects various aspects of the judiciary's functioning. Within this framework, the legislative power enacts the state budget,[25] which includes the budget of the courts, and determines the organisational structure and jurisdiction of courts by statute.[26] The executive branch supervises the administrative activity of the courts through the Minister of Justice, appoints certain court bodies (the President appoints the First President and Presidents of the SC, and the President and Vice-President of the SAC), and exclusively appoints judges through the President.[27] This constitutes a presidential prerogative,[28] meaning it does not require the signature of the President of the Council of Ministers to be valid.[29] It highlights the independence of the judiciary from the government and its subordinate bodies.

20 Art. 166(3) of the Constitution.
21 Art. 134(1) of the Act on the Procedure before Administrative Courts, Journal of Laws of 2002, No. 153, item 1270.
22 Art. 187 of the Act on the Procedure before Administrative Courts.
23 See Art. 269(1) of the Act on the Procedure before Administrative Courts.
24 Art. 173 of the Constitution.
25 Art. 219 of the Constitution.
26 Art. 176(2) of the Constitution.
27 Art. 179 of the Constitution.
28 Art. 144(3)(17) of the Constitution.
29 The judgment of the CT of 11 September 2017, K 10/17, OTK ZU A/2017, item 64.

The prerogative is a right, not an obligation, of the President to appoint judges.[30] As a result, the person appointed is vested with the right of jurisdiction exercised in a specific office and location, thereby establishing that individual's judicial status.[31] This power is constitutional rather than administrative in nature and is not subject to judicial review.[32]

The President appoints judges upon a motion from the NCJ, and the appointment procedure cannot be initiated without the NCJ's motion.[33] In addition to participating in the appointment process, the constitutional role of the NCJ includes '(…) guarding the independence of courts and judges'.[34] This body, which does not belong to the constitutional formula of the separation of powers, safeguards the integrity of this separation and facilitates dialogue between the branches. Its key instrument for performing these tasks is its constitutional right to submit applications to the Constitutional Tribunal (CT) regarding the constitutionality of normative acts insofar as they affect the independence of courts and judges.[35] Other tasks of the NCJ, particularly, its role in consulting on legislative acts concerning the judiciary, its organisational structure and its operations, are determined by statute.[36]

The NCJ's constitutional significance stems from its composition.[37] It comprises: (1) representatives of the executive, namely the Minister of Justice and one person appointed by the President of the Republic of Poland; (2) representatives of the legislature, that is, four members elected by the Sejm from among deputies and two members elected by the Senate from among senators; and (3) representatives of the judiciary, including the First President of the SC, the President of the SAC and 15 members elected from among the judges of the SC, common courts, administrative courts and military courts.

The Constitution does not specify the details of the election of elective members, which are regulated by statute.[38] This applies in particular to the election of judges.

30 See the decision of the CT of 23 June 2008, Kpt 1/08, OTK ZU No. 5/A/2008, item 97; the judgment of the CT of 11 September 2017, K 10/17, OTK ZU A/2017, item 64, the judgment of the SC of 10 June 2009, III KRS 9/08, OSNP No. 7-8/2011, item 114. See: Sarnecki, 2000, p. 53; Jaskiernia, 2008, p. 368. The systemic practice is familiar with the cases of refusal to appoint a person as a judge. See the decision of the President of the Republic of Poland of 3 January 2008 refusing to appoint to a judicial office nine persons indicated in the motion of the NCJ. The refusal was not reasoned. M.P. No. 4, item 38.

31 Cf. the judgment of the CT of 8 May 2012, K 7/10, OTK ZU No. 5/A/2012, item 48; the judgment of the CT of 15 January 2009, K 45/07, OTK ZU No. 1/A/2009, item 3.

32 The jurisprudence in that regard is uniform and settled. See e.g. the decisions of the SAC of: 9 October 2012, I OSK 1872/12, I OSK 1883/12; of 20 March 2013, I OSK 3129/12; of 7 December 2017, I OSK 857/17; of 27 February 2023, II GSK 1362/22.

33 See the decision of the CT of 23 June 2008, Kpt 1/08, OTK ZU 5/A/2008, item 97.

34 Art. 186 of the Constitution. See also the judgments of the CT, K 39/07, OTK 129/10A/2007, and K 40/07, OTK 44/3A/2008.

35 Art. 186(2) of the Constitution.

36 Art. 187(4) of the Constitution.

37 Art. 187(1) of the Constitution.

38 Art. 187(4) of the Constitution. See also the judgment of the CT, K 40/07 OTK 2008/3A/44.

Under the current provisions, the Sejm elects judges to the NCJ[39] for a four-year term.[40]

Within the balance of powers, judges occupy an exceptional position. The Constitution confers upon them the attribute of independence in the exercise of their duties,[41] the purpose of which is to guarantee the constitutional right to a court.

The Constitution does not define judicial independence. In its simplest sense, it means independence from the other branches of power, from judicial and non-judicial organs, and from political influences, as well as the inner resolve of a judge to deliver decisions based on the law, even when they are unpopular.[42]

The Constitution provides two categories of instruments guaranteeing judicial independence: systemic safeguards and personal guarantees for judges. Systemic safeguards include the principles already discussed: the separation of powers and the independence of the judiciary, expressed in its autonomy in areas where the Constitution does not authorise other branches to act in relation to the courts (e.g. constitutional provisions concerning jurisdiction, finality and enforceability of court rulings, immunities and disciplinary liability). Personal guarantees encompass specified positive duties (imperatives) and negative ones (prohibitions), such as such as adequate working conditions (including assistants and facilities), remuneration consistent with the dignity of the office and the scope of duties, the prohibition on membership in a political party or a trade union, the prohibition on engaging in public activities incompatible with judicial independence

A judge's independence is limited only by the constitutional imperative to act on the basis of, and within the limits of, the law, which the Constitution expressly defines as subordination to the 'Constitution and statutes' in the exercise of office.[43] This subordination applies not only to the text of the provisions but also to the systemic principles contained in them, particularly the primacy of the Constitution and the direct applicability of its provisions.[44] When adjudicating conflicts between national and international law, the judge is first and foremost bound by the Constitution's conflict-of-law rules,[45] as well as by its standards for implementing other international legal instruments.[46]

39 Art. 9a of the Act of 12 May 2011 on the NCJ, Journal of Laws of 2011, No. 126, item 714 as amended. This is a vital change. From the establishment of the NCJ until 2017, judges were elected by judges.

40 Art. 187(3) of the Constitution.

41 Art. 178(1) of the Constitution.

42 Banaszak, 2012, p. 890. Cf. The judgment of the CT of 24 June 1999, K 3/98, OTK ZU No. 4/1998, item 52; the judgment of 14 April 1999, K 8/99, OTK ZU No. 3/1999, item 41.

43 Art. 178(1) of the Constitution.

44 Art. 8 of the Constitution.

45 Art. 91 of the Constitution.

46 Art. 9 of the Constitution.

3. International Legal Framework Challenging the Polish Judiciary

Considering the aforementioned legal standards and the lack of formal possibilities to redefine them, the judicial and political community sought sources outside the Polish constitutional framework to 'reverse the rule of law'. They resorted to international law and exploited its complexities, including the nuanced relationship between domestic and international law. They turned to the legal systems of two international organisations of which Poland is a member – the Council of Europe and the EU. The case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) became direct instruments in this regard.

The conceptual basis for the ECtHR's actions towards Poland was the judgment in the case *Guðmundur Andri Ástráðsson*.[47] This judgment, issued in a case against Iceland, was nonetheless highly significant for Poland because the ECtHR developed a new concept of the right to a court. It linked the appointment of a judge to his or her adjudicative independence, defining this link as the essence of the right to be tried by a court established by law. The ECtHR held that the term 'law' in Art. 6(1) ECHR includes not only principles concerning a court's functioning (its powers and jurisdiction) but also the legal basis for a judge's appointment. It determined that this construction reflects the rule-of-law requirement,[48] which is the underlying purpose of a court's establishment. Only a court 'established by law' is independent and impartial, and only a judge's independence can dispel any reasonable doubts individuals may have about the court's independence from external pressures, its neutrality towards competing interests, and its independence from the legislative and executive branches.[49]

The mechanism for monitoring compliance with this new standard involves a specific test verifying whether irregularities in the judicial appointment process are sufficiently serious to constitute a violation the requirement of being established by law. This test consists of three stages: (1) at the first stage, the ECtHR determines whether 'a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such'[50] has occurred. The absence of such a breach means there has been no violation of Art. 6(1) of the Convention;[51] (2) at the second stage, the ECtHR examines whether the breach affected the court's ability to fulfil its adjudicative functions, namely whether it created undue interference by other branches of power;[52] (3) at the third stage, it evaluates the state's response, verifying whether national courts effectively examined and rectified the breach of

47 The Grand Chamber, app. No. 26374/18.
48 Para. 226.
49 Paras. 212 and 213 of the judgment.
50 Para. 244 of the judgment.
51 See para. 245 of the judgment.
52 Para. 246 of the judgment.

the right to a court established by law. Although ECtHR adjudication is subsidiary in nature, 'it falls ultimately on the Court to determine whether the way in which that law is interpreted and applied produces consequences that are consistent with the principles of the Convention'.[53]

The mechanism thus created was subsequently applied in rulings delivered directly in Polish matters. Evidence that it was deliberately designed to undermine the Polish judicial reforms lies not only in speculation and suspicion but also in the fact that Polish institutions – the Helsinki Foundation for Human Rights and the then Commissioner for Human Rights – were permitted to join the case as *amicus curiae*. Both parties were actively involved in the domestic dispute over judicial reform in Poland, supporting the then opposition. Furthermore, during the proceedings, they explicitly connected the issue under examination with Poland. This is also confirmed by the reasoning of the judgment,[54] and by the fact that this case was later cited in the CJEU's case-law concerning Polish matters.[55]

Having established this instrument, the ECtHR began adjudicating on Polish cases that had been pending before it for several years.[56] The first judgment was delivered in *Broda and Bojara* case, which addressed the dismissal of court presidents. The Court held that the right to a fair trial must be interpreted in light of the principle of the rule of law, which requires the availability of effective remedies enabling the exercise of civil rights. It stressed, in particular, that members of the judiciary must be protected from arbitrary acts of the executive where the relevant provisions permitting their dismissal did not set out *expressis verbis* conditions for such action.[57] Judicial review alone could guarantee the rule-of-law standard.[58]

In the *Reczkowicz case*, the ECtHR found that the NCJ was no longer independent 'or able to fulfil its constitutional obligation of safeguarding the independence of courts and judges'.[59] This conclusion was based on circumstances pertaining the constitution of the Council,[60] which enabled '(…) the executive and the legislature

53 Para. 250 of the judgment.

54 Para. 200 and para. 203.

55 See joined cases C–585/18, C–624/18, C–625/18 (para. 138) and case C–619/18 (para. 139).

56 The crucial ones embrace: the judgment of 29 June 2021 in the case Broda and Bojara v Poland (applications Nos. 26691/18 and 27367/18), the judgment of 22 July 2021 in the case Reczkowicz v Poland (application No. 43447/19), the judgment of 8 November 2021 in the case Dolińska-Ficek and Ozimek v Poland (applications Nos. 49868/19 and 57511/19), the judgment of 3 February 2022 in the case Advance Pharma sp. z o.o. v Poland (application No. 1469/20), the judgment of 15 March 2022 Grzęda v Poland (application No. 43572/18), the judgment of 10 June 2022 Żurek v Poland, (application No. 39650/18), the judgment of 6 October 2022 Juszczyszyn v Poland (application No. 35599/20), the judgment of 6 July 2023 Tuleya v Poland (applications Nos. 21181/19 and 51751/20), the judgment of 27 November 2023 Wałęsa v Poland (application No. 50849/21). Altogether, based on the data (see the judgment Wałęsa v Poland, para. 323), the number of cases against Poland amounts to 492 registered cases.

57 Para. 132.

58 Paras. 130–131 of the judgment.

59 Reczkowicz v Poland, para. 269 of the judgment.

60 Para. 270 of the judgment.

to interfere directly or indirectly in the judicial appointment procedure'. As a consequence, the Disciplinary Chamber of the SC was deemed to lack the characteristics of an independent and impartial court established by law.[61] To support its assessment, the Court referred to a resolution adopted by three Chambers of the SC on 23 January 2020 and dismissed the CT's judgment declaring that resolution unconstitutional,[62] describing the latter as arbitrary and unfounded.[63] The Court also questioned the statutory authority of the CT stipulated in Art. 86 of the Act on the Organisation of the CT and the Mode of Proceedings before the CT. Similar findings concerning the Disciplinary Chamber of the SC were later confirmed in the *Żurek* and *Tuleya* judgments.[64]

In the case *Dolińska-Ficek and Ozimek*, the ECtHR held that the SC's Chamber of Extraordinary Review and Public Affairs was not a court established by law.[65] In the statement of reasons, it referred to the same circumstances as in *Reczkowicz*.[66] The Court additionally alleged that the President of Poland had manifestly disregarded the principle of the rule of law by appointing judges despite the SAC having stayed his power to do so.[67]

In *Advence Pharma*, the ECtHR reiterated its allegations towards the NCJ[68] and consequently challenged the appointment of seven new judges to the Civil Chamber of the SC, holding that 'the breaches of the domestic law (…) arising from non-compliance with the rule of law, the principle of the separation of powers and the independence of the judiciary, inherently tarnished the impugned appointment procedure'.[69] The Court also indirectly undermined the legality of the NCJ's operations in *Grzęda* and *Żurek*,[70] where it held that the premature termination of an NCJ member's term of office without a right of appeal violated the right to a court.

Finally, in the case *Wałęsa v Poland*, the ECtHR summarised its findings. This is evidenced by both the use of the pilot-judgment procedure and the content of the decision itself. The Court held that violations of the right to a fair trial under Art. 6(1) of the Convention stemmed from interlinked systemic issues[71] (1) a defective judicial appointment procedure involving the NCJ as reconstituted under the 2017 Amending Act; (2) the resulting lack of independence of the SC's Chamber of Extraordinary Review and Public Affairs of the SC; (3) the exclusive competence of that

61 Para. 276 of the judgment.
62 U 2/20, OTK 61/A/2020.
63 Reczkowicz v Poland, para. 262 of the judgment.
64 The judgment of 16 June 2022, Żurek v Poland, app. No. 39650/18; the judgment of 6 July 2023, Tuleya v Poland, app. Nos. 21181/19 and 51751/20.
65 Para. 354 of the judgment.
66 Para. 353 subpara. 1 of the judgment.
67 Para. 353 subpara. 2.
68 Para. 316 subpara. 2 of the judgment.
69 Para. 345 of the judgment.
70 The judgment of 22 March 2022, Grzęda v Poland, app. No. 43572/18; the judgment of 16 June 2022, Żurek v Poland, app. No. 39650/18.
71 Para. 324 as well as para. 6 of the statement of reasons for the judgment.

Chamber to determine challenges to the independence of a judge or court; (4) flaws in the extraordinary appeal procedure;[72] and (5) the Chamber's exclusive jurisdiction to adjudicate extraordinary appeals.

It concluded that

> (…) in order to put an end to the systemic violations of Art. 6(1) (…) identified in the present case, the respondent State must take appropriate legislative and other measures to secure in its domestic legal order compliance with the requirements of an 'independent and impartial tribunal established by law' and the principle of legal certainty as guaranteed by this provision.[73]

The CJEU was simultaneously active. Its rulings resulted from two procedural tools: (1) actions brought by the EC against Poland under Art. 258 of the Treaty on the Functioning of the European Union (TFEU); and (2) requests for preliminary rulings by Polish courts pursuant to 267 TFEU.

The distinction between these two mechanisms is significant. In the first scenario, the CJEU directly attacked the Polish legal system. In the second, it developed reasoning and criteria that national courts could use to justify departing from domestic law.

The first judgment arising from an action brought by the Commission was delivered on 24 June 2019.[74] It concerned the Act on the SC.[75] The CJEU held that EU law is premised on the assumption that Member States share the values enshrined in Art. 2 of the Treaty on European Union (TEU). Although the organisation of justice lies within Member States' competence, they must comply with their obligations under EU law when exercising that competence. The Court found that the provisions lowering the retirement age of judges and granting the President of Poland discretionary powers to extend their tenure violated Art. 19(1)(2) TEU. It held that the former provisions were disproportionate and unrelated to the stated objectives, while the latter were discretionary and failed to provide for judicial review of the President's decision. Both elements breached the guarantees of judicial independence and impartiality.[76]

A similar allegation regarding the Act of 12 July 2017 amending the Act on the Organisational Structure of Common Courts and certain other acts was examined by the CJEU in its judgment of 5 November 2019,[77] with similar conclusions.[78]

72 Paras. 228–239 and 323(c) of judgment.
73 Statement of reasons para. 7.
74 The judgment in the case C-619/18 of 24 June 2019.
75 This act stipulated that the retirement age of the SC judges was lowered to 65 years.
76 Paras. 91 and 96.
77 C-192/18.
78 C-192/18, statement of reasons.

The next judgment arising from an action brought by the European Commission was delivered on 15 July 2021.[79] The CJEU ruled that by establishing the Disciplinary Chamber of the SC, Poland had failed to fulfil its obligations under Art. 19(1) and Art. 267(2) and (3) TFEU. The breach of Art. 19(1) TEU stemmed from the Chamber's inability to guarantee independence and impartiality or protection from direct or indirect influence by the Polish legislature and executive. These failures were evidenced *inter alia* by: (1) the involvement of the NCJ, whose independence was questionable;[80] (2) the exclusive appointment of new judges to the Disciplinary Chamber; (3) the significantly higher remuneration and greater organisational, functional, and financial autonomy of the Chamber's judges compared to other SC chambers; (4) the President of the Disciplinary Chamber's discretionary power to designate the disciplinary tribunal at first instance in cases involving ordinary- court judges; and (4) acceptance of the classification of judicial decisions as disciplinary offences.

The breach of Art. 267(2) and (3) TFEU arose from the de facto limitation of courts' ability to request preliminary rulings, resulting from the threat of disciplinary proceedings.[81] This judgment was preceded by a decision ordering Poland to: (1) suspend the application of provisions granting jurisdiction to the Disciplinary Chamber of the SC in disciplinary cases concerning judges; and (2) refrain from assigning cases pending before that Chamber to benches whose composition did not meet the independence requirement.[82]

The judgment of 5 June 2023 summarised the works of the CJEU concerning Art. 258 TFEU.[83] The case concerned the Act of 20 December 2019 amending the Act on the Organisational Structure of Common Courts, the Act on the SC and certain other acts.[84] Indeed, the CJEU stated that

> the European Union respects the national identities of the Member States (…) such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another. Whilst they have separate national identities (…) the Member States adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.[85] It follows that, in choosing their respective constitutional model, the Member States are required to comply, inter alia, with the requirement that the courts be independent stemming from Art. 2 and the second Subpara. of Art. 19(1) TEU (…). They are thus required, in particular, to ensure that, in the light of the value of the rule of law, any regression of their laws on the

79 C-791/19.
80 C-791/19, para. 103.
81 See the statement of reasons for the judgment C-791/19 and its para. 117, para. 154 and para. 215.
82 See the statement of reasons for the decision of 8 April 2019, C-791/19.
83 C-204/21.
84 Journal of Laws of 2020, item 190.
85 C-204/21, para. 73.

> organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges.[86]

Consequently, it held that, by amending the challenged act, Poland infringed Subpara. 2 of Art. 19(1) TEU read in conjunction with Art. 47 of the Charter of Fundamental Rights (ChFR) and Art. 267 TFEU.[87]

The series of the CJEU's preliminary judgments began with the judgment of 19 November 2019.[88] From a temporal perspective, this was the first international judgment concerning the Polish justice system. The CJEU referred to its previous judgments,[89] recalling determinations and findings contained therein, particularly the imperative to disapply any domestic norm contrary to EU law, arising from the principle of the primacy of EU law.[90] It therefore stated that it was unnecessary to answer the first question, while the second and third questions were answered as follows: Art. 47 of the ChFR and Art. 9(1) of the Directive of the Council 2000/78/EC of 27 November 2000 'must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provision'.[91] It also set out the criteria for such a court and authorised the referring court to assess the Disciplinary Chamber of the SC in that context.[92] It clarified that

> if that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.[93]

The systemic essence of this judgment lay in the authorisation of the referring court – which, under domestic provisions, was not competent to adjudicate in the pending case – to assume adjudicative powers.[94] The CJEU derived this from the principle of the primacy of EU law as a consequence of a national court's obligation

86 C-204/21, para. 74.
87 C-204/21, statement of reasons.
88 Joined cases C-585/18, C-624/18 and C-625/18.
89 The judgment of 24 June 2019, C-619/18 as well as the judgment of 24 June 2019, C-573/17.
90 Para. 149.
91 C-585/18, statement of reasons, para. 2 subpara. 1.
92 If the circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts as to the imperviousness of that court, in particular, as to the influence of the legislature and the executive, that court is not independent or impartial within the meaning of Art. 47 of the ChFR. Case C-585, statement of reasons and para. 165.
93 C-585/18, statement of reasons 2 subpara. 2.
94 Case C-585/19, para. 166.

under Art. 47 of the ChFR to guarantee individuals effective legal protection. It reiterated this point in the preliminary judgment of 2 March 2021,[95] additionally indicating that it was not necessary to repeal the norm assigning this power to another court through either legislative or constitutional procedure.[96]

In the judgment of 26 March 2020,[97] the CJEU commented on the judicial disciplinary system. Although it declared the references made by the Polish courts inadmissible due to procedural issues,[98] it nonetheless highlighted the connection between disciplinary measures and the guarantees of judicial independence and impartiality, as well as protection from the abuse of disciplinary liability mechanisms. It thus repeated the analysis outlined in judgment C-791/19, holding that 'provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted'.[99] Such a guarantee is essential to their independence.[100]

In the preliminary judgment of 2 March 2021,[101] the CJEU defined the key criteria for assessing the independence of the NCJ. These included: reducing the term of office of the previous composition, changes to the procedure for appointing judicial members, procedural irregularities in constituting the new body, concerns about how the NCJ fulfilled its mandate to safeguard judicial independence and, the potential existence of special relationships between the newly appointed members and the executive.[102] It also highlighted the link between the NCJ's formation and the reform of the SC.[103]

In the preliminary judgment of 6 October 2021,[104] it held that such a court composition may not be regarded as an independent and impartial tribunal established by law

> if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned (…).[105]

95 C-824/18.
96 C-824/18, para. 141. See also para. 167.
97 In joined cases C-558/18 and C-563/18.
98 The national courts de facto made a reference for a preliminary ruling to the Court concerning the conformity to EU law of the provisions of the Polish law regulating the regime of professional liability, which does not fall within the competences of the Court with regard to the preliminary procedure.
99 C-558/19, para. 58.
100 C-558/19, para. 59.
101 C-824/18.
102 C-824/18, paras. 131–134.
103 Those provisions were held by the CJEU to be in breach of Poland's obligations arising from Art. 19(1), second para., of the TEU (case C-619/18).
104 C-487/19.
105 C-487/19, the statement of reasons.

In the preliminary judgment of 16 November 2021,[106] which examined the powers of the Minister of Justice to second a judge to a higher court, it found that '(…) it is necessary that judges be protected from external intervention or pressure liable to jeopardise their independence and impartiality'.[107] If the Minister could second a judge and freely terminate that secondment, there was a risk that such power could be used to exert political influence over judicial decisions.[108] Therefore, decisions taken by the Minister 'must be taken on the basis of criteria known in advance and must contain an appropriate statement of reasons'.[109] Otherwise,

> the possibility to terminate the secondment of a judge could also give the seconded judge the feeling of having to meet the expectations of the Minister for Justice.[110] And (…) the termination of the secondment without that judge's consent is liable to have effects similar to those of a disciplinary penalty.[111]

In the preliminary judgment of 13 July 2023,[112] the CJEU held that Subpara. 2 of Art. 19(1) TEU prevents the Disciplinary Chamber of the SC from ruling on the professional accountability of judges of common courts because it does not guarantee independent and impartial adjudication. Therefore, another court may disregard its rulings, and where national provisions prohibit doing so, it may also disregard those provisions.[113] In the preliminary judgment of 21 December 2023,[114] the CJEU refused to answer a question submitted by the Extraordinary Review and Public Affairs Chamber of the SC, stating that the question was not submitted by a body with the status of an independent and impartial court.[115]

To conclude, it needs to be stressed that the rulings of both courts were delivered in the period 2018–2023. In essence, they recognise that the rule of law guarantees everyone the right to effective judicial review, which comprises the principle of judicial independence and impartiality. This conception of the rule of law is protected under Art. 19(1)(2) TEU, Art. 47 of the ChFR and Art. 6(1) of the ECHR. As judicial independence is also affected by the manner of a judge's appointment, the rulings of the CJEU encroached upon the state's constitutional system and raised questions concerning the functioning of constitutional bodies such as the NCJ and three chambers of the SC (the Civil, Disciplinary, and Extraordinary Review and Public Affairs Chambers). This interference was partly indirect and partly conducted through

106 Joined cases C-748, 749, 750, 751, 752, 753, 754/19.
107 Para. 69.
108 Para. 73.
109 Para. 79.
110 Para. 82.
111 Para. 83.
112 Joined cases C-615/20 and C-671/20.
113 C-615/20, the statement of reasons.
114 C-718/21.
115 The statement of reasons and paras. 47–57, as well as paras. 62–76.

the construction of assessment instruments within the EU legal system, which were subsequently applied by certain national courts.

4. Systemic State Reactions to ECtHR and CJEU Judgments on the Judiciary

Despite allegations that the CJEU and the ECtHR unlawfully interfered with systemic matters and acted *ultra vires*, what occurred in Poland under the influence of the case-law of both courts during 2018–2023 was the adoption of two amendments to the Act on the SC, which redefined certain elements of the reform. These involved: (1) reinstating judges who had retired as a result of the judicial reform,[116] both in the exercise of judicial office and in judicial administrative functions where applicable;[117] (2) dissolving the Disciplinary Chamber of the SC and replacing it with the Professional Liability Chamber;[118] and (3) introducing the so-called judicial independence test.

The legal basis for reinstating judges was the Act of 21 November 2018 amending the Act on the SC. The formal reason advanced was the obligation to implement the interim decision of the President of the CJEU.[119] Judges resumed office by virtue of the statutory provision, although this solution was manifestly in breach of Art. 170 and Art. 183(3) of the Constitution.[120]

The dissolution of the Disciplinary Chamber of the SC and the introduction of the independence and impartiality test were later enacted through the Act of 9 June 2022 amending the Act on the SC and certain other acts. This was the outcome of a political agreement with the European Commission concerning the acceptance of the National Recovery Plan.[121] This statute led to the estab-

116 Art. 111(1) of the Act on the SC.

117 Art. 2(1) as well as (4) of the Act of 21 November 2018 amending the Act on the SC (Journal of Laws of 2018, item 2507).

118 See Art. 1(1) and Art. 8 of the Act of 9 June 2022 amending the Act on the SC and certain other acts, Journal of Laws of 2022, item 1259.

119 See the decision of the CJEU of 11 July 2019, C-619/18, para. 1 subpara. 2. There were three de facto reasons for those changes: pressure from the EU, which denied Poland the approval of the National Recovery Plan; a series of cases in the CJEU as a result of references for preliminary rulings as well as the case C-619/18 arising from the action of the European Commission; pressure from the judicial community, which boycotted the statutory amendments.

120 These two provisions indicate how it is possible to assume the office of a judge and the function of the First President of the SC. In both cases, this is exclusively appointment by the President of the Republic of Poland. The provision envisaging the reinstatement relies however on the assumption of constitutionality. It has not been challenged before the CT. More on that: Muszyński, 2023b, pp. 20–50.

121 Koślicki and Rzemek, 2024.

lishment of the Professional Liability Chamber of the SC.[122] Other effects of the amendment included: (1) allowing judges of the dissolved Disciplinary Chamber of the SC to assume office in one of the remaining chambers of the SC or to retire;[123] (2) discontinuing, by virtue of a statute, proceedings commenced in the Disciplinary Chamber of the SC and unfinished before the amendment entered into force;[124] (3) revising rulings of the Disciplinary Chamber of the SC and granting judges who had been subjected to disciplinary penalties, or against whom consent had been given to prosecute criminally, the right to request the reopening of proceedings within six months; and (4) restricting the disciplinary offence of refusing to implement the administration of justice by formulating a catalogue of negative requirements, thereby excluding such liability.[125]

This act also introduced a new procedural institution – the so-called test of judicial independence and impartiality.[126]

The change of legal status in line with the intentions arising from the case-law of international courts did not, however, prevent actions by certain national courts, nor did it halt further activity by the ECtHR and the CJEU. Occasional judgments of the CT, which from the constitutional perspective limited the normative content of Art. 19(1), second sentence, TEU and Art. 6(1) ECHR,[127] initiated either by a question of law referred by the SC or by an application submitted by the Prosecutor General, did not help. A period of divided jurisprudence and legal uncertainty prevailed in the national legal system.

5. Systemic Undermining of Judicial Status Through National Case-Law on Judicial Appointments

5.1. Judicial Responses of the SAC and the SC

The judicial reform provoked an institutional reaction from some judges. *De facto,* it was the judges' engagement that transformed the national political dispute

122 See Art. 1(22) of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

123 Art. 10(4) of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

124 See Art. 15 of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

125 This catalogue does not include: an error regarding the interpretation and application of provisions of national law or EU law, or relating to fact finding or the assessment of evidence; reference to the CJEU for a preliminary ruling; the examination of the fulfilment of the requirements of a court's or judge's independence, or of a judge's independence and impartiality, yet exclusively in the cases indicated in the statute. See: Art. 2(2) of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

126 See: Art. 1(24) of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

127 See: the judgment of 7 October 2021, K 3/21, OTK 2022/A/65; the judgment of the CT of 10 March 2022, K 7/19, OTK ZU A/2022, item 24.

between the governing coalition and the opposition into a legal issue. This occurred when judges began using adjudicative instruments as a tool to challenge the legislator and chose to fill the gaps in legal bases for systemic actions by invoking the case-law of international courts.

The SAC was the first to act, doing so immediately after the entry into force of the new statutes.

The procedure for appointing SC judges began on 24 May 2018, when the President of Poland announced judicial vacancies in the newly formed SC.[128] As a result, the NCJ conducted a competition procedure and adopted resolutions to submit to the President motions for the appointment of candidates to the SC.[129] Judicial appointments by the President occurred on: 20 September 2018 (the Disciplinary Chamber of the SC), 10 October 2018 and 30 January 2019 (the Extraordinary Review and Public Affairs Chamber), 10 October 2019 (the Criminal and Civil Chambers of the SC).

Certain individuals who were not recommended to the President as candidates submitted appeals with the SAC, seeking a stay of enforcement of the resolutions.[130] Some SAC benches granted the stay applications. Then, on 21 November 2018, the SAC referred a question to the CJEU for a preliminary ruling concerning NCJ resolution No. 330/2018, adjourning hearings in related cases until the CJEU delivered its decision.

On 2 March 2021, the CJEU delivered a judgment,[131] stating that Art. 19(1)(2) TEU must be interpreted as precluding amendments to national law that deprive a court of jurisdiction to review NCJ resolutions concerning judicial appointments that declare such proceedings discontinued by operation of law, or that prevent appeals from appeals from alleging that the NCJ misassessed candidates' compliance with the competition criteria. It added that where such a law exists, a national court may disapply it regardless of its rank (statute or constitution) and continue exercising the jurisdiction previously vested in it by repealed provisions.[132] Consequently, on 6 May 2021, the SAC annulled the part of NCJ resolution No. 330/2018 that recommended

128 M.P. of 2018, item 633. There were 20 vacancies in the Extraordinary Review and Public Affairs Chamber, 7 in the Civil Chamber, and 1 in the Criminal Chamber.

129 See: Krajowej Rady Sądownictwa, 2024.

130 Accordingly, on 25 September 2018, the SAC (II GW 22/18) stayed the enforcement of the resolution of the NCJ of 24 August 2018 (318/2018 appointment of a candidate to the Criminal Chamber of the SC). On 27 September 2018, the SAC (II GW 28/18) stayed the enforcement of the resolution of the NCJ of 28 August 2018 (331/2018, appointment of the candidates to the Extraordinary Review and Public Affairs Chamber of the SC). On 8 October 2018, the SAC (II GW 31/18) stayed the enforcement of the resolution of the NCJ of 28 August 2019 (330/2018, appointment of candidates to the Civil Chamber of the SC). Some applications were dismissed for substantive reasons (e.g. the decisions of 14 September 2018, II GW 21/18 and of 25 September 2018 GW 24/18).

131 C-824/18.

132 C-824/18, the operative part of the judgment, para. 2, subpara. 1.

the appointment of seven candidates as SC judges in the Civil Chamber.[133] The SAC issued annulment judgments in the remaining cases on 21 September 2021.[134]

The systemic essence of the SAC rulings was the assertion that the NCJ is dependent on the legislature and the executive. This view was based on: (1) the Sejm's procedure for electing judicial members of the NCJ;[135] (2) the NCJ's failure to 'guard the independence of courts and independence of judges' demonstrated by its disregard for national and international criticisms of the reform and its failure to oppose the authorities' rejection of the CJEU President's interim decision of 8 April 2020;[136] and (3) alleged manipulation of appeal proceedings against NCJ resolutions to obstruct SAC judicial review.

The SAC concluded that the judicial candidates selected by the NCJ did not fulfil the requirement of independence and impartiality under Art. 47 of the ChFR.[137] Notably, those candidates were not parties to the proceedings and were never formally informed of them.

The SAC also endorsed the SC's interpretation in its judgment of 5 December 2019 and its resolution of 23 January 2020 that the Polish President's announcement of SC judicial vacancies required the countersignature of the President of the Council of Ministers for validity.

Simultaneously, the SC sought to undermine the reforms. The pretext was the lowering of the retirement age for judges,[138] which also applied to sitting judges.[139] The formal basis was three cases pending before the Labour and Social Security Chamber of the SC, which referred three preliminary questions on 30 August and 19 September 2018.[140]

The situation was complicated because the reform stripped the Labour and Social Security Chamber of jurisdiction in such cases, transferring it to the Disciplinary Chamber of the SC, which had not yet been constituted.[141] The Labour and Social Security Chamber asked the CJEU whether: (1) Art. 47 of the ChFR read in conjunction with Art. 9 of Directive 2000/78 empowered it to disapply provisions assigning jurisdiction to a body that had not yet been formed; (2) Art. 267(3) TFEU read in conjunction with Art. 19(1) and Art. 2 TEU and Art. 47 meant that the newly created chamber composed of NCJ-appointed judges who lacked guaranteed independence was not an independent tribunal under EU law; and (3) Art. 267(3) TFEU read in

133 II GOK 2/18.

134 See also II GOK 8/18, 9/18, 11/18, 12/18, 13/18,14/18.

135 The SAC also referred to the preliminary judgment of 19 November 2019 delivered in response to the reference for a preliminary ruling made by the SC (case C-585, A.K. and others).

136 C-791/19, suspension of the Disciplinary Chamber of the SC.

137 Para. 125 of the judgment of the CJEU C-824/18.

138 Art. 37 of the Act on the SC, Journal of Laws of 2018, item 5, which entered into force on 3 April 2018.

139 Art. 111(1) of the Act on the SC.

140 The CJEU joined the cases under one reference number C-585/18 (two remaining cases are C-624/18 and C-625/18).

141 The President of the Republic of Poland appointed the judges on 20 September 2018.

conjunction with 19(1) TEU and Art. 2 TEU and Art. 47 of the ChFR, required it to disregard provisions reserving jurisdiction to the Disciplinary Chamber, given the circumstances of the appointment of its judges raised doubts about their independence and impartiality.[142]

The doubts concerning the Disciplinary Chamber stemmed from the fact that NCJ judicial members were elected by the Sejm rather than by the judiciary, as under the previous system,[143] and that the NCJ's record indicated subordination to political authorities and an inability to ensure judicial independence.[144]

The CJEU answered in its judgment of 19 November 2019.[145] As a result, in its judgment of 5 December 2019, the Labour and Social Security Chamber held that it could disregard a binding statutory provision allocating jurisdiction to another SC chamber, that the NCJ did not meet independence requirements, and that the Disciplinary Chamber was not a court.

The SAC rulings, based on international case-law and referring to institutional and systemic issues, lacked any national legal basis. They even exceeded the constitutional limits of judicial powers and disrupted the balance of powers.

5.2. The Resolution of the Three SC Chambers

The SC's next step was adopting resolution BSA I-4110-1/20 on 23 January 2020, sitting as a joint bench of three chambers: the Civil Chamber, the Criminal Chamber and the Labour and Social Security Chamber.[146] The SC stated that in this way

> it enforces the judgment of the Court of Justice of the European Union of 19 November 2019 in the cases C-585/18, C-624/18 and C-625/18, by clarifying the practical procedural consequences which are linked to the fact that a judge sits on the adjudicating bench of a court who was appointed to his/her office in the proceedings conducted by the National Council of the Judiciary, with regard to which the test of independence from the legislative and executive authorities has a negative result, and the very proceedings before the said Council and also possible prior or subsequent

142 Paras. 44 and 45 of the judgment.

143 C-585/18 para. 41. Cf. Recommendation of the Council of Ministers CM/Rec(2010)12 of 17 November 2010 on judges: independence, efficiency, responsibilities the Opinion of the European Commission for Democracy through Law (Venice Commission) No. 904/2017 [CDL-AD(2017)031] of 11 December 2017 as well as the Opinion of the Consultative Council of European Judges (CCJE) No. 10(2007) of 23 November 2007 on the Council for the Judiciary at the service of society.

144 Paras. 42 and 43 of the judgment.

145 More on that: the excerpt concerning international case law.

146 59 judges participated in the adoption of the resolution. The SC made it impossible for the judges of the Disciplinary Chamber and of the Extraordinary Review and Public Affairs Chamber to participate. Also, the participation of the judges of the Civil Chamber who were appointed by the President of the Republic of Poland after the amendment of the Act on the SC in 2018 was prevented.

> stages of proceedings aimed at the appointment of a particular person to the office of a judge are affected by yet other irregularities.[147]

It also highlighted its obligation to clarify whether the appointment of judges by the President of Poland under the Act of 8 December 2017 amending the Act on the NCJ undermined impartiality and independence standards under Art. 6(1) ECHR, Art. 45(1) of the Constitution and Art. 47 of the ChFR and, if so, to determine the procedural consequences of administering justice in such circumstances.[148]

Consequently, the SC attributed the following interpretation to Art. 439(1)(2) of the Code of Criminal Proceedings and to Art. 379(4) of the Code of Civil Proceedings:[149]

> 1. Irregular composition of the court (…) or inconsistency of the composition of a court with statutory provisions (…) also occurs when a person appointed to the office of a judge of the Supreme Court, upon the motion of the National Council of the Judiciary, which was formed under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3), sits on the bench of that court;
> 2. The irregular composition of a court (…) or the inconsistency of the composition of the court with statutory provisions (…) also occurs when a person appointed to the office of a judge in a common or military court upon the motion of the National Council of the Judiciary, which was formed under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3) sits on the bench of that court if the irregularity of the process of appointment leads, under specific circumstances, to a violation of the independence and impartiality standard within the meaning of Art. 45(1) of the Constitution of the Republic of Poland, Art. 47 of the Charter of Fundamental Rights of the European Union as well as Art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.[150]

At the same time, it defined the temporal effects of this interpretation by attributing value to the interpreted institutions of national law from the perspective of their retroactive effect (*lex retro non agit*). For the Disciplinary Chamber of the SC (Para. 1), the interpretation applied retroactively; for common courts (Para. 2) it did not.

147 Para. 4 of the statement of reasons for the resolution, p. 8.
148 Para. 16 of the statement of reasons for the resolution, p. 27.
149 The operative part of the resolution.
150 Ibid.

In this way, the resolution of the three chambers of the SC reconstructed the national standard of judicial independence from the perspective of Art. 6 ECHR and Art. 47 of the ChFR based on the case-law of the ECtHR and the CJEU at the time. It adopted that: (1) the legal acts of legislative and executive bodies are insufficient for legitimising the independence and impartiality of a judge, and thus the independence of a court. These acts only constitute formal criteria reflecting the appointment process. In turn, effective protection of judicial independence and impartiality requires that the participation of the judiciary in the process of appointing judges be guaranteed. Only such participation ensures sufficient insulation from political authorities' influence; (2) *a posteriori* review of the judicial appointment process by courts is necessary. The admissibility of review is justified when institutional guarantees related to the NCJ or the recruitment competition in the appointment process give rise to doubts. Only this guarantees the proper standard of the individual's right to a court arising from Art. 45(1) of the Constitution;[151] (3) the review must be conducted in accordance with the procedural institutions provided for in the Civil Procedure Code and the Criminal Procedure Code.

Although the resolution did not formally undermine the status of judges, it *de facto* prevented them from adjudicating, as each bench with their participation was (in the SC) or could be (in common courts) treated as failing to meet the requirements for the formation of a court arising from international law and, as a result – according to the SC – from the Constitution and the codes.[152]

On 22 June 2022, the SC adopted another resolution supporting the aforementioned resolution. In the light of its Subpara. 5,

> a motion to exclude from the composition of a common court a person appointed to the judicial office by the President of the Republic of Poland, who acted upon the request of the National Council of the Judiciary formed under the provisions of the Act of 8 December 2017, may not be examined by a court whose adjudicating bench is composed of such a judge; otherwise, the situation will arise which falls under the prohibition *nemo iudex in causa sua*.

Subsequent attempts were made to extend this reasoning to the procedure of the independence and impartiality test.

The resolution of the three Chambers was formally derogated from the legal system by virtue of the CT judgment of 20 April 2020,[153] which held it inconsistent with the Constitution. Despite this, it was *de facto* applied by some judges from the day of its adoption, most often in ongoing adjudication in the SC, which also affected the adjudication of common courts. Judges continued to refer to the resolution even

151 The statement of reasons for the resolution of joined (three) Chambers of the SC, para. 44, pp. 53–54.

152 Art. 87(1) and (2) as well as Art. 88 of the Act on the SC. This resolution was not published.

153 The judgment of the CT of 20 April 2020, U 2/20, OTK A/2020, item 61.

though the CT classified it in its decision of 21 April 2020[154] as law-creating, thereby violating the powers of the Sejm to enact legal acts and hence unlawful.

5.3. The Prime Minister's Countersignature and the Validity of the Polish President's Announcement About SC Judicial Vacancies

A separate issue was the declaration contained in the resolution of the three Chambers of the SC that the Polish President's announcement of 24 May 2018 about judicial vacancies in the SC[155] was invalid, as it required the countersignature of the President of the Council of Ministers.[156] This assessment was based on the thesis that a procedure initiated invalidly cannot end validly. The thesis drew on the analysis that the power of Poland's President to announce judicial vacancies in the SC is a new statutory power not listed in Art. 144(3) of the Constitution among the 30 presidential prerogatives. It cannot be recognised as a secondary prerogative derived from the prerogative concerning the appointment of judges (Art. 144(3)(17) of the Constitution), as only a prerogative whose exercise is necessary for the proper realisation of the main prerogative may be secondary. Thus, publishing such an announcement requires the countersignature of the Council of Ministers' President. This obligation is introduced by Art. 144(2) of the Constitution with regard to every official act of the President which is not a prerogative.

An opposite stance was taken by the SC in the resolution of 16 December 2021 by a bench composed of seven judges of the Extraordinary Review and Public Affairs Chamber. This resolution acquired the force of a legal principle.[157] Subsequently, the CT ruled on 23 February 2022 that the Polish President's announcement about judicial vacancies in the SC did not require a countersignature.[158] Upon the prom-

154 The decision of the CT of 21 April 2020, Kpt 1/20, OTK A/2020, item 60. The resolution of the three Chambers was adopted in violation of the law. See also the statement of reasons for the resolution of the three Chambers of the SC, para. 5, pp. 9–10 and para. 8, pp. 12–13, in which it acknowledges itself that it also dismissed the protective decision of the Civil Chamber of the SC of 20 January 2020, V CSK 347/19 issued in connection with the references for a preliminary ruling to the CJEU. The SC also refused to comply with Art. 86(1) of the Act of 30 November 2016 due to the fact that on 21 January 2020 the Marshal of the Sejm submitted an application with the CT, in which the Tribunal was asked to settle a dispute over powers between the SC and the Sejm with regard to the ability of the SC to adopt abstract resolutions changing the normative situation in the realm of the structure and organisation of the justice system in reference to a ruling of an international court.

155 M.P. of 2018, item 633. There were 20 vacancies in the Extraordinary Review and Public Affairs Chamber, seven in the Civil Chamber, and one in the Criminal Chamber.

156 This power of the President was the result of changes implemented by the Act on the SC, which granted it to the President (Art. 31(1)). Previously, the First President of the SC was the organ competent in that regard. Para. 34 of the statement of reasons for the resolution, pp. 43–45. In turn, the stance of the SC was adopted and applied in the judgments of the SAC of 6 May 2021 and of 21 September 2020 in the cases in which the candidates who were not elected to the SC appealed in August 2018 against the resolutions of the NCJ.

157 The Resolution of the Bench of Seven Judges of the Extraordinary Review and Public Affairs Chamber of the SC of 16 December 2021, I NZP 5/21.

158 Para. 2 of the operative part of the judgment, P 10/19, OTK 14/A/2022.

ulgation of the CT judgment, the problem faded, not due to the direct effect of the ruling but rather the weak argumentation of those seeking to use that formula to undermine judicial reforms.

5.4. The Test of Judicial Independence

By virtue of the Act of 9 June 2022 amending the Act on the SC and certain other acts, the procedure called the 'judicial independence and impartiality test' was introduced into the legal system.[159] Its source is Art. 1(24) of the said Act, which amends Art. 29 of the Act on the SC. It allows examination of

> the fulfilment by a judge of the Supreme Court or a judge seconded to perform judicial activities in the Supreme Court of the requirements of independence and impartiality, including the circumstances surrounding his/her appointment and his/her conduct after the appointment (…) if, under the circumstances of a given case, this may lead to the violation of the independence or impartiality standard, which affects the outcome of the case, having regard to the circumstances concerning the empowered person and the character of the case.

Analogous changes were introduced in the Act on the Organisational Structure of Common Courts, the Act on the Organisational Structure of Administrative Courts, and in the Act on the Organisational Structure of Military Courts.[160]

The purpose of the new institution is 'to provide the participants of judicial proceedings or administrative judicial proceedings with procedural guarantees that there are no doubts as to the impartiality and independence of a judge adjudicating in the case'.[161] This *prima facie* corresponds to the third criterion of the test laid down by the ECtHR (Grand Chamber) in the case *Ástráðsson v Iceland*.[162]

By introducing the independence test, the legislator refused to undermine the process of appointing judges in a general manner,[163] but admitted the possibility of an individual assessment of a judge. The purpose was to prevent courts from making this assessment, by referring directly to judgments of international courts.[164] Courts had previously used the institution of the exclusion of a judge based on the Code of

159 Journal of Laws of 2022, item 1259.

160 Arts. 2, 4 and 5 of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

161 The statement of reasons for the draft act.

162 More on that: the Chapter referring to the case law of the ECtHR. Cf. The judgment of the Court of Appeals in Warsaw – I Civil Division of 11 February 2022, I ACa 565/21.

163 See added Art. 29(4) of the Act, in accordance with which the circumstances surrounding the appointment of a judge of the Supreme Court may not constitute the exclusive basis for challenging a ruling delivered with the participation of that judge or for challenging his/her independence and impartiality.

164 See the part referring to the judicial violation of the Constitution by way of the so-called 'direct application of judgments of international courts'.

Criminal Procedure and the Code of Civil Procedure[165] or conducted an *a posteriori* review by examining, by way of a plea or *ex officio*, the irregular composition of a court related to a procedural irregularity mentioned in Art. 439(1)(2) of the Code of Criminal Procedure (absolute grounds for reversing the judgment) and Art. 379(4) of the Code of Civil Procedure (grounds for the invalidity of proceedings).

The new provision also prohibits undermining a ruling delivered with the participation of a judge appointed to that office as a result of a recommendation by the NCJ formed by the Act of 8 December 2017 amending the Act on the NCJ and certain other acts.

This leads to the conclusion that, by introducing the 'independence and impartiality test', the legislator sought to regulate courts' actions by creating a procedural framework. This framework included: (1) a weekly period for initiating the 'test' procedure, after which 'the right to submit an application extinguishes'; (2) the requirement to specify the circumstances justifying the request together with evidence to support them,[166] making this a formal requirement for submissions and simultaneously justifying the scope of examination within the test; (3) the limitation of the right to request the 'independence and impartiality test' only to cases permitted by statute (in the Act on the Organisational Structure of Common Courts – from the negative perspective, in the Act on the SC – from the positive perspective);[167] and (4) a partial limitation of the appellate procedure.[168]

The new institution proved ineffective. In practice, the solution was undermined and conflated with the existing bases for the exclusion of judges.[169] It was acknowledged that the statutory prohibition against challenging rulings delivered by judges of the SC due to the circumstances of their appointment violated the constitutional right to a court, thereby allowing refusal to apply the test under Art. 91(2) of the Constitution. Instead, references were made to judgments of the ECtHR and both SC resolutions the,[170] and procedures for the exclusion of a judge set out in the Code of Criminal Procedure and the Code of Civil Procedure were applied.[171] The effects are evident in practice.

165 The judgment of the CT of 23 February 2019, P 10/19, OTK ZU A/2022, item 14.

166 Art. 29(9)(2) of the Act on the SC, Art. 42a(7)(2) of the Act on the Organisational Structure of Common Courts.

167 E.g. the application or prolongation of pre-trial detention – Art. 42a(9) of the Act on the Organisational Structure of Common Courts.

168 Art. 29(22) or (25) of the Act on the SC.

169 The judgment of the District Court in Grudziąc I Civil Division of 30 October 2023, I C 976/22. See also the judgments of the Appellate Court in Kraków I Civil Division of 19 April 2023, I ACa 518/21 and of the Appellate Court in Warsaw I Civil Division of 11 February 2022, I ACa 565/21.

170 The decision of the Circuit Court VI Civil and Family Division in Olsztyn of 8 May 2024, VI Co 32/24.

171 Cf. the resolution of the Bench of Seven Judges of the SAC of 3 April 2023, I FPS 3/22; the judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23; the decision of the Circuit Court in Legnica VI Economic Division of 4 March 2024, VI GCo 32/24.

An analysis of jurisprudence shows that the prerequisites for a negative assessment in the test included: (1) public statements by a judge about the political situation in the country, expressed either during the recruitment competition or later, especially public acceptance of acts regarded by parts of the judicial community as unconstitutional, particularly where such statements were linked to the appointment and could imply alignment with political circles dominating the works of the NCJ;[172] (2) employment immediately before the appointment in units subordinated to the Minister of Justice or other executive bodies,[173] where those bodies were managed by the parliamentary majority that enacted the Act of 8 December 2017 amending the Act on the NCJ and other acts; (3) participation in recruitment competitions where the procedure enabled the selection of a manifestly less competent person over other candidates; (4) in the case of judges proposed for promotion, the nature and speed of the promotion and the position attained, as these were considered signs of political support rather than legal merit; (5) elements indicating irregularity in individual NCJ proceedings, including: (5a) refusal by NCJ members to recuse themselves in cases involving related candidates, or favouring candidates who had received administrative promotions in the judiciary through arbitrary decisions of the Minister of Justice; (5b) a lack of transparency in recruitment competitions, such as holding deliberations in camera, denying access to records of the proceedings, or NCJ members voting *in pleno* without providing reasons and disregarding the opinions of smaller teams; (5c) nominating a candidate despite a negative or insufficiently supported opinion from the judicial self-government, or advancing a candidate with significantly less support than another candidate without rational justification, including cases where the candidate had previously been seconded to a higher court through arbitrary ministerial decisions despite the low quality of their work.[174]

It was not ruled out that significant doubts about independence and impartiality could be resolved through the test.[175] It was stressed that the stance of the person concerned and his/her attempts to clarify any doubts before hearing a case were important (e.g. by personally raising doubts under Art. 41 of the Code of Criminal Procedure and Art. 49(1) of the Code of Civil Procedure).

It was highlighted that even serious irregularities in the appointment procedure could not, in themselves, lead to the invalidation of the act of appointment by the

172 Siniecka-Kotula, 2024a.

173 The resolution of the Bench of Seven Judges of the SAC of 3 April 2023, I FPS3/22; the judgment of the Appellate Court in Białystok III Labour and Social Security Division of 14 December 2023, III APa 8/23.

174 The judgment of the Appellate Court in Białystok – III Labour and Social Security Division of 14 December 2023, III APa 8/23.

175 The judgment of the Appellate Court in Gdańsk – I Civil Division of 26 April 2023 I ACa 1109/22. The decision of the Circuit Court – VI Civil and Family Division in Olsztyn of 8 May 2024, VI Co 32/24. The decision of the District Court in Katowice-Zachód in Katowice VII Labour and Social Security Division of 22 June 2023, VII Pz 10/22.

President of Poland,[176] and that an irregular NCJ resolution could not be equated with its non-existence, *ex lege* invalidity, or the invalidity of the proceedings before the NCJ.[177]

It is impossible to provide a definitive number of proceedings conducted in courts since the introduction of this institution. Media data from 2023 cited 350 cases,[178] and preliminary surveys provided limited insight. Publicly known cases typically involved high-profile judges engaged, in various capacities, in the dispute over judicial reform.[179]

The analysis of available cases indicates highly divergent jurisprudence. Rulings included: (1) courts that, as part of an appeal, *ex officio* noted the existence of a problem in a case, analysed it broadly, but did not resolve it;[180] (2) courts that, after conducting the impartiality test (on request or *ex officio*), positively assessed the judge and confirmed that the right to a court had not been infringed;[181] (3) courts that, after conducting the independence and impartiality test, declared that a judge was not empowered to adjudicate in a case.

The latter rulings often arose in cases of public interest,[182] or when the test was conducted by judges seeking retribution against former ruling authorities, for instance, because they had been dismissed as court presidents, or subjected to disciplinary proceedings.[183] These cases frequently involved judges who 'battled' judicial reforms, particularly members of certain judicial associations.[184]

Such rulings often paralysed adjudication. One example is the Criminal Division of the Appellate Court in Rzeszów, which was unable to function because only one of its five members passed the independence and impartiality test. Judgments delivered by the remaining judges were quashed by the SC's Criminal Chamber. These judges were accused of signing support lists for NCJ candidates or of being promoted too quickly.[185] Eventually, this resulted in the suspension of the division's activity.[186]

The independence and impartiality test did not fulfil the drafter's objectives. It became a concession used against the legislator and an additional, entirely legal systemic instrument creating adjudicative chaos. This sometimes resulted in absurd

176 Likewise: the judgments of the CT of 29 November 2007, SK 43/06, OTK ZU No. 10/A/2007, item 130 and of 27 May 2008, SK 57/06, OTK ZU No. 4/A/2008, item 63.
177 Cf. Grajewski and Pułło, 2011, pp. 5–17.
178 Sąd Apelacyjny w Rzeszowie sparaliżowany. Zawiesił orzekanie w procesach odwoławczych, 2024.
179 See e.g. the cases of disciplinary commissioners: Jałoszewski, 2024c.
180 The judgment of the Appellate Court in Warszawa I Civil Division of 11 February 2022, I ACa 565/21.
181 The judgment of the Appellate Court in Gdańsk I Civil Division of 26 April, I ACa 1109/22.
182 See e.g. the judgment of the Circuit Court in Olsztyn I Civil Division of 28 December 2021, I C 593/21.
183 See the judgment of the Appellate Court in Białystok III Labour and Social Security Division of 14 December 2023, III APa 8/23.
184 The judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23. Cf. Jałoszewski, 2024.
185 In the first half of the year, ten judgments were quashed. Kulczycka, 2024.
186 Sobczak, 2024.

situations where judges who declared another judge non-independent subsequently failed the test themselves.[187] Judges excluded one another, often for personal reasons, as nothing prevented them from doing so.[188]

5.5. The Problem of Direct Application of International Judgments by National Judges

The ECtHR and CJEU jurisprudence in Polish matters has created the phenomenon of directly applying European court judgments. Polish law does not permit this. Judgments of these courts are not part of the national legal order.[189] They constitute international obligation, whose fulfilment is guaranteed by Art. 9 of the Constitution, and generally require legislative action. Until the law is amended, national provisions held inconsistent with the EU Treaties or the ECHR remain in force. No national body may infer rights directly from such judgments, even where it appears that a judgment confers rights,[190] or where failure to enforce it would exacerbate a breach of international obligations.

National courts do not enforce international judgments either; they only consider them within specific national procedures, in which a judgment may serve as grounds.[191] to reopen national proceedings. Whether to reopen rests with the court.

International judgments may sometimes be used by national courts to interpret provisions of the TEU, TFEU and ECHR (only those that, under Art. 91, are directly applicable) as well as sub-constitutional national provisions. Two points are noteworthy: (1) only provisions meeting the technical standards of direct applicability and the constitutional requirements may be applied directly;[192] (2) interpretation of national provisions has limits – it cannot contradict their clear wording, nor can it create new content that violates the Constitution or undermines its guarantee functions.[193]

From the outset of the judicial reform, excesses of this kind appeared in jurisprudence. A group of judges identifying as 'European judges', dubbed by the media as 'judges

187 Sędzia wykluczony ze względu na przynależność do Iustitii, 2024.

188 See e.g. the judgment of the Appellate Court in Kraków I Civil Division of 19 April 2023, I ACa 518/21, where judge P. Rygiel excluded judge Z. Drożdżejko and, in turn, a couple of months later the latter excluded the former, alleging that he could not guarantee the independence of the court. See Skowrońska, 2023.

189 See Art. 288 in conjunction with Art. 299 TFEU. Cf. Art. 260 TFEU and Art. 46 ECHR.

190 See the judgment of 21 December 2021 in the case Eurobox Promotion. and Others (joined cases C-357/19, C-379/19, C547/19, C811/19 and C840/19). In this judgment, the CJEU imposed the obligation on national courts to disregard the ruling of the constitutional court if the constitutional court does not fulfil the requirements of a 'court' within the meaning of EU law or if the content of its rulings is inconsistent with EU law.

191 See e.g. Art. 540(3) of the Code of Criminal Procedure. This provision is also applied in the vetting and fiscal penal procedure by way of a reference. See also Art. 272(2) and (3) of the Act on the Procedure before Administrative Courts or Art. 240(1)(11) of the Tax Ordinance.

192 Muszyński, 2023a, pp. 5–36.

193 The judgment of the CT of 7 October 2021, K 3/21, OTK ZU A/2022, item 65.

applying the case-law of international courts', began adjudicating directly on the basis of international judgments.[194] These judgments, in violation of the constitutional framework governing the sources of law, thereby became treated as national law at all levels of adjudication. They were used as a direct basis for undermining the position of judges appointed by the President on NCJ motions made under the Act of 8 December 2017 and, consequently for quashing judgments they delivered. The principle of the primacy of EU law was invoked to justify this practice. Although that principle addresses conflicts between legal provisions, courts extended it to the case-law of the CJEU.[195] By doing so, they disapplied national provisions without offering an alternative EU legal basis, or they directly cited the CJEU's case-law.[196] Courts declared that 'the primacy of EU law over national law is absolute',[197] that the Republic of 'does not operate in a Treaty vacuum', and that the ample case-law of the CJEU and the ECtHR 'has already determined those issues'.[198] To justify specific rulings, they also applied case-law from unrelated cases or foreign jurisdictions.[199] CJEU judgments were juxtaposed with CT rulings declaring he inconsistency of Treaty provisions with the Constitution, and courts concluded that this did not mean that the organisation of the judiciary was inconsistent with the EU Treaties.[200]

Such adjudication resulted in the negation of judicial status, which led to the quashing of substantive judgments,[201] the blocking of proceedings,[202] or even their reopening *ex officio*.[203] One of the most unfortunate outcomes was the SC's Criminal Chamber quashing the conviction of a professional driver for premeditated murder on the grounds that a so-called neo-judge had been on the first-instance bench.[204]

Over time, international judgments were increasingly used to challenge systemic institutions. A judge in Wrocław argued that if, according to the ECtHR, the participation of a neo-judge on the bench meant that the court was not established by

194 See e.g. Jałoszewski, 2024d. See also: Jałoszewski, 2023b or Jałoszewski, 2023a.

195 See e.g. the judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23 and the judgment of the Appellate Court in Białystok III Labour and Social Security Division of 28 February 2022, III AUa 1032/21.

196 See e.g. the judgment of the SC of 5 December 2019, III PO 7/18.

197 See e.g. the judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23; the judgment of the Appellate Court in Warsaw II Criminal Division of 13 July 2022, II AKa 173/21. Cf. the judgment of the Appellate Court in Wrocław II Criminal Division of 6 February 2023, II AKa 190/22; the judgment of the SAC of 4 November 2021, III FSK 3626/21; the judgment of the SAC of 4 November 2021, III FSK 4104/21.

198 The judgment of the Circuit Court in Olsztyn I Civil Division of 28 December 2021, I C 593/21.

199 See e.g. the judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23; the decision of the SC of 16 September 2021, I KZ 29/21.

200 The decision of the Appellate Court in Gdańsk II Criminal Division of 14 October 2021, II AKa 154/21.

201 The decision of the Circuit Court in Kraków I Civil Division of 11 October 2021, I. Cz 311/21-I.

202 The decision of the Circuit Court in Kraków I Civil Division of 10 October 2021, I C 846/20.

203 See e.g. the Criminal Chamber of the SC reopened the proceedings in the case No. III KK 81/23, in which the decision of 22 June 2023 had already been delivered.

204 Walaszczyk, 2024.

law under the ECHR or the Constitution, then statutory procedures could not apply. A first-instance court is bound by a second-instance court's determination only if the latter qualifies as a court. If it does not, then its judgment is not binding. Consequently, the judge held that the second-instance ruling was non-existent as it was not delivered by a lawfully established court.[205] Similarly, the Łódź-Śródmieście District Court ruled that, because the NCJ was unconstitutional, it could not validly move to appoint a judge, rendering the President's appointment invalid and the appointee not a judge. An appellate court in Katowice delivered a comparable ruling.[206]

These actions are unlawful. A judgment is an international obligation of the state, not a source of law. A national court 'sees' a judgment of an international court only through the lens of national law, that is, exclusively through the constructs set out in the aforementioned procedural provisions. There are also no CT judgments that would undermine the presidential act of judicial appointment or allow judgments to be declared non-existent. On the contrary, particularly in the case of common courts, the protection of judges consists solely in the review of their independence and impartiality, and only upon a request submitted in accordance with the proper procedure.

5.6. Other Forms of Harassing Judges

Disciplinary or criminal measures were taken against certain judges, related to their prior professional activity. The most notable case involved disciplinary charges brought against the First President of the SC on 26 February 2024.[207] This stemmed from her conduct during the paralysis of the College of the SC, when some members refused to participate in its works until Poland enforced the preventive decision of the President of the CJEU of 14 July 2021 and the CJEU judgment of 15 July 2021.[208] The First President of the SC wrote to college members, informing them that draft resolutions would be subject to correspondence (electronic) voting and that failure to vote by the deadline would be treated as abstention. She justified the change by referring to the Special Anti-Covid Act. This practice continued until 14 July 2022. A group of judges argued that this action formed grounds for disciplinary and criminal liability of the First President of the SC. The necessary information was submitted.[209] The paradox of this case was that the First President of the SC had no authority to enforce CJEU rulings, as these required the legislator's intervention. She was bound

205 Słowik, 2024.
206 Ambroziak and Jałoszewski, 2024.
207 Czuchnowski, 2024b.
208 The first of those rulings ordered the suspension of the Disciplinary Chamber of the SC, and the second one stated that this chamber did not fulfil the standards of a court. Ten judges of the SC refused to participate in the College of Judges: D. Dończyk, M. Romańska, A. Piotrowska, T. Artymiuk, M. Laskowski, J. Matras, B. Skoczkowska, B. Bieniek, P. Prusinowski and K. Rączka.
209 Jałoszewski, 2024d.

by the statute in force, and it was the judges who had refused to fulfil their statutory obligations who should have faced disciplinary liability.

A second case concerned the Minister of Justice appointing an *ad hoc* disciplinary commissioner to investigate allegations against the judicial members of the NCJ of both the current and previous terms.[210] This was prompted by a report from the Association of Polish Judges Iustitia. The commissioner was tasked with determining whether these members had committed disciplinary offences, or even crimes, by standing as candidates for the NCJ in elections ordered by the Marshal of the Sejm pursuant to the Act of 8 December 2017 amending the Act on the NCJ and certain other acts. The allegation relied on the view that the Act on the NCJ was inconsistent with the Constitution insofar as the Sejm's selection of 15 judicial members was concerned,[211] despite no CT judgment having confirmed such inconsistency. This position reflected only the opinion of certain jurists,[212] not the binding legal situation.

Another case involved a report to the public prosecutor alleging that a judge of the SC was impersonating a public officer,[213] as defined in Art. 227 of the Criminal Code.

Judges were also administratively removed from adjudicating by presidents of courts, based on the Minister of Justice's Regulation of 6 February 2024 amending the Rules and Regulations of Common Courts. The amendment to Para. 43(1)(a) stipulated that cases concerning the exclusion of a judge related to the circumstances of his/her appointment would not be assigned to judges appointed upon the motion of the NCJ formed in accordance with Art. 9(a) of the Act of 12 May 2011 on the NCJ, as amended on 8 December 2017. Those judges were excluded from the Random Case Allocation System.

In some courts, newly appointed presidents also administratively removed from other judicial duties judges appointed by the President upon the motion of the NCJ formed after the amendment of the Act on the NCJ introduced on 8 December 2018. This occurred in district courts in Warsaw, Słupsk and other cities.[214] In the Criminal Division of the Appellate Court in Warsaw, these judges were reassigned from direct adjudication to the Interlocutory Appeals and Applications Section.[215]

Such actions not only constitute abuses of law intended for judicial scheming and retaliation but also violate binding legal standards. They *de facto* undermine judicial independence, thereby eroding public trust in the justice system.

210 Nowaskowska, 2024.
211 Ministerstwo Sprawiedliwości, 2024.
212 Krajowa Rada Sądownictwa, 2024.
213 Jałoszewski, 2024a.
214 The so-called 'old' judges from the district court in Słupsk, lodged in this case, as part of a protest, appeals with the NCJ, which were allowed.
215 Jałoszewski, 2025.

6. Conclusions

In the area of the justice system, multidimensional lawlessness has emerged.

The first dimension concerns axiological issues: some courts, the executive, and the legislature negate fundamental constitutional principles such as the rule-of-law state, the separation of powers, the supremacy of the Constitution, and the presumption of the constitutionality of statutes, upon which public authority rests. External systems, particularly through the judicial and political activism of the ECtHR and the CJEU, are now shaping the constitutional order by attributing new content to these principles.

The second dimension is institutional. The constitutional status of judges, courts, the NCJ, and the President's powers of judicial appointment is undermined directly by the ECtHR and the CJEU, as well as by national courts.

The third dimension is substantive and procedural. This includes the undermining of court rulings delivered in the name of the Republic of Poland[216] (e.g. 'non-existent judgments', judges unauthorised to adjudicate), disregard of binding statutes, and the importation of non-existent legislative constructs into judicial practice, such as the so-called 'revival of repealed law'. Judgments have been delivered without legal basis or on fictional grounds, including international courts judgments.

This situation has created legal chaos incompatible with the rule of law or the right to a court. Those standards aim to determine individuals' cases, not to reshape the state's constitutional system, advance political agendas, or facilitate judicial vendettas.

Yet, as a result of judicial practice – which the state cannot and, since the change of government in December 2023, will not restrain – long-standing standards of legal application have been redefined, or at least their boundaries shifted. This phenomenon has been called 'the reversed rule of law'.

A characteristic feature of the reversed rule of law is its attempted legitimisation by detaching it from the Constitution and embedding it in the realm of international law. Historically, the constitutional order and its derivatives (democracy and the rule of law) belonged exclusively to the state, with no equivalent international standards. Today, international legal constructs not only specify but even create the content of these principles, safeguarded by mechanisms intended for defending the rule of law.

At the forefront of this process are the legal systems of two international organisations of which Poland is a member: the Council of Europe and the EU. Both are regional systems of international law. The Council of Europe operates as a traditional international law system, while the EU is a supranational order whose bodies hold Treaty-based competences to enact law directly binding on Member States. In both

216 Art. 174 of the Constitution.

systems, the relationships between international and national law are framed in terms of supremacy and subordination, albeit in different ways.[217]

In the Council of Europe system, the European Convention on Human Rights and Fundamental Freedoms (ECHR, 1950) is of crucial importance. It imposes specific obligations on states towards individuals under their jurisdiction[218] and has become a strategic act with a quasi-constitutional role in Europe's politically integrated region. The standards contained therein have been elevated to the foundations of the rule-of-law state.[219]

Consequently, the ECtHR has gained considerable significance. Initially, it was a body established 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto (…)'.[220] By the turn of the 21st century, taking advantage of the growing importance of the Convention,[221] the ECtHR strengthened its Treaty-based role by expanding its case-law instruments,[222] and extending its judgments into systemic and political spheres.[223] In this way, it has become an external body overseeing state authorities, operating under an international treaty while simultaneously shaping the normative content of that treaty through its own case-law. It now acts with increasing latitude, including by juxtaposing the content of the ECHR with the state's constitution. Thus, it influences not only the state's autonomy in conducting domestic and foreign policy, but also its constitutional structure, thereby affecting not merely the exercise of sovereignty but its very substance.

In the EU system, the international standardisation of the rule of law is related to Art. 2 TEU. The CJEU now interprets this provision not merely as EU axiology but as a binding obligation requiring Member States to reflect these values in their legal systems.[224] These values are both substantive (human rights, the rule of law, democracy) and procedural (transparent, accountable, democratic, and pluralistic law-making). Through its case-law, the CJEU has also linked these values to Art. 19 TEU and Art. 47 of the ChFR.[225] extending their effect to the entirety of state authority, including Treaty-based exclusive competences. Under Art. 4 TEU, Member States

217 See: Muszyński, 2023c, pp. 178–179.
218 Art. 1 ECHR.
219 Muszyński, 2022, p. 674.
220 Art. 19 ECHR.
221 The Convention as the so-called living instrument.
222 Pilot judgments. More on that: Lubiszewski and Czepek, 2016.
223 The judgment of 29 April 1988, Belilos v Switzerland (application No. 10328/83) and the Report of the Commission of Human Rights of 8 June 1993 in the joined cases Metropolitan Chrysostomos and Georgius Papachrysostomou (applications Nos. 15299/89 and 15300/89) as well as the judgment of the ECtHR of 18 December 1996, Loizidou v Turkey (application No. 15318/89). The judgment of 9 April 2024 in the case Verein KlimaSeniorinnen v Switzerland (application No. 53600/20).
224 Case C-156/21, *Hungary v Parliament and Council*, para. 232.
225 Case C-156/21, *Hungary v Parliament and Council*, paras. 157–163.

must exercise these competences in accordance with EU standards,[226] as required by the principle of loyalty.

Two mechanisms enforce these standards: the principle of the primacy of EU law and the CJEU itself. The principle of primacy requires national law that is inconsistent with EU law to be disapplied and replaced by EU norms, even at the constitutional level,[227] thereby breaching the *ordre public* principle traditionally governing the application of foreign law. The CJEU, as the Treaty-based interpreter of EU law, determines the content of these standards and the compliance of Member States, thereby limiting their sovereignty.

Poland remains a rule-of-law state committed to binding international law. One of its tasks is to harmonise national and international standards, subject to the supremacy of the Constitution.

The growing importance of human rights in international law underscores this need. Yet, while international and national standards share axiological foundations, they are not fully convergent.

The guarantees arising from the European Council and EU systems are inherently interventionist, reflecting the specificities of international law and enforcing the unification of standards, notably the right to a court. In Poland, however, this standard has been misused to interfere with the state's constitutional system. The independence of judges and courts is a constitutional standard, hierarchically superior to Treaty-based norms. Nevertheless, through international case-law, constitutional solutions have been reinterpreted to fit within an international-law framework, resulting in the reversal of the Constitution's supremacy over international agreements.[228] This transformation occurred outside the legislative process, driven by the judicial activism of international courts.

The Constitution of Poland guarantees judicial autonomy, a standard that had not changed since its enactment. Yet, international case-law has been used to redefine it in order to reverse judicial reforms enacted by the legislature.

This involved not only altering legal standards, but also granting national courts powers not provided by the Constitution. Courts used these powers uncritically and unlawfully, attempting to redefine the constitutional balance between the legislative and judicial branches by, for example, applying repealed law.

The Constitution remains the supreme law of Poland, and its observance is the foundation of the rule-of-law principle. In the EU, this principle, derived from Member States' constitutional traditions (Art. 2 TEU) is formally recognised, ensuring coherence between national and EU systems.

226 Case C-896/19, Repubblica, para. 48; Case C-791/19, Commission v Poland, paras. 51, 56. Case C-157/21, Poland v Parliament, para. 267.

227 See the case C 430/21-RS, the judgment of the CJEU of 22 February 2022, para. 51.

228 This is visible in the provision referring to the powers of the CT indicating the direction of constitutional review. See: Art. 188(1) and (2) of the Constitution.

The judicial reform in Poland did not attempt to change these relations. It redefined certain statutory-level issues within the constitutional framework, as confirmed by CT jurisprudence. It did not dismantle the system's foundations but operated within the acceptable scope of differentiation permitted at the European level, where no uniform judicial organisation exists.

This reform was nevertheless perceived as an attack on European values. International bodies sought to block it, not through dialogue but by advancing interpretations of national law and state powers without constitutional basis. This was justified by portraying Poland as a 'new (young) democracy', lacking established democratic structures and thus requiring external guidance and control.

The rule of law guarantees effective judicial review by an independent court composed of impartial judges. Judicial independence and impartiality are constitutional standards. However, in the actions of the ECtHR and the CJEU, these standards have become tools of interference in Polish statehood. To this end, Art. 6 of the ECHR and Art. 19(1)(2) TEU have been reinterpreted beyond their traditional wording. The ECtHR extended the lawful judge concept by adding a substantive element: that irregularities in judicial appointments could infringe the right to a court. Similarly, the CJEU altered the nature of Art. 19 TEU. Until 2017, this provision required Member States to provide legal protection of individuals in EU legal relations through national courts, obliging legislatures to create the necessary institutional, procedural, and substantive guarantees. It was not a provision that could be applied directly.[229] In the new formulation, it became a source of substantive-law content relating to the standards of the justice system. This content was subsequently created and developed in the CJEU's case-law.

Such actions interfered with national legal structures, including judicial appointments and institutional arrangements. The NCJ, the presidential prerogative and, consequently, newly appointed judges came under attack. These were, however, indirect interferences. Both courts defined in their rulings only the essence of the values, requiring that this standard be achieved either by amending national law (ECtHR and CJEU judgments under Art. 258 TFEU) or by creating instruments to challenge the reform of national courts (CJEU preliminary rulings).

In relation to the NCJ, allegations concerned the method of electing new members and the unlawful termination of the 'old' council term, although the latter bore no causal link to the functioning of the 'new' council. As a result, instead of assessing the independence and impartiality of a judge after appointment, the point of assessment was shifted to the stage of appointment, when the candidate was not yet a judge. His or her conduct could not be assessed in term of independence, as this attribute was not yet required. The assessment instead considered whether the candidate guaranteed future independence and possessed impeccable character, a subjective judgment by the appointing body or the candidate.

229 Cf. Wegener, 2016, pp. 308–330, in particular, note 32 and note 43. This is an assessment that was previously universally shared by legal scholars in Europe.

After appointment, failure to remain independent may constitute grounds for removal from office, but not for undermining the validity of the appointment itself.

Both courts' actions sought to challenge the President's prerogative, undermining its exercise under Art. 179(1) of the Constitution, by removing the presumption of the regularity of appointments in light of the newly interpreted provisions of Art. 19(1)(2) TEU and Art. 6(1) ECHR.

If independence and impartiality must be real and not merely formal, then failure to meet certain substantive standards during the appointment process – whether by the appointing bodies or the candidate – may be deemed to violate the right to a court. Consequently, appointments became relative and subject to review.

It is paradoxical that this concerns a prerogative, a right exercised entirely freely, even arbitrarily, by the President. In exercising it, the President acts solely on the basis of, and within the limits of, the Constitution. This prerogative is fully empowered and cannot be redefined by sub-constitutional acts, which include international treaties such acts. It may be only supplemented in ways that do not alter its essence. A prerogative is also unquestionable, as no procedure exists for its review. All state organs are bound by the presidential act and cannot invoke their own powers to challenge it, as those powers end where the presidential prerogative begins.

In Polish practice, some even criticised the very concept of prerogatives and demanded that they be subject to national and international review,[230] reflected in the initiation of cases. Administrative courts dismissed the possibility of classifying this empowerment as an administrative act, although they attempted to obstruct its exercise.[231] The ECtHR did not attempt to settle this matter, and even the SC, in its three-chamber resolution, refrained from directly evaluating the prerogative. However, the SC did, for the first time, reject the constitutional presumption of independence of an appointed judge and the statutory presumption of his/her impartiality, thus undermining the constitutional construction of the separation of powers. It also indicated mechanisms to review appointments, relying on procedural institutions and instructing their use for *ex post* evaluations of judicial appointments as systemic institutions. It did so by providing a *contra legem* interpretation to bypass the prerogative. The CT later found this resolution unconstitutional, both formally (lack of SC competence) and (substantively (the interpretation conflicted with the Constitution). Despite this, some courts at all levels complied, although the procedural mechanisms invoked were inapplicable. Impartiality is distinct from independence.

Attempts were also made to challenge the presidential prerogative externally, with arguments such as the irregular NCJ issuing an irregular motion and the

230 On 14 May 2020, the ECtHR informed the Polish Ministry of Foreign Affairs of hearing joined applications which were submitted by persons who had not been appointed to judicial positions by the President of the Republic of Poland. See: Helsińska Fundacja Praw Człowieka, 2020. See also: the decision of the Voivodeship Administrative Court in Warsaw of 27 January 2005, II SAB/WA 378/04, LEX No. 827243, the decision of the SAC of 7 December 2017, I OSK 857/17, LEX No. 2441401.

231 See e.g. the decision of the SAC, II GW 22/18, II GW 28/18, II GW 31/18, 330/2018.

announcement of SC judicial vacancies lacking the Prime Minister's countersignature. Both claims were dismissed by the CT.

The judgments of the ECtHR and the CJEU addressed virtually the entire judicial reform. Their enforcement, however, is as a rule carried out by state organs within their national (constitutional) competences, ensuring state influence over how these judgments are enforced and over the delineation of the boundaries of subordination to them. Only those organs authorised by national law may enforce these judgments, as it is the constitution-maker or, where appropriate, the legislator who determines who is empowered to do so, and in what manner.

Judges enforcing judgments of international courts often confused the direct application of an international agreement with the state's enforcement of an international court's judgment. A judgment of such a court, established by an international agreement, is not identical to a substantive provision of the agreement that meets the criteria for direct applicability. In enforcing such judgments, national courts also began determining whether a state body or its organisational unit constituted a court. They had no authority to do so, as the Constitution or statute alone confers this status. Neither the Constitution nor statute, nor the provisions of an international agreement, empowers national courts to resolve systemic issues. Yet they inferred such a power from international court judgments, which themselves improperly conferred it.

This posed a paradox. Under an international court's ruling, a body was not considered a court established by law from the perspective of international law, yet it remained a court under national law. National courts, bound by the Constitution and statutes, rejected this, even though that binding force holds constitutional rank.[232] Their judgments assessing whether a body or its organisational unit met the prerequisites of a court established by law were thus inconsistent with binding legal provisions.

No international judgment provides a basis to conclude that a ruling issued by judges appointed by the President upon the motion of the NCJ formed under Art. 9(a) of the Act of 12 May 2011 on the NCJ is *de iure* non-existent. Nor do such judgments undermine the status of common court judges. They merely indicate the need for mechanisms enabling a party with doubts – arising from the appointment procedure – about a judge's independence or impartiality to file an appropriate motion. There has never been any automaticity in this regard or any possibility for a court to act *ex officio*.

Nonetheless, national courts adjudicated on this issue. In doing so, not only did they violate the constitutional content of the rule of law but also sought to introduce changes exceeding those required by ECtHR and CJEU rulings. They acted in breach of their obligation to administer justice and even infringed the individual's right to a court.

232 See Art. 178(1) of the Constitution.

The preliminary ruling procedure has become the most dangerous instrument for undermining the rule of law. Previously undervalued and primarily applied in administrative, legal and economic matters,[233] these rulings have allowed the CJEU to create a number of interpretations of Treaty provisions. These interpretations not only conflict substantively with national legislation but also interfere with the constitutional structure of the separation of powers. Such actions include authorising national courts to act on the basis of repealed laws no longer binding in the state,[234] or even without any legal basis.[235] The CJEU derived this authority from the principle of the primacy of EU law, extending its effect to include the 'revival' of repealed national laws. It thus broadened the scope of the said principle to cover the suspension of the application of national norms inconsistent with EU norms and triggered a cascade effect, namely a return to previously binding national law.

No international court is competent to interfere with the constitutional principle of the separation and balance of powers (Art. 10 of the Constitution), by altering it or redistributing the constitutional powers of state organs exercising legislative and judicial authority. International courts may not entrust national courts with this function, and the so-called principle of the primacy of EU law cannot serve as a basis for doing so. This principle is merely a conflict-of-law rule stemming from ECJ/CJEU case-law. It is not a competence-conferring norm allowing a national court to act beyond its statutory powers. A national court cannot refuse to apply a national norm inconsistent with EU law and simultaneously apply another norm that has been repealed and is no longer binding,[236] nor can it invoke the primacy principle to disregard both a national and a valid EU norm.[237]

Neither court adopted a consistent methodology for determining national law. They asserted the existence of national norms in a literal manner, disregarding purpose, axiology and national jurisprudence, contrary to the national rules of interpretation. This produced absurd consequences.[238] ECtHR judgments even created substantive

233 Cf. Muszyński, 2023c, pp. 177–199.

234 C-824/18, A.B. and others. The first para., the second subpara. of the operative part of the judgment. Likewise, the second para. of the operative part.

235 In the preliminary judgment of 13 July 2023 in joined cases C-615/20 and C-671/20, the CJEU highlighted the obligation to implement the standards even in the situation where there are no national statutory provisions. See case C-615/20, para. 76. C-824/18 para. 167.

236 See the judgment of 5 December 2019. The Labour and Social Security Chamber of the SC, where the Chamber, by referring inter alia to the principle of the primacy of EU law, decided the case that fell beyond its statutory powers, but within the powers of another chamber of the SC.

237 By referring to the aforementioned principle, the SC refused to refrain from proceeding with the resolution of the joined Chambers of the SC, so in favour of the principle of the primacy of EU law, it refused to comply with the disposition arising from Art. 86(1) of the Act of 19 December 2019 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings before the Constitutional Tribunal (the imperative to stay proceedings before the authorities that are involved in a dispute). At the same time, it did not indicate a specific provision of EU law (the basis for its action), and merely wrote in the statement of reasons that the refusal to apply that provision followed from the obligation to enforce a preliminary judgment.

238 See the separate opinion of Judge Wojtyczek, case Broda and Bojara, para. 2.

norms absent from national law,[239] or attributed incorrect effects to certain national rulings. In the judgment *Dolińska-Ficek and Ozimek v Poland*, the ECtHR stated that the President was obliged to suspend judicial appointments because the SAC had stayed the application of NCJ resolutions.[240] In doing so, it not only confirmed the SAC's unlawful actions, by which the SAC had conferred upon itself powers unknown in the legal system, but also attempted to define the President's constitutional prerogative and undermine its essence.

Both courts redefined the systemic elements of the Polish State, including the rank and mutual relations of certain state organs (CT, SC, SAC), and as well to the legal effects of their jurisprudence. They freely balanced and assessed these elements despite their role and legal rank being enshrined in Polish law, at the constitutional level.[241] This rank cannot be changed. Consequently, the courts incorrectly reconstructed the national legal order, thereby violating the international-law imperative that requires international courts to abide by national law. Only correctly reconstructed law may form the basis for assessment under the Convention (ECtHR) or the Treaties (CJEU). Faulty reconstruction leads to faulty judgments, as the CT has indicated in its rulings.[242]

As a consequence, international judgments have depreciated the role of national organs, particularly the Sejm's power to enact binding law and the CT's authority. They have permitted the refusal to apply binding law in favour of repealed provisions and vested common courts with the power to disregard CT judgments, in violation of Art. 190 of the Constitution.[243]

Tribunals and national courts have manipulated their case law to create a judicative network. The ECtHR and CJEU cite themselves and each other, cross-referencing this case law with selectively treated national jurisprudence.[244] They assign

239 See the separate opinion of Judge Wojtyczek, case Broda and Bojara, para. 4. There is no individual right of a judge to irremovability. Independent adjudication may not be considered in the categories of an individual right. Likewise, there is no individual right to a term of office for a judge to fulfil his/her function, and it may not be analysed in the category of acquired rights. See e.g. the judgment of the CT in the case No. K 1/12, OTK ZU No. 11A/2012, item 134 or the judgment in the case No. P 37/14, OTK ZU No. 8A/2015, item 121.

240 Subpara. 353, second para.

241 Directly, see Art. 174 of the Constitution. And as a derivative of the systemic position of the organ, see: Art. 190(1) of the Constitution.

242 E.g. K 3/21, OTK 2022/A/65; K 6/21 OTK 2022/A/9 or K 7/21 OTK 2022/A/24.

243 In the judgment of 5 June 2023, case C-204/21, para. 80, the CJEU stated that in the light of the second para. of Art. 19(1) TEU in conjunction with Art. 47 ChFR, as well as in the light of the principle of the primacy of EU law, the case-law of a national constitutional court may not prevent national provisions from being subject to review by the said Court. In turn, in the preliminary judgment of 13 July 2023, in joined cases C-615/20 and C-671/20, second indent of para. 94(4), the said Court ordered the rejection of the jurisprudence of the CT if it prevented from reviewing acts issued by the Disciplinary Chamber (a body whose independence and impartiality are not guaranteed).

244 C-718/21. The CJEU adjudicated on the basis of the findings and assessments made by the ECtHR and the SAC, by juxtaposing it with its own case-law referring to the conditions of appointing judges to the Polish SC.

meanings to Treaty provisions that often lack basis in the provisions' wording or character. The CJEU even reinterprets Treaty provisions so that competence-based provisions become substantive norms and attributes to them direct effect.[245] A growing practice is the mutual copying of argumentation: a national court sets out arguments in an application, the CJEU adopts and develops them, and the national court then uses them as the CJEU's own reasoning.[246]

Judgments from both courts have also introduced vague non-legal criteria, such as 'giving rise to reasonable doubts, in the minds of individuals, as to the independence and impartiality of the judge concerned'. These interpretations are illogical from a legal perspective. Substantive meanings are assigned arbitrarily to provisions, disregarding the causative link between the assigned content and the literal wording of the provision. Moreover, these judgments often contain numerous substantive and factual errors, sometimes to an embarrassing degree.

The Polish judiciary enjoys a constitutionally strong position regarding both adjudicative independence and the independent status of judges. These standards give judges significant freedom. However, they assumed that only individuals of high ethical standards would occupy judicial office. Before 2018, the process of creating judges functioned as a form of self-selection, where the judicial community's consent determined which candidatures reached the President. This fostered a closed system, the proverbial 'extraordinary caste'.[247] When this fundamental interest was violated, combined with strong guarantees of inviolability subsequently reinforced by international case law, a form of rebellion arose among some members of the judiciary.

This rebellion was supported by the liberal and leftist political opposition, which sought to take power in Poland. It used its influence in the EU and the Council of Europe, institutions also dominated by representatives of liberal and leftist factions. Both courts are largely composed of judges of this provenance,[248] which proved crucial in reversing the rule of law. Without the creation of new international standards, national courts would have been powerless. These standards bypassed constitutional safeguards, enabling their circumvention or outright disregard. As a result, the Polish judiciary faced near collapse. Courts created formal obstacles, prolonging case resolution by returning cases to the starting point on the pretext of an irregular bench, often in the SC and through extraordinary measures after the entire appellate procedure had ended. Some advocates joined this unlawful and unethical practice

245 In the preliminary judgment of 13 July 2023 (joined cases C-615/20 and C-671/20), the CJEU stressed the obligation to respect its judgment due to the direct effectiveness of the second para. of 19(1) of the TEU. It reiterated it in case 824/18 (para. 111). As regards the ratione materiae scope of the application of Art. 19(1), first para., TEU, it needs to be reminded that this decision refers to 'areas covered by EU law', regardless of the situation in which the Member States apply that law within the meaning of Art. 51(1) of the ChFR. See the judgment of 5 November 2019, case C-192/18, para. 101 and the case-law cited therein.

246 See in particular case C-585/18 (the joined cases are C-624/18 and C-625/18).

247 '*Nadzwyczajna kasta' – kto i kiedy to powiedział? 'Jestem chyba najczęściej cytowanym mówcą w Europie*', 2024.

248 More on that: Puppinck and Loisseau, 2020.

when they perceived calculable, albeit fallacious advantages for their clients. This caused chaos and destroyed legal certainty, a fundamental element of the rule-of-law state. Thus, the right to a court was undermined in the guise of its protection.

In this context, the United Right's arbitrary introduction of the statutory test of judicial independence and impartiality was particularly ill-considered. It was intended as a political gesture to the European Commission during negotiations over National Recovery Plan payments and to resolve disputes over reviewing judicial appointments. It was also assumed that a minimal protection would apply: independence and impartiality could not be challenged solely on the basis of judicial appointment.

The measure proved ineffective and emboldened both the European Commission and judges challenging the constitutional system. This time, they received a fully legal instrument. It must be recalled that the previous instruments they had relied upon – the resolution of the three Chambers of 20 January 2020 and provisions related to challenging a judgment due to a judge's appointment – had formally been declared unconstitutional. Their use did not make them lawful. However, the statutory test duplicated the mechanism for excluding a judge while simultaneously strengthening the position of those challenging judicial status. This was despite the fact that reviewing judicial independence is a legal paradox. Independence is inherent to the judicial function: an abstract state that requires a judge to act assertively against all external influences when assessing a case and delivering a judgment. A finding that a judge is not independent should lead to removal from office, not exclusion from a case, as was permitted in this instance.

Although the quantitative impact has not yet become widespread, challenges to the independence and impartiality of judges appointed on the motion of the NCJ under Art. 9a of the Act on the NCJ remain an issue.[249] The test is administered by the same judges who previously pursued other avenues, and a qualitative shift has emerged: some lower courts have begun rejecting judgments of higher-instance courts.[250] Legal certainty has disappeared in Poland.

249 Siniecka-Kotula, 2024b.

250 See: the District Court Warszawa-Praga Południe, case I CO 149/24, declared the judgment of the SC to be non-existent. See also the judgment of the District Court Wrocław-Krzyki.

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