COMMISSIONER FOR HUMAN RIGHTS

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Judge Ksenija Turković
President, First Section
European Court of Human Rights
F-67075 Strasbourg Cedex

Written comments
of the Commissioner for Human Rights
in the case of *Joanna Reczkowicz and Others v. Poland*
(Applications no. 43447/19, 49868/19, 57511/19)

1. Pursuant to Rule 44 (3) (a), (5) and (6) Rules of the European Court of Human Rights (**ECtHR**) and on the basis of the leave granted by the President of the First Section, the Commissioner for Human Rights (**CHR**) wishes to submit the written observations related to the present case.

I. General Observations

2. The case pending before the Court addresses the lawfulness of appointments to the Polish Supreme Court (**SC**) since 2018. The essential questions are, whether the newly shaped nomination process met the ECHR requirements; whether it was based on objective criteria and a fair procedure; whether it guaranteed independence and impartiality of those nominated, and in the end, whether they were lawfully established as judges.

3. The assessment of the attributes of persons appointed as SC judges and the SC benches with their participation, does not depend on the circumstances of specific cases brought by the individual applicants, but on the **systemic irregularities**. At the same time, the case is of paramount importance to the domestic judicial system, since the **doubts concern the staffing of the top judicial body** which carries out a supervisory function over all ordinary courts in Poland. Supreme Court's rulings **are not subject to a subsequent review by a judicial body that – if meeting itself the ECHR standards – could resolve the doubts and cure the deficiencies**.

4. The doubts as to lawfulness of judges' appointments, generate further doubts as to the legal force of theirs decisions. The ruling of the European Court of Human Rights will be therefore important for all private parties seeking judicial protection of their rights, whose cases may be considered by the Supreme Court in a composition involving a person who was appointed in a deficient process.

5. In this *amicus curiae* opinion, the Commissioner would like to present the circumstances, the course and the assessment of the process of appointing Supreme Court judges since 2018. The main points are the following:

6. *First*, the persons appointed to the Supreme Court since 2018, including both newly established chambers: the Disciplinary Chamber as well as the Chamber of Extraordinary Control and Public Affairs, **were appointed in a flagrant violation of law**. The legislative and executive bodies have arranged the procedure for the selection of SC judges in such a way as to, initially – **ensure that nominations receive the persons who have their support**, and then – legalize their choice by all means.

7. *Second*, the Supreme Court nomination process was **intentionally** regulated and carried out in an unlawful manner. Public authorities carried out the process in this way, **not to offer sufficient guarantees of independence and impartiality to those appointed**. To the contrary, it was to ensure that those appointed will then comply with the expectations of the authorities, and in that way, the authorities **gain influence over the content of court decisions**.

8. Therefore, **the fundamental aim of the judicial appointment process has been compromised** – it failed to ensure the independence of the appointed persons from the extrajudicial bodies and failed to provide them with the legitimacy required to resolve legal disputes.

9. *Third*, the intentionality, systemic nature and gravity of infringements in the SC nomination process result in the **refusal to extend the guarantee of irremovability of judges** to those persons and **restrict the application of the principle of legal certainty** to decisions adopted by them. Such grave violations cannot be rewarded by the acceptance of the situation unlawfully created (*ex iniuria ius non oritur*).

II. Requirements of the "court" under the Convention

1. The test of establishment and the test of independence

10. The requirements of an independent and impartial body established by law are of a **constitutive nature**, without meeting them, the body cannot be considered a "court" under Article 6(1) ECHR, irrespective of the designation given to it by national law. The Strasbourg Court has the ultimate competence to decide, on the basis of autonomously developed criteria, whether the judicial authority meets the Convention requirements.

11. The ECtHR case law indicated that the verification of the authority should begin with (a) the assessment of whether it has been lawfully established, and then cover (b) the assessment of whether it meets the requirements of independence and impartiality. These two tests may operate **autonomously** in the circumstances of specific cases. A failure to meet any of them should result in a refusal to recognize the authority as a "court" under the Convention.[1]

12. Nonetheless, the establishment test and the test of independence may be **linked**. Both criteria may determine that in the minds of individuals the judge will not have sufficient legitimacy. Furthermore, the same circumstances may be relevant for the assessment of the authority's attributes, especially those which are related to the lawfulness of the process of its staffing.

13. These requirements, however, appear in a specific, logical **sequence**: the establishment test is primary and precedes the independence test, and the latter in turn, the impartiality test. The requirement of the establishment by law is a basic prerequisite of the very being of the court under the law. It covers not only the legal basis for the court's existence, but also the composition of the

[1] See, in particular, ECtHR judgment of 12.03.2019, *Ástráðsson v. Iceland*, paras. 102–103.

bench in each case under examination.[2] If a judge is not appointed in accordance with the law, there is no court properly established. Then, any further examination of the attributes of the court becomes redundant. The Convention guarantees of a "court" cannot be satisfied by an authority that does not possess the original attribute of being a court.

2. The requirement of a court established by law

14. The European standard of the court requires that it is established according to the will of the legislator, i.e. by an act adopted by the Parliament. A court that is not so established, will lack the legitimacy required in a democratic society to resolve legal disputes.[3] In the light of the Strasbourg Court's case law, the requirement to establish a court by law seeks to ensure that **the judicial system is not dependent on the discretion of the executive**. This lays the foundation for public confidence in the judiciary.[4]

15. The requirement includes the legislation providing for the establishment of judicial organs,[5] as well as their competence,[6] but also the process of appointing judges,[7] and the participation of judges in the examination of the case.[8] The process of appointing judges must be conducted in compliance with the applicable rules of national law in force at the material time,[9] and these rules must be strictly observed.[10] At the same time, the substantive conditions and detailed procedural rules for the appointment must be such as not give rise to reasonable doubts with respect to the judges appointed.[11]

16. It is not every irregularity in the process of appointing judges which will render the act of appointment ineffective. However, **serious irregularities that may have affected the outcome of the appointment process, undermine the capacity of the appointed persons to fulfill the role entrusted by law to the judge**.

17. In the Strasbourg case-law, the irregularities in the process of appointing judges reaching the threshold of **a flagrant breach** of national law, disqualify the judge and the court, amounting to a violation of Article 6(1) ECHR. These irregularities are to be of a fundamental nature and form an integral part of the establishment and functioning of the judicial system. The concept of "flagrant" violation of national law relates to the nature and gravity of the violation. The Court also takes into account whether national law was **deliberately** breached or whether the breach constituted a **manifest disregard** of law (*Ástráðsson*, para. 102). Consequently, the Court cannot be satisfied with appearances but must ascertain whether the breach of the applicable national rules on the appointment of judges created a real risk that other authorities, in particular the executive, exercised **undue discretion** which undermined the integrity of the appointment process (*Ástráðsson*, para. 103). An essentially equivalent formula has been recently adopted by the European Court of Justice in the *Simpson and HG* ruling (para. 75).

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[2] See ECtHR ruling of 28.11.2002, *Lavents v. Latvia*, paras. 82 and 114; ECtHR judgment of 9.07.2009, *Ilatovskiy v. Russia*, para. 36; see also ECJ judgment of 26.03.2020, C-542/18 RX-II and C-543/18 RX-II *Simpson and HG*, para. 73.
[3] See, *Lavents*, para. 114; *Ástráðsson*, para. 99.
[4] *Ástráðsson*, para. 99.
[5] ECtHR judgment of 5.10.2010, *DMD Group, A.S. v. Slovakia*, para. 59.
[6] *Lavents*, para. 114.
[7] *Ástráðsson*, para. 98.
[8] ECtHR judgment of 20.10.2009, *Gorguiladzé v. Georgia*, para. 68; ECtHR ruling of 27.10.2009, *Pandjikidzé and others v. Geoargia*, para. 104; see also *Simpson and HG*, para. 73.
[9] *Ástráðsson*, para. 98.
[10] *Ilatowskiy*, paras. 40-41.
[11] See ECJ judgment of 24.06.2019, C-619/18 *Commission v. Poland (Independence of the Supreme Court)*, para. 11; ECJ judgment of 19.11.2019, C-585, 624 and 625/18 *A.K. and others*, para. 121; *Simpson and HG*, para. 71.

3. The requirements of judicial independence and impartiality

18. The requirements of independence and impartiality are key to the effectiveness of judicial protection and necessary for the protection of all rights and freedoms derived from the Convention. The independence and impartiality of judges and courts are indispensable and inalienable safeguards of the right to a fair trial.[12]

19. In determining whether a body can be considered to be "independent", the Strasbourg Court has regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[13] The latter serves to inspire the confidence in the courts of the public and the parties to the proceedings.[14] In the context of this case, **the court (judge) must be independent of any external, extrajudicial influence**, especially from the executive, but also from the legislator, i.e. the Parliament.[15]

20. While the requirement of "impartiality" embraces both the subjective aspect – the court must be free of personal prejudice or bias, and the objective aspect – **the court must offer sufficient guarantees to exclude any legitimate doubt in this respect**;[16] in the context of the present case the existence of objective guarantees are of particular relevance. As the concepts of independence and objective impartiality are closely linked, the Commissioner analyzes the deficiencies of the appointment process together under both of them.

21. Objectively justified, legitimate reasons to fear that a particular court lacks independence or impartiality, preclude considering the authority as meeting the Convention standards.[17] **The threshold of a reasonable doubt is therefore sufficient to establish a breach of Article 6(1) ECHR**. For this purpose, it is not necessary to prove the factual lack of independence or impartiality of the judge or court. To find a violation of the Convention, the Court may rely on a **systemic analysis of the national law and its actual implementation**, and does not need to review the conduct of the individual judge in a specific case.

III. Irregularities in the process of appointing Supreme Court judges as of 2018

1. Circumstances of the establishment, staffing and operation of the National Council of the Judiciary

22. The deficiencies in the appointment of Supreme Court judges as of 2018 are due to factors and circumstances related to the legal regulation and the actual course of the nomination process and, in particular, the participation of the National Council of the Judiciary (**NCJ**), a body formed and staffed in a manner manifestly incompatible with the national law.

23. The constitutional role of the NCJ in the process of appointing SC judges is defined by two essential tasks: (a) to submit motions to the President of the Republic for appointment to judicial posts (Article 179 Constitution), and (b) to uphold the independence of courts and judges (Article 186(1) Constitution). The establishment and staffing of the NCJ should therefore ensure that it is capable of fulfilling its role in a manner that does not give rise to reasonable doubt as to the legitimacy and

[12] See ECtHR judgment of 15.10.2009, *Micallef v. Malta*, para. 86.
[13] ECtHR judgment of 28.06.1984, *Campbell & Fell v. UK*, para. 78
[14] See ECtHR judgment of 21.06.2011, *Fruni v. Slovakia*, para 141.
[15] ECtHR decision of 18.05.1999, *Ninn Hansen v. Denmark*, p. 20.
[16] ECtHR judgment of 25.02.1997, *Findlay v. UK*, para. 73.
[17] See *Fruni v. Slovakia*, para 141.

independence of that body, and consequently the legitimacy and the independence of those nominated by it.[18]

24. The Commissioner for Human Rights submits that the following considerations are essential to assess, if the NCJ meets the necessary requirements, so that its nominees can be then accepted as independent and impartial judges established by law: (a) the procedure and nature of legislative changes in the Act on the National Council of the Judiciary; (b) the course of the election of the new members of the NCJ; and additionally (c) further activities of the NCJ since it was re-staffed.

25. *First*, the Act of 8 December 2017 amending the Act on the National Council of the Judiciary introduced new rules for the election of judicial members of the NCJ. **The election of 15 judges, so far elected by their peers, was entrusted to the Sejm, contrary to the constitutional rule** (Article 187 (1) Constitution), according to which the Sejm elects only four members of the NCJ from among the members of the Sejm. The interpretation that the Constitution establishes the principle of the election of judges to the NCJ by their peers was confirmed by the Constitutional Tribunal (**CT**) in 2007. The CT indicated that the Constitution clearly states that members of the NCJ shall be judges elected by judges.[19]

26. As a result of the legislative change, the legislature and executive branches granted themselves almost a monopoly over the formation of the NCJ, **contrary to the constitutional principle of the separation and balancing of powers** (Article 10 (1) Constitution). At present, 23 of all 25 members of the NCJ are appointed by these extrajudicial branches. As a result, they have gained **excessive influence over the nomination process**, and the NCJ lost the ability to contribute to making the nomination process more objective.

27. *Second*, with the same amendment, the legislature also decided to **prematurely terminate the four-year term of the then judicial members** of the NCJ, thus violating another constitutional rule (Article 187 (3) Constitution). These issues are also examined by the ECtHR in the pending cases: *Grzęda v. Poland* (43572/18), and *Żurek v. Poland* (39650/18).

28. *Third*, the election of new NCJ members, held in spring 2018, was boycotted by the vast majority of Polish judges, thereby expressing a firm opposition to the unconstitutional measures introduced. As a result, out of a total number of about 10 thousand Polish judges, only 18 candidates applied for 15 positions. This **defeated** the objective of the **representativeness** of the NCJ's composition which was provided by legislative and executive bodies as a reason to adopt changes. Another declared objective – the **transparency** of the election process – was compromised by the national authorities which for many months concealed the lists of support for the candidates to the NCJ and refused to make them public despite a binding decision of the Supreme Administrative Court (**SAC**) ordering disclosure.[20] This made it impossible for the public to verify, whether candidacies for NCJ members were submitted in accordance with the law.

29. *Fourth*, the new membership of the NCJ consists of **persons related to the executive**, and especially – to the Minister of Justice. The new composition embraces judges delegated to the Ministry of Justice or those appointed by the Minister as presidents of courts in the period preceding

[18] Compare, *A.K. and others*, paras. 138–139.
[19] See CT judgment of 18.07.2007, case K 25/07, para. III.4. A different view was presented in the judgment of the CT of 20.06.2017. (case K 5/17). It should be borne in mind, however, that this ruling was issued by the CT after the unconstitutional changes had been introduced in it since Autumn 2015. They lead to the *de facto* elimination in Poland of a genuine constitutional review of the law. In that case, the CT adjudicating panel was composed i.a. by persons appointed to positions previously lawfully taken (so called "duplicate-judges"; *sędziowie-dublerzy*). Furthermore, the case was brought to the CT by the Prosecutor General who, at the same time, is the Minister of Justice; and the case was decided in the course of a fierce political and legal dispute concerning the NCJ.
[20] Judgment of 28.06.2019, case I OSK 5282/18.

the election.[21] These new members were then in a relationship of professional dependence or personal gratitude to the executive.

30. *Fifth*, the new composition of the National Council of the Judiciary was formed even contrary to the rules adopted on 8 December 2017. Judge Maciej Nawacki was elected to the NCJ by the Sejm despite the failure to meet the formal condition of submitting a candidacy to the NCJ provided for in the Act, i.e. obtaining the minimum number of 25 judges' signatures or signatures of 2 thousand citizens.[22] Hence, his participation in the adoption of resolutions of the collegial body undermines the legal force of all such acts of the NCJ.

31. *Sixth*, an analysis of NCJ's activities after it was re-staffed in 2018 may also be of importance for the evaluation of the present NCJ's genuine nature and its impact on the judicial nomination procedure.[23] In the opinion of the Commissioner, **the National Council of the Judiciary does not fulfil anymore the constitutional role of the guardian of judicial independence**. The NCJ does not intervene in cases of judges against whom politically motivated disciplinary or criminal proceedings are initiated or administrative measures applied. Despite having prerogatives in the legislative process to do so, the NCJ does not address the threats to judicial independence resulting from changes in domestic legislation.

32. The NCJ, on the other hand, undertakes measures aimed at its own legitimization. The NCJ's application of 22 November 2018 made to the Constitutional Tribunal was an apparent request to review the constitutionality of the Act of the NCJ. Its true aim was to obtain confirmation of its own status and constitutionality of the legislative changes made with regard to the NCJ. The apparent nature of the application was acknowledged even by the Constitutional Tribunal itself.[24]

33. The nomination practice of the new NCJ raises serious doubts as well. Recommendations for judicial positions were given to many those judges who previously supported the candidacies of the new members of the NCJ by signing the lists of support – which the national authorities did not want to disclose. This indicates that there exist a pattern whereby the new members of the NCJ treat senior judicial appointments as a way of rewarding those who supported their candidacies to the NCJ.

2. The process of nominations to the Supreme Court in 2018

34. As a result of the adoption of a new Act on the Supreme Court in late 2017,[25] the model for the nomination of SC judges was radically changed. Any involvement of the Supreme Court in the evaluation of candidates was excluded. The process was substantially impoverished and diluted, whilst fully entrusted to the NCJ, after it was re-staffed in line with the desire of the political authorities.

35. The Commissioner for Human Rights does not question the legislator's prerogative to design and regulate the process of appointing judges. The Commissioner also recognizes that the Convention does not impose any specific model for the appointment of judges. Yet, the Convention and the ECtHR case law require the State party to respect the requirements of Articles 6 and 13 in the appointment process to the national court. The CHR considers, that the nomination of SC judges in 2018 did not meet these requirements.

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[21] Out of the 15 elected members of the NCJ, as many as 10 were submitted by persons related to the Ministry, 9 were appointed by the Minister of Justice as court's President or Vice-President in the preceding period, 9 were active in committees or teams of the Ministry, and 4 were directly employed by the Ministry.
[22] See i.a. the resolution of 23.01.2020 of the Supreme Court, BSA I-4110-1/20, para. 32, p. 41.
[23] See *A.K. and others*, para. 144.
[24] CT judgment of 25.03.2019, case K 12/18, para. III.1.
[25] Act of 8.12.2017 on the Supreme Court, original text in *Dziennik Ustaw* of 2018, item 5.

36. *First*, the nomination procedure was initiated by an act of the President of the Republic,[26] issued without the countersignature of the Prime Minister as required under Article 144(3) of the Constitution. It sets a closed list of prerogatives with respect to which the President acts alone without PM's countersignature. The announcement of vacancies in the Supreme Court, which formally initiates the qualification procedure, is not included on that enumerative list.

37. The procedure was therefore launched on the basis of an act which, by virtue of Article 143(2) Constitution, **has never become valid**. The initiation of the procedure was thereby **in manifest and flagrant violation of the Constitution**, and for that reason, the entire process of appointments to the Supreme Court is affected by a primary legal deficiency, resulting in the invalidity of the nomination process and the recognition that the acts of judicial appointment are either non-existent or invalid *ex lege*.

38. *Second*, the qualification to the SC was boycotted by the vast majority of the legal community in Poland. For the 44 positions announced, only 216 candidates applied out of all those eligible, i.e. judges, prosecutors, attorneys at law, advocates and notaries. Thus, regardless of other circumstances affecting the deficiencies of the nomination process, **the possibility of selecting the best candidates to the most important court in Poland was indeed jeopardized**.

39. *Third*, the National Council of the Judiciary did not carry out a genuine verification of the applications. The process was a sketchy examination of the candidacies, based on limited material, mostly submitted by the candidates themselves. The process of evaluating the candidates was hectic, with four of the NCJ's teams spending on average only a dozen of minutes interviewing the individual candidates, whilst asking mostly some basic questions.

40. *Fourth*, the political interest and influence of the executive was evident in the process of selecting candidates to the Supreme Court. Indeed, the National Council of the Judiciary **recommended only the candidates who were associated with the authorities and had their support**.

41. *Fifth*, the resolutions of the NCJ, in which it recommended judges to the SC were appealed to the Supreme Administrative Court by some those candidates who were refused the recommendation. For that reason the NCJ **acts of recommendation have not become final**. Additionally, by ordering interim measures, the SAC suspended the execution of a number of such resolutions – so that **the acts have not become enforceable**, either**.** In spite of this, the President handed over the appointment acts to the persons recommended.

42. Furthermore, the candidates accepted those President's acts of appointment, knowing that the appointment process should be halted. In that way the persons appointed to the court which is placed at the top of the Polish judiciary, demonstrated **the readiness to undermine the *res judicata* effect of a final court decision, if this serves their individual interest**. This undermines both the substantive and ethical qualifications of those appointed to the Supreme Court.

43. *Sixth*, the process of nominating judges to the Supreme Court **could not have been subjected to effective judicial review before the final appointment by the President, even though this was required by national law,** as the Constitutional Tribunal confirmed in 2008.[27] Although at the opening of the 2018 competition, the appeal against the resolution of the NCJ was admissible, during that competition the effectiveness of **judicial review was limited** by the legislator. The amendment of the Act on NCJ introduced partial *res judicata* of NCJ resolutions (new Article 44(1b) of the Act on the NCJ), and also limited the effectiveness of SAC rulings repealing the NCJ acts (see Article 44

[26] Announcement of the President of the Republic No. 127.1.2018 of 24.05.2018 on the vacancies of judicial positions in the Supreme Court, *Monitor Polski* of 2018, item 633.
[27] See CT judgment of 27.05.2008, case SK 57/06, para III.5.

(4) of the Act on the NCJ).[28] Subsequently, judicial review of the nomination process was **entirely excluded**, first, in light of the judgment of the Constitutional Tribunal of 25 March 2019 (case K 12/18), and then, by way of a statutory amendment.[29] The political authorities have deliberately led to the arbitrary exclusion of scrutiny of the nomination process in order to ensure that only those supported by them will be appointed.

IV. Failure to comply with the requirements of establishment as well as independence and impartiality in case of persons appointed to the Supreme Court since 2018

44. The circumstances discussed above indicate that **the selection and appointment to the Supreme Court since 2018 was in flagrant breach of the regulations and principles of national law and European standards**. The process was clearly contrary to the explicit legal requirements. The flagrant an manifest violation consists in a striking discrepancy between how the process of appointing a Supreme Court judge should have been conducted and how it actually was conducted.

45. All the above-mentioned deficiencies in the appointment process are of a serious nature, although the Commissioner deems that **the irregularities should be assessed in the light of the cumulative formula**.[30] Therefore, there is no need to show that each of them separately fulfils the criteria indicated in the case law of both European Courts – it is sufficient that they together lead to a joint conclusion that the judge (the court) has not been properly established.

46. The Court links a flagrant violation of law to a "real risk" of misuse of power - i.e., the exercise by the legislature or the executive of undue discretion. In the Polish context, not only was there a "real risk" of the abuse of power, but indeed, **undue discretionary powers have already been exercised**. This consideration may be of significance for determining the consequences of the flawed appointment process.

47. The course of the legislative process of the amendments to the NCJ and the SC, in which objections to the proposed changes raised by parliamentarians, experts and representatives of civil society were ignored, and the subsequent course of the process of electing new members of the NCJ, as well as the process of selecting candidates and appointing judges to the SC – demonstrate that the **infringements were committed intentionally in order to ensure that the political authorities have a dominant influence on the appointments of judges**. The outlined circumstances of staffing of the National Council of the Judiciary, the procedure of qualification to the Supreme Court, and issuing the President's acts of appointment, justify doubts as to the failure to meet the Convention requirements by persons appointed to the position of the Supreme Court judges.

48. **First**, (1) the premature termination of the 4-year term of office of the previous members of the NCJ guaranteed by the Constitution; (2) the unconstitutional election of the new 15 NCJ members by the Sejm; (3) the lack of sufficient independence of the NCJ from other public authorities; and (4) the NCJ's *de facto* resignation from its constitutional role of upholding judicial independence

– disqualify the NCJ as an independent, objective initiator of motions to the President of the Republic for the appointment to judicial posts.

49. **Second**, (1) the initiation of the SC nomination procedure by an act that has never become valid for the lack of the countersignature required by the Constitution; (2) the general boycott of the election by the judiciary and other legal professions; (3) the lack of a real verification of the nominations; (4) the noticeable political influence in the nomination process; (5) the violation of final court decisions

[28] Act of 20.07.2018 amending the Law on the organization of common courts and certain other acts, *Dziennik Ustaw* of 2018, item 1443.
[29] Act of 26.04.2019 on the amendment of the Act on the National Council of the Judiciary and the Law on the organization of administrative courts, *Dziennik Ustaw* of 2019, item 914.
[30] See *mutatis mutandis*, *A.K. and others*, paras. 142 and 153.

suspending the execution of the nomination resolutions; (6) obstructing the judicial review of the nomination process prior to the handing over of the appointment acts; (7) rendering ineffective any future ruling of the national court (SAC) considering appeals against the NCJ's resolutions; (8) intensive legislative and judicial action (e.g. CT judgment in case K 12/18) to legalize deficient appointments

– **nullify the Supreme Court nomination procedure, undermine the nomination effect and deprive those appointed of the necessary legitimacy to resolve legal disputes**. There were no objective conditions for such judges to be seen as lawfully established, independent and impartial.

50. **Third**, (1) the association of the persons nominated to the Supreme Court with the incumbent Minister of Justice and (2) their acceptance of the act of appointment despite the absence of final nomination resolutions, or the disregard of a binding court decision suspending the enforceability of the NCJ resolutions

– **have seriously and permanently undermined confidence in their capacity to maintain standards of independence and impartiality in the exercise of judicial activities**.

51. The Commissioner submits that, in light of the above mentioned conditions and factual and legal circumstances, the process of appointing judges to the Supreme Court in 2018 did not meet the requirements of the appointment process. **The initiation and course of the process were affected by irregularities so grave that the its outcome becomes unacceptable *ab initio***. Manifest, intentional, and flagrant violations of the law have nullified the effect of the appointment process and prevented those so appointed from obtaining the judicial legitimacy.

52. Indeed, the legislature and the executive have formed the nomination procedure to the Supreme Court judges to staff the Supreme Court with the persons they support, and then legalize the appointments by all means. The selection of judges held in this way does not meet the aim of the nomination process. The public authorities organized the nominations in this manner, not to ensure the independence and impartiality of those appointed, but to make sure that the Supreme Court complies with their expectations and *de facto* gain influence over the content of court decisions.

53. **The entirety of the appointment of Supreme Court judges was a flagrant violation of the law.** The nomination process was only a form of giving a **procedural appearance to the discretionary decision to appoint certain persons to the Supreme Court**. The decision which was taken, in fact, **beyond the law**.

V. The issue of legal certainty and the guarantee of irremovability of judges

54. The Commissioner for Human Rights submits that **the principle of legal certainty and the guarantee of irremovability of judges cannot reward intentional, systematic violation of the law by national authorities**. The deliberate, systemic nature and the degree of violations by national authorities in the process of appointing Supreme Court judges should result in the refusal to extend the guarantee of irremovability of the judge to the persons unlawfully appointed.

55. The criterion of intentionality of an infringement has been introduced in the Strasbourg case-law (*Ástráðsson*, para. 102). Similarly, the Court in Luxembourg, in its judgment in the case C-619/18 concerning the independence of the Polish Supreme Court, indicated that the examination of changes introduced by the national authorities should also **include verification of the true aims pursued by them**.[31]

56. Negative assessment of the intentionality of the national authorities is intensified by the **systemic dimension of changes introduced in the Polish justice system**. In a systematic way, a *de facto* change of the state system is introduced, by means of legislation violating the Polish

[31] C-619/18 *Commission v. Poland*, para. 82 et subseq.

Constitution. Today, the Constitutional Tribunal does not fulfill the role of a court of law, instead it is used to legitimize actions that are inconsistent with the Constitution.

57. For these reasons, the Commissioner considers that **flagrant, and even more so intentional violations of the law disavow the argumentation relying on the principle of legal certainty and the principle of irremovability of judges**. Public authorities cannot be rewarded by the acceptance of the situation thus created.

58. The Commissioner proposes, however, that a distinction be made between the consequences of such a situation for the persons unlawfully appointed and the consequences that may affect the parties to judicial proceedings in which such persons have adjudicated.

59. In particular, **the absolute legal consequences should affect the authorities established against the law**. Public authorities cannot benefit from their own unlawful conduct (*ex iniuria ius non oritur*). Those appointed were aware of the flaws of the process - yet, they participated in it and accepted the act of nomination.

60. The nullification of the effect of the appointment process prevents the situation of persons appointed in such circumstances from being covered by the principle of legal certainty. These persons have not been successfully established as Supreme Court judges and do not have a status that could be protected. They are therefore not covered by the guarantee of irremovability.

61. Whereas, the Commissioner would like to emphasize that **the parties to court proceedings should be protected**. The refusal to recognize the status of unlawfully appointed SC judges and for this reason, the recognition that the decisions taken by persons who are not judges – are legally ineffective, can and should be mitigated in order to protect the rights and interests of the individuals.

62. Then, however, **the relative protection of the stability of court decisions is a consequence of the protection of the legal security of private parties**, and not the protection of the status of persons and bodies that are unlawfully established and lacking the quality of the judge and the court.

VI. Conclusion

63. The Commissioner for Human Rights considers that the persons appointed to the Supreme Court since 2018 were nominated in a deficient procedure that was contrary to the law in force. The nature and gravity of the irregularities that had occurred, undermined the integrity of the nomination process. As a consequence, the persons appointed were established in a flagrant violation of Polish law and, for that reason, in violation of the ECHR requirements. The circumstances of their nomination gave rise to sustainable, legitimate doubts as to their independence and impartiality. In consequence, a Supreme Court's adjudicating panel with the participation of a person so appointed, cannot be regarded as a “court established by law” within the meaning of Article 6(1) ECHR.

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