Restoring the Rule of Law in Poland: Towards the Most Appropriate Way to Put an End to the Systemic Violation of Judicial Independence

ECtHR 23 November 2023, No. 50849/21, *Wałęsa* v *Poland*

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Introduction

On 23 November 2023, the European Court of Human Rights delivered its judgment in *Wałęsa* v *Poland*.[1] The case concerned key pillars of the so-called 'reform of the Polish judiciary', that began in 2016 after the October 2015 victory in the parliamentary elections by the populist right-wing 'Law and Justice' party (*Prawo i Sprawiedliwość*).[2] The judgment concerned: (1) the procedure for the election of members of the National Council of the Judiciary; (2) the establishment of the Chamber of Extraordinary Review and Public Affairs, one of the two newly created in the Supreme Court (besides the Disciplinary Chamber); and (3) the introduction of an extraordinary appeal that allowed final verdicts to be challenged even 20 years after they had been issued. These 'reforms' were introduced in 2018[3] as a next step after structural and personal changes in

[1]ECtHR 23 November 2023, No. 50849/21, *Wałęsa* v *Poland*.

[2]K. Marcinkiewicz and M. Stegmaier, 'The Parliamentary Election in Poland, October 2015', 41(3) *Electoral Studies* (2016) p. 221 at p. 224.

[3]M. Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense', 12 *Hague Journal on the Rule of Law* (2020) p. 421 at p. 425-427, K. Gajda-Rozczynialska

European Constitutional Law Review, 21: 139–163, 2025

doi:10.1017/S1574019625000070

the Constitutional Tribunal.[4] Because of the predominant role played by the National Council of the Judiciary in the process of judicial appointments, verifying all candidates and selecting them for final nomination by the President of Poland, the election of its members in 2018 by the lower chamber of the Polish parliament (Sejm) gave rise to a differentiation between 'old' judges and the 'new' ones. The old judges are the ones who were appointed before the amendments, and the 'new' judges are the ones whose candidatures were verified by the 'new' judicial council, composed mainly of judges selected by politicians.[5] That is why the independence of the new judges is being questioned.[6]

The establishment of the Chamber of Extraordinary Review and Public Affairs in 2018 was combined with the appointments of all 'new' judges to this chamber and the introduction of new procedural rules, including the extraordinary appeal.[7] The applicant claimed that the Chamber's reversal of the final civil court judgment that had been given in his favour over ten years earlier violated Articles 6(1), 8 and 18 of the ECHR.

Deciding in favour of the applicant, the Court identified systemic violations of the right to an 'independent and impartial tribunal established by law' within the Polish judiciary. Based on previous judgments in *Dolińska-Ficek and Ozimek*,[8] *Advance Pharma sp. z o.o.*[9] and *Reczkowicz*,[10] which concerned respectively the composition of the Chamber of Extraordinary Review and Public Affairs, the status of 'new' judges appointed to the Civil Chamber, and the creation of the

and K. Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', 12 *Hague Journal on the Rule of Law* (2020) p. 451 at p. 461-462, D.M. Driesen, *The Specter of Dictatorship* (Stanford University Press 2021) p. 116.

[4]W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 61-75, A. Płoszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional', 15 *Hague Journal on the Rule of Law* (2023) p. 51 at p. 53-56.

[5]According to the amended law, a candidate for membership of the National Judicial Council has to be supported by at least 25 judges. However, the key factor is voting on his candidature in the Sejm. *See* Arts. 11a-11d of the statute about the National Council of the Judiciary (Journal of Laws 2024, item 1186 as amended).

[6]*See* the interview with Professor Sadurski from 30 November 2023 at https://oko.press/prof-sadurski-odwolac-uchwala-sejmu-krs-i-caly-tk-rozliczenia-maja-byc-masowe-cofnac-neo-sedziow, visited 5 March 2025.

[7]M. Gersdorf and M. Pilich, 'Judges as Representatives of the People: a Polish Perspective', 16 *EuConst* (2020) p. 345 at p. 359; Gajda-Rozczynialska and Markiewicz, *supra* n. 3, p. 461-462; L. Pech et al., 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', 13 *Hague Journal on the Rule of Law* (2020) p. 1 at p. 8-11.

[8]ECtHR 8 November 2021, Nos. 49868/19 and 57511/19, *Dolińska-Ficek and Ozimek* v *Poland*.

[9]ECtHR 3 February 2022, No. 1469/20, *Advance Pharma sp. z o.o.* v *Poland*.

[10]ECtHR 22 July 2021, No. 43447/19, *Reczkowicz* v *Poland*.

Disciplinary Chamber, the European Court of Human Rights called for immediate implementation of appropriate legislative and other measures to restore the rule of law within the Polish judiciary.[11] The Court adopted the pilot judgment addressing the structural defects identified in previous cases to facilitate the most speedy and effective resolution of the Polish legal order's dysfunctionality.

Wałęsa v *Poland* is worth a deeper analysis for several reasons. First, the Court thoroughly analysed the judicial reforms in Poland in the wider context of previous judgments. Second, within the pilot procedure, the Court discovered the general dysfunction of the Polish National Judicial Council and its influence on the Supreme Court and the judiciary. Third, the results of the most recent parliamentary elections in Poland offer a chance to undertake legislative measures to implement this judgment.[12] Fourth, the judgment paves the way forward on how to restore the rule of law in Poland. It is an open question, if and to what extent *Wałęsa* v *Poland* can stimulate discussion in Council of Europe member states, especially for those in which national councils of the judiciary hold a strong position in the process of judicial appointments.

Factual background

The applicant, Lech Wałęsa – trade union leader of 'Solidarity' (*Solidarność*), who was awarded the Nobel Peace Prize in 1983 and was the first Polish president elected in direct elections (1990-1995) – for many years faced rumours about his alleged cooperation with the Communist security apparatus. He categorically denied the allegations and initiated legal actions against his critics, including Krzysztof Wyszkowski (defendant), another 'Solidarity' activist and member of the 'Law and Justice' party since 2010. The Court judgment followed a civil lawsuit that Wałęsa initiated in 2005 before the Gdańsk Regional Court for infringement of his personal rights. The applicant charged Wyszkowski with the

[11] *Wałęsa* v *Poland*, *supra* n. 1, para. 42.

[12] *See* M. Jałoszewski, 'Bodnar's Action Plan. How to Restore the Rule of Law and Unblock Funds for National Recovery and Resilience Plan', *Rule of Law blog*, 4 March 2024, https://ruleoflaw.pl/poland-rule-of-law-restoration-action-plan-bodnar/, visited 5 March 2025. *See also* A. Wójcik, 'Restoring the Rule of Law in Poland: An Assessment of the New Government's Progress', *GMF*, 17 June 2024, p. 4-10, https://www.gmfus.org/news/restoring-rule-law-poland-assessment-new-governments-progress, visited 5 March 2025. Poland has an ongoing debate on how to proceed with reforms of the Polish judiciary quickly and effectively while preserving the rule of law. For contributions in English, *see* the chapters written by A. Bodnar, P. Filipek and M. Taborowski in M. Bobek et al. (eds.), *Transition 2.0. Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023). *See also* M. Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR', 15 *Hague Journal on the Rule of Law* (2023) p. 353.

dissemination of untrue information concerning his alleged collaboration with the Communist state's security services. A final judgment in this dispute was given by the Gdańsk Court of Appeal in 2011. The defendant was ordered to publish an apology on TV stations. Disagreeing with the verdict, he challenged the judgment using extraordinary remedies, such as a cassation appeal to the Supreme Court in 2011 and reopening the proceedings before the Court of Appeal in 2017 on account of newly discovered evidence. Both legal actions were found unjustified.

The situation changed in 2020 when the Prosecutor General submitted an extraordinary appeal against the Gdańsk Court of Appeal judgment from 2011. This action was legally permitted due to a new law on the Supreme Court from 2017[13] that established the Chamber of Extraordinary Review and Public Affairs. In the Prosecutor General's view, the extraordinary appeal was necessary to uphold the principle of a democratic state governed by the rule of law, which must protect freedom of expression and speech. The Prosecutor General requested the Supreme Court to overturn the contested judgment and to dismiss the applicant's claim.

In response to the Prosecutor's appeal, Wałęsa requested the exclusion of the judges of the Chamber of Extraordinary Review and Public Affairs, including the judge rapporteur, from the case examination. In his opinion, the procedure for the appointment of all judges to the Supreme Court upon new rules raised serious doubts concerning the rule of law. Wałęsa stressed that the judges had been recommended for appointment by the 'new' judicial council, established through a flawed procedure based on the amended Law on National Judicial Council.[14] Nevertheless, his motion was dismissed. The decision was issued by the Chamber of Extraordinary Review and Public Affairs in a single-judge panel without any written reasons.

On the same day as the mentioned decision, the Chamber reversed the judgment of the Gdańsk Court of Appeal from 2011 and dismissed the applicant's appeal to the extent found as justified. According to the chamber's reasoning, the rationale behind quashing a judgment issued 10 years ago was the importance of public debate for a democratic state governed by the rule of law. Mr Wałęsa decided to lodge a complaint with the European Court of Human Rights under Article 34 of the ECHR.

[13]A statute from 8 December 2017 about the Supreme Court, Journal of Laws 2024, item 622 as amended.

[14]*See* the statute about the National Council of the Judiciary in the version from 2018 (Journal of Laws 2018, item 389 as amended).

Judgment

The Court declared the complaint admissible and identified violations of Article 6(1) and Article 8 of the ECHR. In its detailed and extensive justification, the Court presented the factual and legal context of the case, giving particular attention to the legal status of the Chamber of Extraordinary Review and Public Affairs, the proceedings before the Chamber, and reasons for the application of the pilot judgment procedure. The following presentation will embrace these three areas of analysis, beginning with the legal status of the Chamber of Extraordinary Review and Public Affairs in which the adoption of the *Ástráðsson* test played a crucial role. Then the procedural issues seminal for the outcome of the case as well as the reasons for the application of the pilot judgment procedure will be provided.

Legal status of the Chamber of Extraordinary Review and Public Affairs

After finding the applicant's claim admissible, the Court decided to apply the criteria set out in the *Guðmundur Andri Ástráðsson* judgment[15] to assess the irregularities in the judicial appointment process to the Chamber of Extraordinary Review and Public Affairs. In that judgment, the Court developed a threshold test comprising three criteria, taken cumulatively, to assess whether the irregularities are of such gravity as to violate the right to a 'tribunal established by law'. These criteria are aimed at answering three questions: (1) whether there was a manifest breach of the domestic law that affected the fundamental rules for the appointment of judges; (2) whether the breach had to be assessed in the light of the object and purpose of the requirement of a 'tribunal established by law';[16] and (3) whether the review conducted by national courts, if any, played a significant role in determining whether such breach amounted to a violation of the right to a 'tribunal established by law'.

In applying that test to the Chamber of Extraordinary Review and Public Affairs, the Court focused first on the appointment of its members by the 'new' National Council of the Judiciary. The Court observed that the procedure for judicial appointments to the Chamber was assessed as contrary to the domestic law in the resolution of the joined Chambers of the Supreme Court from 2020.[17] Furthermore, the President of Poland appointed the new Chamber of Extraordinary Review and Public Affairs judges, violating the interim relief

[15]ECtHR (GC) 1 December 2020, No. 26374/18, *Guðmundur Andri Ástráðsson* v *Iceland*.

[16]The Court clarified that this guarantee aims 'to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers' (para. 246).

[17]Supreme Court 23 January 2020, No. BSA I-4110-1/20, OSNKW 2020/2/7.

ordered by the Supreme Administrative Court in a dispute on the legality of the National Council of the Judiciary's recommendation for appointments.[18] These violations were considered a manifest breach of Polish law in the procedure for appointments of judges to the Chamber.[19]

Second, the Court stressed that by the 2017 Amending Act,[20] the Polish judiciary was deprived of the right to elect judicial members of the National Council of the Judiciary. The legislative and executive powers gained a decisive influence on the composition of this institution. The Court assessed this as a breach of domestic law, incompatible with the rule of law, the principle of the separation of powers, and the independence of the judiciary. The gravity of the breaches in the appointment procedure to the Chamber of Extraordinary Review and Public Affairs impaired the essence of the applicant's right to a 'tribunal established by law'.[21]

Third, the Court did not identify any procedure under Polish law that offered the applicant the possibility to challenge defects in the process of judicial appointments to the Chamber.[22] Consequently, the Court found that the Chamber did not meet the standard of independence and impartiality.[23]

Considering all three criteria from the *Ástráðsson* test as fulfilled, the Court concluded that the Chamber of Extraordinary Review and Public Affairs was not an 'independent and impartial tribunal established by law'.[24]

Proceedings before the Chamber of Extraordinary Review and Public Affairs

Separately, the Court drew attention to the procedure before the Chamber. Based on statistics presented by the government on the operation of extraordinary appeals in 2018-2022, the Court discovered that most of these remedies were submitted by the Prosecutor General - Minister of Justice.[25] According to the Court, the merger of these two posts creates a risk that an extraordinary appeal submitted by political actors may, in practice, be a tool of political supervision

[18]SAC 27 September 2018, No. II GW 28/18, https://orzeczenia.nsa.gov.pl/doc/A9253095C1, visited 5 March 2025.

[19]*Wałęsa* v *Poland*, *supra* n. 1, para. 172.

[20]A statute from 8 December 2017 amending the Statute about the NCJ and other acts, Journal of Laws 2018, item 3.

[21]*Wałęsa* v *Poland*, *supra* n. 1, para. 173.

[22]Ibid., para. 174.

[23]Ibid., para. 180.

[24]Ibid., para. 176.

[25]According to Art. 1 § 2 of the Law on the Prosecutor's Office from 28 January 2016 (Journal of Laws 2024, item 390 as amended), the Prosecutor General is simultaneously the Minister of Justice. These two functions were separated in 2010 and joined again in the mentioned statute.

over court judgments by the executive.[26] Subsequently, based on the Venice Commission's critical opinion on the planned 'reforms'[27] and equally critical evaluations made by the Group of States against Corruption[28] and the Parliamentary Assembly of the Council of Europe,[29] the Court found that the extraordinary appeal, with a broad and subjective basis, violated the principle of legal certainty.[30] The time limit to file this remedy – five years from the day the decision appealed has become final – was considered too long.[31] However, its extension to 20 years for the Prosecutor General was viewed as particularly alarming and incompatible with the rule of law, notably standards of legal certainty, *res judicata* and foreseeability of law.[32]

Focusing on the factual assumptions of the given case, the Court did not find any reason to contest the final judgment in the applicant's case.[33] Instead, the Court stressed the political character of the extraordinary appeal and stated that there was no reason to adopt this measure between two private individuals.[34]

Adoption of the pilot procedure

Deciding on the application of the pilot judgment procedure, the Court pointed out both the number of issued judgments and incoming cases concerning the judicial reform in Poland. Analysing the origin of the violations of Article 6(1) ECHR, the Court identified three areas that need to be improved. The first and the main one is the procedure for judicial appointments involving the National Council of the Judiciary, as established under the 2017 Amending Act. From the Court's viewpoint, the 'new' judges of the Supreme Court, including those appointed to the Chamber of Extraordinary Review and Public Affairs, do not meet the requirements of an 'independent tribunal established by law'.[35] The second area is the legal status of all Chamber of Extraordinary Review and Public Affairs judges,[36] which the Court considered did not guarantee independence and

[26] *Wałęsa* v *Poland*, *supra* n. 1, para. 231.
[27] Venice Commission, 11 December 2017, No. CDL-AD(2017)031.
[28] Group of States against Corruption, 18-22 June 2018, 80th Plenary Meeting.
[29] Parliamentary Assembly of the Council of Europe, 28 January 2020, resolution 2316(2020).
[30] *Wałęsa* v *Poland*, *supra* n. 1, para. 234.
[31] Ibid., para. 236.
[32] Ibid., para. 237.
[33] Ibid., para. 250.
[34] Ibid., para. 251.
[35] Ibid., para. 324a.
[36] It has to be remembered that the Chamber of Extraordinary Review and Public Affairs was created as a new chamber of the Supreme Court in the statute from 8 December 2017 about the Supreme Court (Journal of Laws 2024, item 622 as amended) and all its judges were appointed in the procedure before the 'new' judicial council. Therefore, all of them have the status of 'new' judges.

impartiality.[37] The third one is the extraordinary remedy, which does not comply with the standards of a fair trial and the principle of legal certainty.[38]

Focusing on the first area, the Court expressed the need: (a) for legislative action guaranteeing the right of the Polish judiciary to elect judicial members of the National Council of the Judiciary; (b) to address the status of all judges appointed in the deficient procedure involving the judicial council as constituted under the 2017 Amending Act and of decisions adopted with their participation; as well as (c) to ensure effective judicial review of the National Council of the Judiciary's resolutions proposing judicial appointments to the President of Poland, including appointments of the Supreme Court judges.[39]

Drawing attention to the second and the third areas, the Court called for legislative measures to be taken to ensure that the Chamber of Extraordinary Review and Public Affairs satisfies the requirements of an 'independent and impartial tribunal established by law'.[40] Regarding procedural aspects of the extraordinary appeal, the Court demanded that the State eliminate provisions that allow the arbitrary interpretation of the grounds of the remedy, fresh determination of the case, including the facts, and extended time-limits for lodging the remedy with the Prosecutor General.[41] The Court also suggested putting in place safeguards against abuse of process in the extraordinary appeal procedure, in particular, so as to exclude instrumentalisation of that procedure for political reasons.[42]

In my further considerations, I will focus on the first area of improvements suggested by the Court, which is the procedure for judicial appointments involving the National Council of the Judiciary, as established under the 2017 Amending Act.

Commentary

The judgment presented above is a starting point for analysing how the rule of law in Poland should be restored. On the one hand, the Court gave recommendations that must be adopted by the Polish legislature.[43] On the other hand, the Court itself pointed out that its role is not to specify the most appropriate way for this

[37] *Wałęsa* v *Poland*, *supra* n. 1, para. 324b.
[38] Ibid, para. 324c.
[39] Ibid., para. 329. *See also* CM/Del/Dec (2023) 1468/H46-18, No. 9.
[40] Ibid., para. 330.
[41] Ibid., para. 331.
[42] Ibid., para. 331.
[43] Ibid., paras. 329-331.

process to be carried out.[44] It remained, therefore, unclear exactly what the balance between judicial independence and legal certainty should look like. The most challenging and preliminary step for all the obligations given by the Court is the re-establishment of the National Council of the Judiciary, which plays a central role in the process of judicial appointments for all judiciary branches and all levels of jurisdiction, including the Supreme Court and its chambers. This obligation has legal, organisational, and political dimensions. Its complexity will be the core of further analysis. The need to restructure the Supreme Court and rethink the procedure for extraordinary appeal will be discussed in light of the main challenges related to the composition of the judicial council.

Principles for the election of members of the National Council of the Judiciary

The most comprehensive measure recommended by the Court is the necessity for new legislation that guarantees the Polish judiciary's right to elect judicial members of the National Council of the Judiciary.[45] In previous judgments, the Court had formulated this recommendation in another way, stating that at least half of the members of judicial councils should be judges chosen by their peers.[46] A move away from this earlier formula ('at least half of the members') to its general version ('to elect judicial members of the judicial council') without indicating exact numbers was not explained in *Wałęsa* v *Poland* at all. In the latter judgment, the Court referred to the decision of the Committee of Ministers from 2023[47] made in connection with reforms undermining the independence of the judiciary in Poland. From this viewpoint, the formula 'the right of the Polish judiciary to elect judicial members of the National Council of the Judiciary', used previously in the Committee of Ministers decision[48] and repeated by the Court in *Wałęsa* v *Poland*, can be understood as a recommendation to restore the rules for the election of the judicial council members that were binding before the 2017 Amending Act.[49] At that time, the Polish judiciary had the right to elect judicial

[44]Ibid., para. 332.

[45]Ibid., para. 329.

[46]ECtHR 9 January 2013, No. 21722/11, *Oleksandr Volkov* v *Ukraine*, para. 112; ECtHR (GC) 15 March 2022, No. 43572/18, *Grzęda* v *Poland*, para. 305. *See also* Venice Commission, 11 December 2017, No. CDL-AD(2017)031, para. 17; Recommendation CM/Rec (2010)12 of the Committee of Ministers on Judges Independence, para. 46.

[47]Decision of the Committee of Ministers No. CM/Del/Dec (2023) 1468/H46-18 about the execution of judgments against Poland concerning the independence of the judiciary.

[48]No. 9 of this decision.

[49]At that time, all judicial members of the judicial council were elected by judges. Under the 2017 Amending Act judges were deprived of this right in favour of the Sejm.

members of the National Council of the Judiciary.[50] However, the Court's recommendation in paragraph 329 appears baffling, especially in light of the previous remark expressed by the Venice Commission, the Group of States against Corruption, and the Parliamentary Assembly of the Council of Europe, that 'at least half of the members of the judicial council are judges elected by their peers'.[51] If two different formulas are mentioned in the same judgment and the Court uses one of them as a recommendation, its choice ought to be explained. Otherwise, there is a lack of precision. How the formula used by the Court ('to elect judicial members of the National Council of the Judiciary') is understood may have a significant impact on future legislation on the composition of the judicial council. There are several possible readings of the judgment in *Wałęsa* v *Poland* and options for the Polish legislator on the composition of the judicial council. This freedom of interpretation does not stem from a desire to give Poland space to decide about the composition of the council but rather from a lack of precision in the reasoning of the Court.

Trying to achieve a trade-off, one could understand the two formulas in connection. Reading them together, it follows that the Polish judiciary should have a decisive role in the election of the judicial members of the council. The interpretation could be justified by the Court's broad analysis of the Polish legal regulation both before and after the 2017 Amending Act. It would also be consistent with the reasoning presented by the Court that the composition of the judicial council should be free from any influence that threatens the impartiality and objectivity of this institution.

Nonetheless, there are a few arguments why the judgement in *Wałęsa* v *Poland* should not be understood as a recommendation to restore the set-up from before the coming into force of the 2017 Amending Act. To some extent, the previous model was criticised in legal doctrine as offering judges an entirely decisive role in creating the judicial council.[52] Bearing in mind that the Polish National Council of the Judiciary is composed of 25 members, 15 of whom are judges,[53] the election of

[50]Simultaneously, the previous version of the recommendation given by the Venice Commission and repeated by the Court was also fulfilled, because more than half of the judges who were members of the judicial council were elected by the judges' peers.

[51]*Wałęsa* v *Poland*, *supra* n. 1, para. 119.

[52]B. Banaszak, *Konstytucja RP. Komentarz* (C.H. Beck 2009) p. 253; B. Szmulik, 'Zmiany ustaw o Krajowej Radzie Sądownictwa i Sądzie Najwyższym jako realizacja postulatów o demokratyzację niezawisłego i niezależnego sądownictwa w Polsce', 2 *Kwartalnik Krajowej Rady Sądownictwa* (2018) p. 47-48; R. Gwiazdowski, *(Nie)praworządność* (Wydawnictwo Wei 2023) p. 251.

[53]*See* Art. 187 para. 1 Constitution of the Republic Poland. Besides these judges, the Presidents of the Supreme Court and the SAC, who are also judges, are members of the judicial council. Their membership in the judicial council is not combined with any election, but is a result of their positions as heads of the two highest courts in Poland.

judicial members of the council by judges gave the latter a decisive role in the management of the council empowered with the exclusive right to propose candidates for judicial appointments to the whole judiciary.[54] In practice, while the election system before the amendment promoted judges from the higher courts, the amended version promoted less experienced judges.[55] The disadvantages of this co-optative model had been identified even before the Law and Justice parliamentary election victory in 2015 but had not led to any legislative amendments.[56] The threats of judicial 'corporativism' are also identified in the literature of other countries, mainly Central and East-European.[57] Unfortunately, empowering the Sejm in 2017 with the right to elect judicial members of the council was politically motivated. It deprived the National Council of the Judiciary of the prestige, impartiality, and legitimacy of its decisions.[58] Nevertheless, if the election process were based on transparent and objective criteria, not tainted by severe political conflict, and with the realistic participation of judges – e.g. submitting a short list of candidates to the Sejm – it could be assessed as consistent with the rule of law.[59] It could even lead to a greater democratic legitimisation of judicial power.[60] It may be

[54]According to Art. 186 para. 1 of the Statute from 2 April 1997, Constitution of the Republic Poland, Journal of Laws 1997, No. 78, item 483 as amended (henceforth the Polish Constitution), the National Council of the Judiciary is responsible for safeguarding the independence of courts and judges.

[55]Before the election in 2018, the judicial council included two judges of the Supreme Court, two judges of courts of appeals, eight judges from regional courts, one from district courts, one from administrative courts, and one from a military court. After the election in 2018, there were 12 judges from district courts, two from regional courts, one from military courts, and no judges from courts of appeal and the Supreme Court. *See* Informacja o działalności Krajowej Rady Sądownictwa w 2018 r., p. 20-26.

[56]The proposals were based on judges' elections to the judicial council by the Sejm. However, the elections were limited to candidates nominated by judges (two judges for one seat). *See* https://polskieradio24.pl/artykul/2450404,rzeplinski-wybor-czlonkow-krs-przez-poslow-daje-silniejsza-legitymacje, visited 5 March 2026.

[57]P. Castillo-Ortiz, 'Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe', 9 *Hague Journal on the Rule of Law* (2017) p. 315; S. Späč et al., 'Capturing the Judiciary from Inside: The Story of Judicial Self-governance in Slovakia', 25 *German Law Journal* (2018) p. 1741 at p. 1749-1752.

[58]In fact, the requirements for the election of new judicial members of the judicial council, with a majority of 3/5 of votes cast by at least half of the members of Sejm and the presentation of a list of support from either 2,000 citizens or 25 judges, did not create any realistic mechanisms to elect judges non-politically.

[59]The legal and factual environment in which the election of the judicial council members takes place is stressed by the ECJ as more decisive in the evaluation of their independence than the authority responsible for this election. *See* ECJ (GC) 21 December 2023, Case C-718/21, *L.G.* v *Krajowa Rada Sądownictwa*, para. 64.

[60]*See* the opinion of the former President of the Polish Constitutional Tribunal Andrzej Rzepliński, https://polskieradio24.pl/artykul/2450404,rzeplinski-wybor-czlonkow-krs-przez-poslo

agreed that judges who elect and are accountable only to themselves lose an important part of their democratic legitimacy and oversight.[61] The judiciary, as the third State power, needs democratic legitimacy for several reasons, mainly to avoid a noticeable decrease in perceived judicial independence.[62]

From this point of view, the suggestion that judicial members of the National Council of the Judiciary be elected only by their peers seems to be too specific. It does not include different possibilities on how to construct the election process in detail with the participation of legislative or executive power.[63] The only margin of appreciation left to the legislator concerns rules for the election of judges by their peers. However, even in this possible reading of the judgment, the Court gave requirements concerning the diversity of the judge's career stages.[64] Undoubtedly, diversification in this field, complemented by other mechanisms like gender balance,[65] can make the election process more objective and the composition of the judicial council more specific. A system of checks and balances within this process based on the participation of different actors from judicial, executive, and legislative powers may enhance the objectivity and professionalism of the appointments.[66] Nevertheless, it is not the rules for the election but how the election is organised in practice that plays a seminal role in the impartial and professional functioning of the judicial council. There is no ideal way to appoint judges to this institution. Any system, including the election of judicial members of the council exclusively by judges, can be misused if it lacks basic cultural

w-daje-silniejsza-legitymacje, visited 5 March 2025. *See also* ECtHR 8 November 2021, Nos. 49868/19 and 57511/19, *Dolińska-Ficek and Ozimek* v *Poland*, para. 293.

[61]D. Kosař et al., 'The Case for Judicial Councils as Fourth-Branch Institutions', 20 *EuConst* (2024) p. 82 at p. 96.

[62]*See* figure 51 of the 2024 EU Justice Scoreboard on 'How the general public perceives the independence of courts and judges', p. 45, https://commission.europa.eu/document/download/84aa3726-82d7-4401-98c1-fee04a7d2dd6_en?filename=2024%20EU%20Justice%20Scoreboard.pdf&prefLang=pl, visited 5 March 2025. Poland is the third country from last in that regard.

[63]It is worth mentioning that the same reasoning is not present in the ECJ's case law, which gives EU member states much more freedom in the election of the judicial council members and does not entirely exclude the participation of the legislative power. *See* ECJ (GC) 15 July 2021, Case C-791/19, *Commission* v *Poland*, para. 103; *Krajowa Rada Sądownictwa*, *supra* n. 59, para. 64.

[64]*See* Opinion No. 10 (2007) on 'the Council for the Judiciary at the service of society' the Consultative Council of European Judges, 23 November 2007, cited in ECtHR 8 November 2021, Nos. 49868/19 and 57511/19, *Dolińska-Ficek and Ozimek* v *Poland*, para. 170.

[65]*See* para. 36 of the explanatory memorandum to Recommendation CM/Rec (2010)12 of the Committee of Ministers on Judges Independence.

[66]Simultaneously, actors from different state powers remaining in a conflict can successfully blockade elections. For example, the election of the President of the Oberlandesgericht in Stuttgart was prolonged for more than a year by the disagreement between judges and the Minister of Justice: *see* https://www.lto.de/recht/justiz/j/andreas-singer-neuer-praesident-olg-stuttgart-gentges-justiz-streit-baden-wuerttemberg-richterwahlausschuss, visited 5 March 2025.

standards for all actors taking part in the election process. In other words, even the most diversified and transparent system to appoint new judicial members to the council would be practically harmful to judicial independence, if all participants in that process did not agree to apply the rules fairly and legally.

In Europe, there are various election models for national judiciary councils. Judges are elected to these bodies mostly by their peers.[67] The participation of other state powers, including election by Parliament[68] or the involvement of executive power[69] are also solutions that are present in European legal orders. It is debatable, however, how – if at all – the recommendations from *Wałęsa* v *Poland* impact the assumptions of these models. Although the judgment is based on the Polish legal order, other jurisdictions should not ignore its findings.[70] The requirements for impartial and professional fulfilment of judicial obligations by the judicial council are the same for all parties to the Convention. Therefore, if such a recommendation is given to one party, but similar inefficiencies or dangers are identified in another legal system, a change in the model of the elections to a council should be considered by the national legislator concerned.[71] Nevertheless, total uniformity in the election of judicial members to the judicial council would be undesirable because it would not recognise nuances that are important for a

[67]It is the most recommendable model. *See* ENCJ Compendium on Councils for the Judiciary from 29 October 2021, p. 6.

[68]In Romania election by judges is validated by Senate. *See* Art. 133 para. 2 of the Romanian Constitution. *See also* B. Selejan-Gutan, 'Perils of a "Perfect Euro-Model" of Judicial Council', 25 *German Law Journal* (2018) p. 1707 at p. 1715-1716. In Spain, the election is in the control of Parliament: *see* A.T. Pérez, 'Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary in Spain', 25 *German Law Journal* (2018) p. 1769 at p. 1775-1776.

[69]In the Netherlands, the members of the National Council of the Judiciary are appointed by Royal Decree after a recommendation of the Minister of Justice and Security. *See* E. Mak, 'Judicial Self-Government in the Netherlands: Demarcating Autonomy', 25 *German Law Journal* (2018) p. 1806.

[70]The third point of the Committee of Ministers Recommendation 1477 (2000) about the execution of court judgments promotes the *erga omnes* significance of Court decisions. The postulate was supported by the encouragement of the governments of the High Contracting Parties to use their right to intervene in cases before the Court.

[71]The jurisprudence of the Court has already inspired national legislators to improve their legal systems following the ECHR. An example of this practice is the judgment of the ECtHR in 28 September 1995, No. 14570/89, *Procola* v *Luxembourg*, in which some members of the Judicial Committee of the Conseil d'Etat had performed an advisory function in the same case. This judgment, in which the violation of Art. 6 ECHR was identified, gave rise to legal amendments in Luxembourg, England, and France. *See* S. Shetreet, 'The Impact of International Law on Judicial Independence in Domestic Law: The Jurisprudence of the ECtHR', in S. Shetreet and W. McCormack (eds.), *The Culture of Judicial Independence in a Globalised World* (Brill 2014) p. 20 at p. 30-31; A. Claeys, 'L'originalité de la justice administrative française en Europe', 33 *Droit administratif* (2023) p. 1766 at p. 1771-1772.

particular legal order based on its evolution and legal culture. No election system would be universally accepted by politicians, let alone academics specialising in this field.[72] For example, the Dutch legal culture is characterised by pragmatism and the ability to achieve consensus.[73] The same is not true for Western Balkan states, for which legal formalism is more typical.[74] Therefore, it is postulated that the Court should rather stay away from far-reaching pronouncements on the design of judicial councils without analysis of their functioning.[75]

The discussion on jurisprudence and legal culture leads to two spheres of judicial independence: *de jure* (guaranteed by law) and *de facto* (statistically measured).[76] On the one hand, countries with a high level of *de facto* judicial independence may receive general recommendations with a broader margin of appreciation in the composition of their judicial councils. This would mean that diversified possibilities of creating judicial councils, including executive and legislative power participation in appointing judicial members, would be permissible. On the other hand, general recommendations would lead to considerable differences between legal systems in the various ways that judicial councils are elected. Following that approach, countries with lower levels of de facto judicial independence would have fewer possibilities in creating their rules on the composition of judicial councils.[77] Nevertheless, a discussion about securing their legal systems from threats from populistic-oriented politicians is

[72]*See* the discussion on this topic in the special issue of the *International Journal for Court Administration* 3(2018) titled 'Measuring Judicial Independence and Accountability', especially critical remarks made by Fabri about evaluations by the European Commission for the Efficiency of Justice and the European Network of Councils for the Judiciary. *See* M. Fabri, 'Pitfalls in Data Gathering to Assess Judiciaries', 3 *International Journal for Court Administration* (2018) p. 67. *See also* N. Garoupa and T. Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence', 103 *The American Journal of Comparative Law* (2009) p. 103 at p. 106-113.

[73]Those characteristics resulted in the creation of the judicial council in the 1990s whose obligations are judges' recruitment and training as well as advising in appointing the court management boards. *See* N. Graaf, 'An Introduction to Dutch legal culture', in S. Koch and M.M. Kjølstad (eds.), *Handbook on Legal Cultures* (Springer 2023) p. 285 at p. 295.

[74]It is connected with post-socialist tradition and the economic transformation that is still ongoing in these countries. *See* L. Bubalo, 'An Introduction to the Legal Cultures of Bosnia and Herzegovina, Croatia and Serbia (Western Balkan)', in Koch and Kjølstad, ibid, p. 151.

[75]M. Leloup and D. Kosař, 'Sometimes Even Easy Rule of Law Cases Make Bad Law. ECtHR (GC) 15 March 2022, No. 43572/18, *Grzęda* v *Poland*', 18 *EuConst* (2022) p. 753 at p. 775.

[76]B. Hayo and S. Voigt, 'The Long-term Relationship between the De Iure and De Facto Judicial Independence', 183 *Economics Letters* (2018) p. 1 at p. 2, F. van Dijk, *Perceptions of the independence of judges in Europe. Congruence of society and judiciary* (Palgrave Macmillan 2021) p. 17-19.

[77]The differentiation would surely be used by populistic parties to prove the unequal treatment by the Court of the parties to the ECHR. This strategy was used frequently by the previous Polish government. *See* the statement of the Polish Vice-Minister of Justice after ECtHR 6 July 2023, No. 21181/19 and 51751/20, *Tuleya* v *Poland*, that the Courts 'applied double, unlawful standards'.

also present in countries with a high level of de facto judicial independence.[78] The cultural and legal specificities between national legal orders do not mean that there should be different standards for the election and composition of the national councils of the judiciary. In *Wałęsa* v *Poland*, the Court focused on the Polish legal order, and this judgment is binding on Poland. However, the considerations given by the Court about the need to protect national councils of the judiciary from unlawful influence from executive and legislative powers create a common standard for all Council of Europe member states. In my view, regardless of significant differences between legal orders and their legal culture, the Court's recommendations should be precise enough to limit space for speculation.

Moreover, the composition and election of judicial council members should not disregard the competencies of the particular councils.[79] If, in a given legal order, the judicial council is competent (only) to administrate courts and does not protect or influence judicial status,[80] including appointments, then its composition from the perspective of the rule of law and judicial independence is less significant than in the systems in which this institution has a central position for the structural existence of the whole judiciary (e.g. Poland). However, it is possible that in a particular legal order, values other than judicial independence might play a crucial role in creating a judicial council.[81] It should not be taken for granted that the judicial council has to be composed solely of judges, or that they have to constitute the majority or even a part of this institution.[82] If the judicial council is at least partially composed of members with economic, human resources, psychology, IT, or management backgrounds, then such values as their education and professional experience should play a predominant role in the process of their recruitment.

The judgment in *Wałęsa* v *Poland* (at least in the maximalist view based on the election of all judicial council members only by judges) seems to limit discussions

See https://niezalezna.pl/polska/strasburg-polska-ma-zaplacic-tuleyi-36-tys-euro-kaleta-podwojne-standardy/490499, visited 5 March 2025.

[78]In Germany discussion is mainly focused on the protection of the Federal Constitutional Court: *see* K. Duden, 'Schützt das Verfassungsgericht!', *Verfassungsblog*, 7 February 2024, https://verfassungsblog.de/schutzt-das-bundesverfassungsgericht/. In the Netherlands, it concerns the election of the NCJ members: *see* N. Graaf et al. (eds.), *Constitutionele waarborgen. Over de Raad voor de Rechtspraak en rechterlijke onafhankelijkheid* (Boom 2024).

[79]As Aarli and Sanders pointed out, they can be diversified. *See* R. Aarli and A. Sanders, 'Judicial Councils Everywhere? Judicial Administration in Europe, with a Focus on the Nordic Countries', 14(2) *International Journal for Court Administration* (2023) p. 3 at p. 10-14.

[80]National councils of the judiciary in the Nordic countries lack competencies within the personal dimension (appointment, promotions, removals, disciplining, evaluation). *See* Aarli and Sanders, *supra* n. 79, p. 30-31.

[81]Leloup and Kosař, *supra* n. 75, p. 773.

[82]*See* different types of national councils of the judiciary in Kosař et al., *supra* n. 61, p. 98.

about various possibilities for electing judicial members to the judicial council. The judgment does not differentiate under what circumstances all the members, or at least half of them, should be elected by judges. Nevertheless, it is clear from *Wałęsa* v *Poland* that the election process for the judicial members of the council should not exclude the judiciary. This general conclusion, derived from the judgment, does not imply that there is no margin of appreciation within the boundaries marked by the Court. In practice, members of judicial councils are nominated not only by the judges themselves but by associations of judges, courts, conferences of judges, and different instances or courts they represent.[83] Any specificities are legally possible on condition that the elections are based on criteria that guarantee independence, separation of powers, fairness, and professionalism.

It is also worth noting that the judgment in the *Wałęsa* case could spark a debate in those countries where a national judiciary council does not exist.[84] In Germany, judges at the federal level are appointed by the competent Federal Minister and a committee for the selection of judges.[85] At the level of particular states, there are many differences in which the commissions responsible for judicial appointments (*die Richterwahlausschüsse*) are constructed.[86] The state Minister of Justice plays a predominant role in many of them.[87] Does a more significant role of the executive mean that the legislators in Germany should give more power within judicial appointment procedures to judges themselves? In discussing this topic, such an option did not find considerable approval among

[83]Aarli and Sanders, *supra* n. 79, p. 15.

[84]Judicial councils are not present in countries that have a German legal tradition: *see* F. Wittreck, 'German Judicial Self-Government – Institutions and Constraints', 25 *German Law Journal* (2018) p. 1931 at p. 1932. The judicial council is also not known in the Czech Republic: *see* D. Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court's Presidents and the Ministry of Justice', 13 *EuConst* (2017) p. 96 at p. 97.

[85]*See* Art. 95 para. 2 of the Grundgesetz für die Bundesrepublik Deutschland (Journal of Laws 2022 I p. 2478, henceforth GG). The details are regulated in the statute from 25 August 1950 Richterwahlgesetz (Journal of Laws 2015 I p. 1474).

[86]According to Art. 98 para. 3 GG, the legal status of judges can be regulated by special state laws. Art. 98 para. 4 GG expresses clearly that judges may be elected by the state Minister of Justice and a committee of the selection of judges. *See* E.W. Böckenförde, 'Verfassungsfragen der Richterwahl', 250 *Schriften zum öffentlichen Recht* (1974) p. 40-43, K.F. Gärditz, 'Richterwahlausschüsse für Richter im Landesdienst – Funktion, Organisation, Verfahren und Rechtsschutz', 4 *Zeitschrift für Beamtenrecht* (2010) p. 109-112, A. Sanders and L. von Danwitz, 'Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy', 19 *German Law Journal* (2018) p. 769 at p. 795-797.

[87]Gärditz, *supra* n. 86, p. 109-110.

German scholars.[88] In my opinion, the recommendations stipulated in *Wałęsa* v *Poland* do not apply to countries that do not possess judicial council. Their systems of judicial appointments are considerably different from those of countries like Poland, where the National Council of the Judiciary plays a predominant role in this process.[89] Therefore, the implications of *Wałęsa* v *Poland* should be analysed rather in countries with similar judicial appointment procedures to Polish ones.

In July 2024 an amendment to the process of the election of judicial members to the National Council of the Judiciary was introduced.[90] As recommended in *Wałęsa* v *Poland*, according to the new legislation judges are to be elected to the judicial council exclusively by their peers. There will be a strict division for judges from every court level and branch, to guarantee plurality and to avoid misrepresentation. However, the 2024 Amendment Act was redirected by the President of Poland to the Constitutional Tribunal and has not yet come into force.[91] The judgment of the Tribunal about the conformity of the 2024 law with the Polish Constitution is expected. Besides the President's unwillingness to restructure the National Council of the Judiciary,[92] his decision to refer the Act to the Constitutional Tribunal was based on the clear differentiation in the statute between the status of the judges appointed before ('old' judges) and after ('new' judges) the entry into force of the 2017 Amending Act. The group of 'new' judges was to be excluded from applying for positions in the judicial council. The Venice Commission criticised this proposal as it lacks an individual evaluation of each judge; they thus deemed it disproportionate.[93] This critique aligns with the

[88]*See* the discussion and votes on this proposal during the *73 Deutscher Juristentag in Bonn* (2022) p. 24-30, https://djt.de/wp-content/uploads/2022/09/Beschluesse.pdf, visited 5 March 2025.

[89]It does not mean that the legislators in these countries are exempted from any measures that should be undertaken to guarantee an impartial and transparent process for judicial appointments. *See also* W. Piątek, 'Neue Kriterien für die Auswahl von Richtern. Zur Stärkung Richterlicher Unabhängigkeit', 2 *Archiv des öffentlichen Rechts* (2024) p. 348-356.

[90]A statute from 12 July 2024 amending the statute about the National Council of the Judiciary; available at https://orka.sejm.gov.pl/proc10.nsf/ustawy/219_u.htm, visited 5 March 2025.

[91]*See* the application to the Constitutional Tribunal from 1 August 2024, available at the official website of the President of Poland, https://www.prezydent.pl/prawo/wnioski-do-tk/nowela-ustawy-o-krs-skierowana-do-trybunalu-konstytucyjnego,89868, visited 5 March 2025.

[92]It was recently expressed during the official speech in the Sejm on 16 October 2024. *See* the official version of the speech, https://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/sejm-oredzie-w-zwiazku-z-rocznica-wyborow-parlamentarnych-z-2023-r,92870, visited 5 March 2025.

[93]Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft Law amending the Law on the National Council of the Judiciary, 8 May 2024, No. CDL-PI(2024)009, para. 43.

findings of *Wałęsa* v *Poland*, where no distinction was made between judges' rights and obligations, irrespectively of whether they are 'new' or 'old' judges.

Status of judges appointed in the procedure before the new National Council of the Judiciary

One of the main consequences of the new set-up of the National Council of the Judiciary, according to the 2017 Amendment Act, is the deciding of cases by judges[94] appointed in a procedure assessed in *Wałęsa* v *Poland* as defective.[95] Nevertheless, the defects do not automatically imply that these people are not judges. The President of Poland appointed them based on a judicial council resolution. Although there are opinions among Polish legal scholars questioning the legal status of 'new' judges,[96] the act of their appointment cannot be found to be non-existent.[97] In *Wałęsa* v *Poland*, there was no conclusion that the appointments of 'new' judges were non-existent.[98] The Court found the incompatibility of the judicial appointment procedure with the requirements derived from Article 6(1) ECHR. It formulated recommendations to restore the rule of law within judicial appointments.[99] Moreover, this judgment gives no right to 'old' judges appointed before the introduction of the 2017 Amendment Act to withdraw from adjudication within one panel with 'new' judges.[100] This judgment should not be treated as an automatic approval for the general exclusion of every 'new' judge from a particular proceeding. Instead of that, an individual verification in each case is appropriate. This strategy is constantly presented in the

[94]Referred to in this article as 'new' judges.

[95]*Wałęsa* v *Poland*, *supra* n. 1, para. 329.

[96]According to Professor Wojciech Sadurski, the 'new' judges 'are not judges in these new positions. They only benefit from ethically unworthy actions'. *See* the interview with Professor Sadurski, *supra* n. 6.

[97]As Szwed noted, candidates for judicial positions were appointed by the President of Poland, who has the competence to decide on this action. The President acted based on a motion of the National Council of the Judiciary, which is also a competent body in this procedure. It is not legally possible to prove that the motion of the judicial council and the judicial appointment did not legally exist. *See* Szwed, *supra* n. 12, at p. 365. *See also* P. Filipek, 'Defective Judicial Appointments and Their Rectification under European Standards', in Bobek et al., *supra* n. 12, p. 454.

[98]This has been postulated in the Polish literature, at least by some researchers. *See* K. Skotnicki, 'Problem konstytucyjności składu obecnej Krajowej Rady Sądownictwa w Polsce', 93 *Acta Universitatis Lodziensis. Folia Iuridica* (2020) p. 47 at p. 57.

[99]In other words, the Court did not say that the inconsistency of judicial appointments made by the National Council of the Judiciary in a flawed composition (after the coming into force of the 2017 Amending Act) is invalid. It needs to be adapted to Art. 6 ECHR.

[100]*Wałęsa* v *Poland*, *supra* n. 1, para. 170.

Polish Supreme Administrative Court jurisprudence concerning motions for disqualifying 'new' judges from a particular proceeding.[101]

The same strategy for an individual assessment of each judicial appointment was confirmed by the Venice Commission in the opinion submitted at the request of the Polish Minister of Justice.[102] The Minister pointed out the possibility of assessing all judicial appointments as invalid *ex tunc* as an option to restore the rule of law within the Polish judiciary. In the view of the Venice Commission, that option would not meet the rule of law standards. Whatever reform is implemented, it cannot jeopardise the functioning of the judicial system as such. The invalidation of all judicial appointments would raise questions regarding the balance of state powers between the legislature and the judiciary. Removing the status of a judge through law would mean that appointees would have no right to judicial review against the invalidation of their appointment. Instead, the invalidation of individual appointments based on the characteristics of each case has been assessed as desirable and proportional.[103] The need for individual verification of every judicial appointment was repeated by the Polish Ombudsman in a letter addressed to the Polish Prime Minister.[104]

A general assessment of all judicial appointments since the coming into force of the 2017 Amending Act, without consideration of all particularities connected with first or next-time appointments, proceedings in which judges were appointed from outside the judicial system, including the executive power, based on the quality of their adjudication, would be harmful to the whole judicial system.[105] It would not reflect all specifics connected with the legal basis for each appointment and the factual characteristics of every candidate who applied for a free judicial position. The general assessment of all judicial appointments in Poland from 2018 onwards would be incompatible with the need to protect judicial independence, which can be easily violated.[106] In other words, the identified defectiveness in judicial appointments after the 2017 Amending Act should not lead to the

[101] *See* the last orders of the SAC from 10 July 2024, No. I GZ 202/24 and No. I GZ 203/24.

[102] The application was sent to the Venice Commission on 11 June 2024. *See* the detailed questions at https://www.money.pl/gospodarka/bodnar-pisze-do-komisji-weneckiej-w-sprawie-neosedziow-rysuje-dwa-scenariusze-7049788508289568a.html, visited 5 March 2025.

[103] Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on European standards regulating the status of judges, 11-12 October 2024, No. CDL-AD(2024)029, paras. 29-32.

[104] Letter from 21 October 2024, VII.510.48.2024.JRO.

[105] Among 'neo' judges many subcategories of judges may be identified. *See* A. Bodnar, 'Poland after Elections in 2023: Transition 2.0 in the Judiciary', in Bobek et al., *supra* n. 12, p. 307-308.

[106] For this reason, one of the options to deal with 'packed' courts and judges is to do nothing. In this view, it is better to wait for the natural renewal of the bench than to risk the violation of judicial independence. *See* D. Kosař and K. Šipulová, 'Court-unpacking: A Preliminary Inquiry', in Bobek et al., *supra* n. 12, p. 338.

automatic deprivation of the status of judge for all of the 'new' judges. Another reason for that is purely pragmatic. It is impossible to question more than 2,000 judicial appointments[107] without causing severe disruption to the judiciary. For this reason, the vetting process certainly has to be undertaken over a longer period.

Nevertheless, ceasing to question judges' status does not remove the need to remedy the defects in the appointment of judges identified in *Wałęsa* v *Poland*. However, in contrast to the election of the National Council of the Judiciary members, the Court gave no recommendations on how to verify the judicial appointment process. It is stressed only that the status of all judges should be addressed, including decisions adopted with their participation. It is debatable whether this process should be the same for the Supreme Court judges and judges of other court branches.[108] Another issue is the distinction between judges appointed before the 'reform' and subsequently promoted to a higher position and those appointed during the period of the deficient procedure. It is unclear whether the same rules should be applied to the administrative judges, bearing in mind that the administrative judiciary, unlike the Supreme Court and ordinary (civil and criminal) judiciary, was not structurally reformed within the last eight years.[109] Answers to these questions are within the margin of appreciation given to Polish legislator.

Wałęsa v *Poland* gives no clear answer to this dilemma. If the Court decides to adopt a pilot judgment, its task is to indicate measures to ensure the long-term effectiveness of the ECHR system.[110] Nevertheless, at least a direction on how to address the review of defective judicial appointments can be deduced from the reasoning put forward by the Court. First of all, there is no doubt that the review should be undertaken. The Court stated clearly that the status of all judges appointed by the deficient procedure should be addressed. That does not mean that the verification procedure has to be identical for district court judges and the Supreme Court, including the Chamber of Extraordinary Review and Public Affairs judges. The Venice Commission expresses the same remark, which

[107]According to the data collected by the Helsinki Foundation for Human Rights, between 2018 and August 2023, the President of Poland nominated 2,204 judges. *See* A. Statystyczna, 'Powołania sędziów w latach 2018-2023 na wniosek tzw. "nowej" Krajowej Rady Sądownictwa' (2023) p. 4.

[108]It is true that 'the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be'. *See* ECtHR (GC) 12 March 2019, No. 26374/18, *Guðmundur Andri Ástráðsson* v *Iceland*, para. 222.

[109]For more on this subject *see* W. Piątek and P. Ostrowski, 'La justice administrative polonaise est-elle (toujours) indépendante du pouvoir exécutif?', 39 *Revue Française de Droit Administratif* (2023) p. 973 at p. 979-982.

[110]*Wałęsa* v *Poland*, *supra* n. 1, para. 314.

accepted individual assessment based on a grouping of similar cases.[111] Second, it should be based on objective and non-political criteria. The need to exclude political influences during the verification appears to be especially challenging, because at least some of the 'new' judge appointments were politically motivated. The only way to avoid politics is to focus on the judicial independence of a verified person[112] and to answer the question of whether he or she was (in)dependent in the process of adjudication. There is no simple answer to this question; only an individual assessment of every judicial appointment and subsequent adjudication can show whether the decisions made by that judge were not politically motivated, lacking explanation, or with grave procedural or substantive errors. Third, the Court stressed the need to preserve legal certainty and foreseeability. Even if it was presented within the extraordinary appeal's evaluation, the same legal certainty requirements for judgments issued with the participation of 'new' judges could be assessed as reasonable. These remarks lead to the conclusion that the most radical solution based on the automatic invalidity of all judgments would not be proportionate to achieve the goals connected with the rule of law restoration.[113] Balancing the values and interests of various groups that meet in courts, including the 'new' judges, would be a more welcome solution.

The question of how to go through the verification process depends also on the Polish legal order. In this regard, Article 180 paragraph 2 of the Polish Constitution, according to which recalling a judge from office can be done only by virtue of a court judgment and under circumstances specified by law, is worth stressing.[114] From this perspective, the removal of a judge by the judicial council, even in a new composition, is not legally permissible. The need for judicial participation and control in this process is also stressed in *Wałęsa* v *Poland*.[115] Finally, the last words will belong to a court that has to take into consideration all the above-mentioned criteria of objectivity, legal certainty, and foreseeability of law. This obligation is linked with these aspects of the judgment in *Wałęsa* v *Poland,* which correspond to the legal position and structure of the Supreme Court. In practice, it is hardly conceivable that the 'new' judges' verification could be carried out without the involvement of that court, especially when it comes to its judges.

[111]Joint opinion, *supra* n. 103, para. 29.

[112]In a personal dimension, judicial independence means that a judge is internally independent. *See* R. Piotrowski, 'Konstytucyjne granice reformowania sądownictwa', 2 *Krajowa Rada Sądownictwa* (2017) p. 10.

[113]As Filipek pointed out, the cure may then turn out to be as bad as the disease. *See* Filipek, *supra* n. 97, p. 461.

[114]As Szwed pointed out, even apart from the provisions of the Polish Constitution, judges have certain rights related to their employment: *see* Szwed, *supra* n. 12, p. 369.

[115]*Wałęsa* v *Poland*, *supra* n. 1, para. 329.

Bearing in mind the referral of the 2024 Amendment Act by the President of Poland to the Constitutional Tribunal, it is worth considering possible ways to restore the rule of law without legislative amendments recommended in *Wałęsa* v *Poland*. Unfortunately, the process of defective judicial appointments is still ongoing.[116] The initiative not to announce new vacancies for judges is more than welcome.[117] From a long-term perspective, withholding of judicial positions could lead to inefficiencies in the judicial system. The choice between appointing judges through a defective procedure or ceasing to make appointments at all, as a result of which the judicial system could become inefficient, is an example of balancing different values in which the impossibility of lawful judicial appointments should prevail over the threat of (unreasonable) time for case resolution. Unfortunately, it is the only thing that can be done without any legislative action.

Effective judicial review of the National Council of the Judiciary's resolutions

The last recommendation of the Court with regard to judicial appointment procedure in Poland was to ensure effective judicial review of the judicial council's resolutions on candidates for the position of judge. Undoubtedly, the judicial review process would be ineffective if any decisions affecting the result of the judicial appointment were outside of the administrative court's jurisdiction. In my opinion, this recommendation should be understood broadly as a need for effective judicial review of the whole process of a judicial appointment or verification, irrespectively of its future procedural and structural characteristics. A court should have the right to examine all aspects of this process and decide whether it was lawful. A final court's decision should tackle the core of the case (judicial appointment) being binding for all authorities and parties to the proceedings.

Focusing on the Polish legal order, the process of judicial appointment does not end with the National Council of the Judiciary resolution but with the act of nomination given by the President of Poland,[118] which is exempted from countersigning by the Prime Minister.[119] This act has been considered to be of symbolic relevance.[120] Although it was not expressly stated in *Wałęsa* v *Poland*, as

[116]The last nominations for 60 judges were given by the President of Poland on 19 July 2024. *See* information from the official website of the President of Poland, https://www.prezydent.pl/aktualnosci/nominacje/palac-prezydencki-nominacje-sedziowskie,87785, visited 5 March 2025.

[117]This initiative was announced by the Minister of Justice for ordinary courts and the President of the SAC for regional administrative courts.

[118]Art.179 Constitution of the Republic of Poland.

[119]Art. 144 para. 3 point 17 Constitution of the Republic of Poland.

[120]J. Zimmermann, *Prawo administracyjne* (Wolters Kluwer 2012) p. 155.

such, this act is assessed in the jurisprudence of the Court as an act of government (*acte de gouvernement*), which means that it is not subject to judicial control.[121] The recommendation expressed in *Wałęsa* v *Poland* follows this reasoning, by expressing the need for effective judicial review of the judicial council's resolutions that propose judicial appointments to the President of Poland. If a nomination given by the President had only a formal and symbolic nature, then the procedure before the National Council of the Judiciary would play a decisive role in the whole procedure.

In practice, nominations proposing judicial appointments that follow the National Council of the Judiciary's resolutions for the incumbent President of Poland do not have a purely formal nature.[122] A lack of nomination without any explanation raises questions about its lawfulness and the effectiveness of judicial control limited to the judicial council's resolutions. The uniform jurisprudence of the Supreme Administrative Court does not allow review of the acts of the President of Poland in this field, as they are *actes de gouvernement*.[123] This has already led to legally absurd situations. There was a case in which the National Council of the Judiciary's resolution was contested before the Supreme Administrative Court, but the President of Poland did not wait for the resolution of this case and nominated a judge based on the contested resolution. Afterwards, the Supreme Administrative Court reversed the resolution and considered that its judgment did not affect the legality of the nomination made by the President of Poland.[124] Therefore, there is no legal instrument that forces the President of Poland to nominate a candidate who was proposed in the resolution of the judicial council or to appeal against an order refusing the nomination.

In fact, it is the President of Poland who plays the decisive role in the process of a judicial appointment, not the National Council of the Judiciary. The recommendation in *Wałęsa* v *Poland* about effective judicial review of the judicial council's resolutions without taking into consideration the (*de facto* et *de jure*) role performed by the President of Poland would be insufficient. In my opinion, the presidential nominations should not have the status of *actes de gouvernement*, because they have decisive character in the judicial appointment process. They determine the final effect of this process and, therefore, should be legally verified by administrative courts. It has been postulated that these acts of the President should be subject to judicial review, but the Supreme Administrative Court has so

[121]ECtHR 14 December 2006, No. 1398/03, *Marcovic et autres* v *Italie*, para. 18; ECtHR 4 April 2024, No. 17131/19, *Tamazout et autres* v *France*, para. 84.

[122]For the same observation, *see* S. Spáč, 'Recruiting European Judges in the Age of Judicial Self Government', 19(7) *German Law Journal* (2018) p. 2093.

[123]Order of the SAC, 9 October 2012, No. II OSK 1883/12; order of the SAC, 17 October 2012, No. I OSK 1889/12.

[124]Judgment of the SAC, 6 May 2021, II GOK 7/18.

far not shared this view.[125] According to the case law of the European Court of Justice, the necessity for judicial oversight of decisions that result in legal consequences for judicial appointments remains unquestioned.[126] *Wałęsa* v *Poland* is another reason to change this way of thinking and look once again at the process of judicial appointments from the perspective of effective judicial control.

Considering the abovementioned domestic legal context, judicial nominations given by presidents should not always be considered as *actes de gouvernement*.[127] A decisive role in categorising them as such should be the legal importance of these acts for the outcome of the judicial appointment process.

Conclusion

Irrespective of the urgency of the measures to be taken by Poland to restore the rule of law in the judiciary, this process cannot be organised quickly and easily without any compromises regarding the status of newly appointed judges and their decisions. The judgment in *Wałęsa* v *Poland* identifies the spheres that should be improved, such as restoring the independence of the National Council of the Judiciary, addressing the 'new' judges' status, and ensuring effective judicial review of the judicial council's resolutions. The Polish legislature has to decide how to interpret the general recommendation to give the Polish judiciary the right to elect judicial members of the National Council of the Judiciary. On the one hand, it would be beneficial for Poland to have clear recommendations, step by step, on how to restore the rule of law. On the other, it is not the Court's role to replace the decisions of national authorities in domestic lawmaking and, in this way, to reduce their ambit.

In reality, there is no ideal way to go through this process, nor is there any chance of preserving all aspects of the rule of law to the fullest possible extent. Rather, a compromise has to be achieved. *Wałęsa* v *Poland* clarifies that the basis for this objective should be repeated election of the National Council of the Judiciary judge-members by their peers and the verification of all judicial appointments by the newly established judicial council. Based on this judgment, a preliminary assumption can be made that all judicial appointments from 2018 onwards should be assessed as legally existing and reviewed, as required by the rule

[125]Orders of the SAC, 27 February 2023, No. II GSK 1362/22, II GSK 1520/22, II GSK 1886/22.

[126]ECJ 2 March 2021, C-824/18, *A.B., C.D., E.F., G.H., I.J.* v *Krajowa Rada Sądownictwa*, para. 156.

[127]Whereas the acts of the President of Poland play a decisive role in the process of judge's appointments, the same cannot be said about the acts of the President of Germany in terms of the federal judges: *see* F. Wittreck, *Die Verwaltung der dritten Gewalt* (Mohr Siebeck 2006) p. 307.

of law. It is possible that some judges will be removed from office. Presumably, the next series of European Court of Human Rights judgments concerning the Polish legal order will tackle these issues. Therefore, it should be stressed once again that every resolution in the process of restoring the rule of law, given by the judicial council or other actors, like the President of Poland, should be lawful and remain contestable within the procedure before the (administrative) judiciary.

For states other than Poland, especially those with their own national councils of the judiciary, the Court in *Wałęsa* v *Poland* set out additional standards of judicial independence, indicating how to protect the judiciary from excessive influence by the executive and legislative powers. The Court's recommendations are worth the attention of all Council of Europe member states who want to counteract the possible disintegration of the judiciary. However, recommendations should be consistent and clear: they should not leave space for speculation. This condition was not entirely achieved in the *Wałęsa* v *Poland* judgment. The Court's recommendation to proceed with legislation guaranteeing the right of the Polish judiciary to elect judicial members of the National Council of Judiciary came unexpectedly, at the end of an overly extensive deliberation. The Court did not explain how or why it chose the formula it decided on in preference to another one. Ultimately, the wording of the recommendation in the *Wałęsa* case does not eliminate doubts about how to restore the independence of the Polish National Council of the Judiciary.

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Acknowledgements. This case note is a part of research project No. UMO-2018/30/E/HS5/00421, financed by the Polish National Science Centre, devoted to the appealability of administrative court judgments. I am grateful to the editors and anonymous reviewers for their helpful comments.