

Strasbourg, 4 April 2022

CDL-PI(2022)009

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in cooperation with

THE UNIVERSITY LA SAPIENZA, ROME and
THE UNIVERSITY OF BARCELONA

International Round Table
SHAPING JUDICIAL COUNCILS
TO MEET CONTEMPORARY CHALLENGES

University *La Sapienza*, Rome

21 – 22 March 2022,
(Hybrid format)

PRESENTATION
by

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Judge, European Court of Human Rights (ECHR)

INDEPENDENCE OF THE JUDICIARY
FROM THE STANDPOINT OF THE EUROPEAN COURT OF HUMAN RIGHTS



Presidency of Italy
Council of Europe
November 2021 - May 2022
Présidence de l'Italie
Conseil de l'Europe
Novembre 2021 - Mai 2022



VENICE COMMISSION
COMMISSION DE VENISE
COUNCIL OF EUROPE
CONSEIL DE L'EUROPE



SAPIENZA
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International Round Table SHAPING JUDICIAL COUNCILS TO MEET CONTEMPORARY CHALLENGES

Independence of the Judiciary from the Standpoint of the European Court of Human Rights

21 March 2022

Raffaele Sabato, Judge, European Court
of Human Rights

The opinions expressed are the author's own and do not reflect the views of the ECtHR or its members



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Independence of the justice system

The role of Article 6 ECHR

An independent and impartial tribunal

A tribunal established by law: the appointment process

The case-law of the ECtHR (and of the CJEU)

Factsheet – Independence of the justice system

https://www.echr.coe.int/Documents/FS_Independence_justice_ENG.pdf



Independence of the justice system

Article 6 ECHR

"... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."



Independence and right to a fair trial

- Independence criteria: a) tribunal established by law (absence of outside influence in appointments); b) quality of legislation
- Statutory independence: a) objective and subjective criteria; b) absence of outside influence (in pending cases); c) objective guarantees as to career of judges (security of tenure; no civil or criminal liability of judges except in cases of malicious intent or serious negligence)
- Doctrine of appearances
- Relation to other Convention rights
- Disciplinary proceedings against judges



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Case-law between the 1970's and the 2020's – only security of tenure and disciplinary proceedings being relevant for the topic concerning the role of High Councils for Justice – cfr. *Baka*, *O. Olkov* and *Denisov*



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Case-law between 2020 and 2022 – relevant for HCJs

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- Doctrine of appearances
- Relation to other Convention rights
- Disciplinary proceedings against judges

Case-law between 2020 and 2022 – relevant for HCJ



Interactions between Council of Europe bodies, Venice Commission and ECHR

The experience of new democracies

The creation of a body of soft-law instruments (European Charter on the Statute for the Judge of 1998, CM's Recommendations 12 of 1994 and 12 of 2010, the CCJE's Opinions starting in 2000 (esp. no.s 10 of 2007 and 24 of 2021), the Magna Carta of Judges of 2010, etc.)

Venice Commission's Rule Of Law Checklist; Venice Commission's Report on the Independence of the Judiciary; etc.



The role of the concept of “tribunal established by law” in the new developments of case-law

Background at the **Luxembourg Court** concerning the situation of the **rule of law in Poland** (after the Association of Portuguese Judges case):

- A. Judgment of the CJEU (Grand Section) Commission v. Poland 24.6.2019 (Case C-619/18) – lowering to 65 the retirement age of Supreme Court judges, with effect for previously appointed judges.
- B. Judgment of the CJEU (Grand Section) A.K. and Others v. Poland of 19.11.2019 (Joined Cases C 585/18, C-624/18, C-625/18) on a reference for a preliminary ruling from the Labour Chamber with respect to the Disciplinary Chamber and the conditions laid down by the National Council of the Judiciary (“the NCJ”) for access to it;
- C. Opinion of Advocate General Tonchev; interim order of 8.4.2020 (Case P/7/20);
- D. Judgment of the Polish Constitutional Court of 7.10.2021
- E. Judgment of the CJEU (Grand Section) of 2.3.2021 (Case C 824/18); order for a preliminary ruling from the Polish Supreme Administrative Court on applications for appointment as a Judge of the Supreme Court, which were not accepted by the NCJ which had proposed other candidates.
- F. Pending cases

Note: Astreinte of EUR 1,000,000 per day per case (B); expulsion of the Polish CSM from the ENCJ – European Network Councils of Justice – 28.10.2021

Background at the Strasbourg Court

- A. judgment of the ECHR (Grand Chamber) *Guðmundur Andri Ástráðsson v. Iceland* on 1.12.2020; important precedent; right to a tribunal "established by law" in relation to flawed appointments of judges; criminal sanction for violation of the traffic legislation; Ástráðsson test
- B. Article by Robert Spano in the European Law Journal, February 2021
- C. A public discussion in Italy hosted by "Diritti Comparati" – March/May 2021

At the time 38 pending Polish cases

The judgments of the Strasbourg Court concerning Poland

- (a) *Xero Flor w Polsce sp. z o.o. z o.o.c. Poland*, section I, judgment of 7.5.2021 (final); in a civil case there is a ruling of the Constitutional Court "not constituted by law"
- (b) *Grzęda v. Poland*, Grand Chamber public hearing held on 19.5.2021, judgment delivered on 15.3.2022 (final); an elected judicial member of the HCJ is made lose his membership "ante tempus" by law under the legislation establishing the new HCJ
- (c) *Broda and Bojara v. Poland*, section I, judgment of 19.6.2021 (final); Vice-Presidents of courts are prematurely dismissed from their offices, by virtue of the new rules on HCJ and appointments of chief judges
- (d) *Reczkowicz v. Poland*, section I, judgment of 22.7.2021 (final): lawyer sanctioned by disciplinary chamber of the Supreme Court 'not constituted by law' by virtue of the new rules on HCJ



The judgments of the Strasbourg Court concerning Poland

(e) : *Dolińska-Ficek et Ozimek v. Poland, section I*, 8.11.2021 (final) - 57 pending cases at that moment

Two judges that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which had decided on cases concerning the applicants, had not been a “tribunal established by law” and had lacked impartiality and independence. Judges had been appointed by the President of Poland on the recommendation of the National Council of the Judiciary (“the NCJ”), whose judicial members were no longer elected by judges but by the Sejm (the lower house of Parliament). The procedure for appointing judges to the Civil Chamber of the Supreme Court had been unduly influenced by the legislative and executive powers.



The judgments of the Strasbourg Court concerning Poland

(f) : *Advance Pharma Sp. z o.o. v. Poland*, section I, 3.2.2022 (not final)

This case concerned a complaint brought by the applicant company that the Civil Chamber of the Supreme Court, which had decided on a case concerning it, had not been a “tribunal established by law”, as it is composed of judges appointed by the President of Poland on the recommendation of the National Council of the Judiciary (“the NCJ”) since the entry into force of new legislation providing, among other things, that its judicial members are no longer elected by judges but by the Sejm (the lower house of Parliament).

The Court held that there had been a violation of Article 6 § 1 of the Convention, finding that The Civil Chamber of the Supreme Court was not an “independent and impartial tribunal established by law” within the meaning of the Convention. It noted, in particular, that the procedure for appointing judges to the Civil Chamber of the Supreme Court had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Civil Chamber of the Supreme Court, which had examined the applicant’s case. In addition, **under Article 46** (binding force and execution of judgments) of the Convention, the Court found that the violation of the applicant company’s rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way. It was an inescapable conclusion **that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction established by the Court and might lead to further aggravation of the rule of law crisis in Poland. Therefore, rapid action on the part of the Polish State to remedy this was required.** It fell upon the State of Poland to draw the necessary conclusions from this judgment and to take appropriate measures in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.



Additional considerations

- one R39 request was the object of a press release (Wrobel)
- the «tribunal established by law» issue is raised both by parties in a case, and judges
- issues with subsidiarity, Article 35 and domestic remedies





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