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Dealing with 'fake judges' under EU Law: Poland as a Case Study in light of the Court of Justice's ruling of 26 March 2020 in *Simpson* and *HG*

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Laurent Pech
Middlesex University London

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Abstract

One of the most concrete but also problematic aspects of what may be labelled 'rule of law backsliding' is not only the increasing number of bodies masquerading as courts but also the increasing number of individuals masquerading as judges, with the situation in Poland being exhibit A in this respect. This paper will focus on the latter issue in light of the right to a tribunal *previously established by law*. In EU law, the right to a tribunal established by law is an aspect of the right to a fair trial and is provided for in the first sentence of the second paragraph of Article 47 of the Charter. While there is ample case law concerning the requirements that courts must be independent and impartial, the Court of Justice had not interpreted and applied the term 'established by law' to comprehensively review a judicial appointment procedure until its Grand Chamber judgment of 26 March 2020 in *Simpson* and *HG*.

While the Court's ruling does not directly concern a national judicial appointment procedure but rather an irregularity affecting the procedure for the appointment of a judge to the former EU Civil Service Tribunal, this paper contends that the Court of Justice's reasoning can be extrapolated to the situation where irregularities have affected national judicial appointment procedures and this is indeed what this paper will attempt to do as regards the situation in Poland in light of the Polish Supreme Court's findings in its resolution of 23 January 2020.

This paper will conclude by assessing the extent to which (if any), individuals appointed to Polish ordinary courts and Supreme Court posts on the basis of the Polish law of 8 December 2017 amending the Law on the National Council of the Judiciary, and the individuals appointed to the Constitutional Tribunal without a legal basis as well as the unlawfully appointed President of the said Tribunal in December 2016, may be considered proper judges or, on the contrary, to borrow from English law, 'de facto judges' or 'usurpers'. In this respect, it will also be submitted that the Polish law of 14 February 2020, informally known as the 'muzzle law', cannot constitute a lawful obstacle when it comes to dealing with usurpers and more generally, assessing the lawfulness of any judicial appointment made by the Polish president. Indeed, as a matter of EU law and as made clear by the Court in *Simpson* and HG, 'everyone must, in principle, have the possibility of invoking an infringement' of the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law. This means inter alia that the CJEU but also national courts of EU Member States 'must be able to check whether an irregularity vitiating the appointment procedure' in dispute 'could lead to an infringement of that fundamental right.'

Keywords

European Union; Poland; Article 47 of the of the Charter of Fundamental Rights of the European Union; Article 6(1) of the of the Convention for the Protection of Human Rights and Fundamental Freedoms; Appointment of judges; Irregularity in a judicial appointment process; Right to effective judicial protection; Right to a tribunal previously established by law; Principle of judicial independence

Author

Laurent Pech is Professor of European Law, Middlesex University London; member of the EU's H2020 funded RECONNECT research project and leader of the work package dedicated to the rule of law (principles): https://reconnect-europe.eu/project-info.

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1. Introduction

One of the most concrete but also problematic aspects of what may be labelled 'rule of law backsliding'[1] is not only the increasing number of bodies masquerading as courts but also the increasing number of individuals masquerading as judges, with the situation in Poland being exhibit A in this respect.[2] This paper will focus on the latter issue in light of the right to a tribunal *previously established by law*.

In EU law, the right to a tribunal established by law is an aspect of the right to a fair trial and is provided for in the first sentence of the second paragraph of Article 47 of the Charter (hereinafter: CFR): 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.' This sentence corresponds with the first sentence of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR),[3] and as per the EU Charter, it is well established that the Court of Justice must ensure that the interpretation which it gives to the second paragraph of Article 47 CFR safeguards a level of protection which does not fall below the level of protection established in Article 6 ECHR, as interpreted by the European Court of Human Rights.[4]

While there is ample case law concerning the requirements that courts must be independent and impartial, the Court of Justice had not interpreted and applied the term 'established by law' to comprehensively review a judicial appointment procedure until its Grand Chamber judgment of 26 March 2020 in *Simpson* and *HG*.[5] As will be shown below, the Court's ruling does not directly concern a national judicial appointment procedure but rather an irregularity affecting the procedure for the appointment of a judge to the former EU Civil Service Tribunal. It is however submitted that the Court of Justice's reasoning can be extrapolated to the situation where irregularities have affected national judicial appointment procedures and this is indeed what this paper will attempt to do as regards the situation in Poland in light of the Polish Supreme Court's findings in its resolution of 23 January 2020.[6] This paper will conclude by assessing the extent to which (if any), individuals appointed to Polish ordinary courts and

[1] See L. Pech and K. Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

[2] See e.g. in respect of Poland's 'fake constitutional court', its three 'fake members' and 'fake President', T. Koncewicz, 'The Court is dead, long live the courts? On judicial review in Poland in 2017 and 'judicial space' beyond', *VerfBlog,* 8 March 2018, <https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond/>. For a recent and more general assessment of the rule of law situation in Poland, see Council of Europe (PACE), *The functioning of democratic institutions in Poland*, Resolution 2316 (2020), para. 4: Poland's so-called judicial reforms 'in numerous aspects run counter to European norms and standards. They cumulatively undermine and severely damage the independence of the judiciary and the rule of law in Poland. Moreover, the reforms have made the judicial system vulnerable to political interference and attempts to bring it under political control of the executive, which challenges the very principles of a democratic State governed by the rule of law.'

[3] 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

[4] See recently joined cases C-585/18, C-624/18 and C-625/18, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, para. 118 and the case-law cited.

[5] Joined Cases C-542/18 RX-II *Simpson v Council* and C-543/18 RX-II *HG v Commission*, EU:C:2020:232.

[6] Supreme Court Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber), Case BSA I-4110-1/20, 23 January 2020. English translation available at <www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf>.

Supreme Court posts on the basis of the Polish law of 8 December 2017,[7] and the individuals appointed to the Constitutional Tribunal without a legal basis as well as the unlawfully appointed President of the said Tribunal in December 2016,[8] may be considered proper judges or, on the contrary, to borrow from English law, 'de facto judges' or 'usurpers'. This distinction will be further detailed immediately below.

2. Setting the scene: The problem of individuals masquerading as judges in the light of the right to a tribunal previously established by law

The critical problem of individuals being *irregularly appointed* to national judicial posts (or regularly appointed judges *irregularly promoted* to higher courts) in a procedure involving a body manifestly lacking basic independence and set up in obvious violation of the national constitution, is a new problem in EU law. And this is arguably why the Court of Justice's case law has historically been primarily concerned with the issue of compliance with judicial independence and impartiality standards of national bodies,[9] rather than the question of whether national bodies presenting themselves as courts and tribunals can be considered courts and tribunals previously 'established by law' [10] within the meaning of Article 47 CFR. This is why this paper primarily aims to address the issue of 'fake judges' in the light of the EU right to a tribunal previously established by law, itself reflecting Article 6(1) ECHR, and will do so on the basis of the approach adopted by the Court of Justice in its Grand Chamber ruling of 26 March 2020 in *Simpson* and *HG*. Before further exploring the Court of Justice's analysis of the appointment procedure at issue in these two disputes, it may be helpful to clarify the meaning of 'established by law' and what this paper means by 'fake judges'.

According to the settled case-law of the European Court of Human Rights, and as recalled by the European Court of Justice, the term 'established by law' reflects the principle of the rule of law and covers 'not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case

[7] Law amending the Law on the National Council of the Judiciary and certain other Laws of 8 December 2017 (Dz. U. of 2018, heading 3).

[8] See European Commission, *Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland*, COM(2017) 835, 20 December 2017, para. 57: 'The unlawful appointment of the President of the Constitutional Tribunal, the admission of the three judges nominated by the 8th term of the *Sejm* without a valid legal basis […] have *de facto* led to a complete recomposition of the Tribunal outside the normal constitutional process for the appointment of judges'.

[9] See most recently Case C-791/19 *Commission v Poland (Independence of the Disciplinary Chamber of the Supreme Court)*. Within the framework of this infringement action, the Court of Justice granted the interim measures applied for by the Commission and ordered the immediate suspension of the activities of the 'disciplinary chamber' as regards disciplinary cases concerning Polish judges on 8 April 2020 due, inter alia, to the fact that this body's lack of independence and impartiality cannot, prima facie, be ruled out. See Case C-791/19 R, EU:C:2020:277.

[10] Two preliminary cases now pending before the Court of Justice – Case C-487/19 *W.Ż.* (lodged with the Court on 29 June 2019) and Case C-508/19 *Prokurator Generalny* (lodged with the Court on 3 July 2019) – will offer the Court of Justice the opportunity to interpret the concept of 'established by law' in light of the irregular judicial appointments made by current Polish authorities. See *infra* Section 3 for a detailed account regarding the nature of these irregularities.

irregular',[11] but 'also encompasses, by its very nature, the process of appointing judges'.[12] The Court of Justice's understanding of the term 'established by law', which also constitutes one of classic 'factors' used by the Court to determine whether a national body making a reference for a preliminary ruling is a court or tribunal for the purposes of Article 267 TFEU,[13] is fully in line with the understanding of the European Court of Human Right as will be shown in this paper's next section.

As regards the informal if not disagreeable expression of 'fake judges', it is used to refer to the situation where individuals, following their flagrantly irregular appointments to judicial posts, masquerade as judges. This has become a crucial and pressing issue as national authorities in at least one EU Member State engaged in a process which will soon result in the annihilation of judicial independence.[14] A key feature of this process has been the irregular appointment of large number of individuals to judicial posts and the irregular promotion of a similarly large number of judges with the aim to subvert the judiciary from within with individuals not seemingly unaverse to toeing and/or enforcing the (political) party line. In this respect, one may, dare we say, distinguish between several degrees of 'fakeness'. To simplify, one could distinguish, to borrow from English law, between (i) de facto judges, i.e., judges whose acts 'may remain valid in law even if the appointment of that judge is invalid and without legal effect',[15] and (ii) individuals known as 'usurpers', that is, individuals 'who have sat on a panel of judges in full knowledge that they lacked authority to do so'[16] and whose decisions ought to be automatically invalidated. Arguably, any 'usurper' deserves the 'fake judge' label whereas any 'de facto judge', notwithstanding a legally flawed appointment, may still be considered a judge as long as he/she does not lack the competence or qualification to deliver a judgment and judicial independence standards are complied with in every case.

Some of the key legal issues in this respect are as follows: When does an irregular appointment (or irregular promotion) amount to a breach of the right to a tribunal established by law? What should then be the legal consequences of any finding that a court was/is composed of one or more individuals masquerading as judges? To what extent ought the principle of legal certainty and the public interest in preserving the stability of the legal system be taken into account to limit the effect of any finding that a ruling has been issued in violation of the right to a tribunal

[11] Joined Cases C-542/18 RX-II *Simpson v Council* and C-543/18 RX-II *HG v Commission*, EU:C:2020:232, para. 73, citing to that effect, see, to that effect, ECtHR, 8 July 2014, *Biagioli v. San Marino*, CE:ECHR:2014:0708DEC000816213, paras 72 to 74, and ECtHR, 2 May 2019, *Pasquini v. San Marino*, CE:ECHR:2019:0502JUD005095616, paras 100 and 101 and the case-law cited.

[12] Ibid., para. 74, citing ECtHR, 12 March 2019, *Ástráðsson v. Iceland*, CE:ECHR:2019:0312JUD002637418, interim judgment, para. 98.

[13] See e.g. Case C-54/96, *Dorsch Consult*, EU:C:1997:413, para. 23: 'In order to determine whether a body making a reference is a court or tribunal for the purposes of Article [267 TFEU, which is a question governed by [EU] law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent'.

[14] See Letter to the President-Elect of the European Commission from the president of the Network of Presidents of the Supreme Courts of the EU; the president of the European Association of Judges; and the president of the European Network of Councils for the Judiciary, 20 September 2019: <https://www.encj.eu/node/535>.

[15] Opinion of Advocate General Sharpston delivered on 12 September 2019, EU:C:2019:977, para. 100, citing *Fawdry & Co (A Firm) v Murfitt* (Lord Chancellor's Department intervening) [2002] EWCA Civ 643.

[16] Ibid.

established by law? Where to draw the line so as to avoid incentivising *deliberately* illegal behaviour in the name of legal certainty?

These questions will be addressed below in light of the recent judgment of the Court of Justice in *Simpson* and *HG*, which was itself decisively influenced by the recent case law of the European Court of Human Rights.

3. Judgment of the Court (Grand Chamber) of 26 March 2020 in *Simpson* and *HG*

3.1 Background: Reform of the judicial framework of the CJEU

The Grand Chamber judgment in *Simpson* and *HG* is connected to the radical and arguably ill-advised changes made in relation to the General Court of the EU which resulted in the number of General Court (hereinafter: GC) judges being doubled and the Civil Service Tribunal (hereinafter: CST) being closed in September 2016 (hereinafter: CST).[17] Before it was known that the CST would be closed, a public call for applications was published in December 2013 in respect of two posts of judges with a starting date of 1 October 2014. Due to a number of reasons which need not be summarised here, the Council proved unable to fill those *two* posts while the term of office of a *third* CST judge expired on 31 August 2015. In a Decision adopted on 22 March 2016, the Council decided to appoint *three* rather than *two* judges from the list of candidates established following the call for applications of 2013. The Council justified this irregular course of action 'for reasons of timing' due to then near closure of the CST on 1 September 2016.

3.2 Irregularity affecting a judicial appointment procedure and the right to a tribunal previously established by law

In three rulings, two of which are the subject of the Court's Grand Chamber judgment of 26 March 2020, the General Court set aside orders of the CST on the main ground that one of the members of the panel of CST judges had been irregularly constituted in violation of Article 47 CFR and in particular, the principle of the 'lawful judge' to borrow the unusual phrasing used by the General Court which appeared to be inspired from German law.[18] The Court of Justice, exercising its review jurisdiction and in line with the reasoning suggested by Advocate General Sharpston, found that the General Court correctly held that the Council erred in law by using the list of candidates drawn up as a result of the 2013 call for applications to fill the *third* post whereas the public call only provided for *two* posts. However, the Court of Justice found no violation of the 'fundamental rules' governing the procedure for the appointment of judges to the EU CST. This led the Court to rule that the applicants did not suffer a violation of their right to a tribunal established by law notwithstanding the Council's manifest disregard for the 2013 call for applications. It followed that the Court did not have to deal with the issue of whether

[17] For further analysis and references, see A. Alemanno and L. Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System' (2017) 54 *Common Market Law Review* 129.

[18] The principle of the lawful judge appears to originate from German law. See Opinion of Advocate General Sharpston, op. cit., para. 101: In Germany, the Federal Administrative Court 'has had occasion to make the point that, notwithstanding its fundamental importance to litigants, the right to a 'lawful judge' as provided for in the German Constitution aims in principle only to prevent the risk of manipulation of judicial institutions'.

the principle of legal certainty should preclude judgments which have been delivered by (or involving) a judge irregularly appointed from being set aside automatically as a consequence.[19]

3.2.1 The judgment's most noteworthy aspects

The Court's judgment offers several noteworthy aspects. First, both the Advocate General and the Grand Chamber referred to the *right to a tribunal established by law* and did not embrace the *principle of the lawful judge* invoked by the General Court. As noted by AG Sharpston, 'the former is the wording used not only in the first sentence of the second paragraph of Article 47 of the Charter and Article 6(1) of the ECHR but also in the relevant case-law of the European Court of Human Rights'.[20]

Second, both the AG and the Grand Chamber carefully took account of the case law of the European Court of Human Rights regarding the notion of 'established by law'. The Court of Justice recalled that this notion ensures that 'the organisation of the judicial system does not depend on the discretion of the executive' and 'covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned'.[21] Also worth noting is the Court of Justice's reference to the important ruling issued by the second section of European Court of Human Rights in the case of the 'Icelandic judges'.[22] This ruling issued on 12 March 2019 may be viewed as the equivalent of the Court of Justice's 'Portuguese judges' ruling to the extent that it 'held that where a judge had been nominated to a court in breach of the national rules governing the judicial appointment procedure, the participation of that judge in a panel which had found the applicant guilty of criminal offences constituted *in itself* (our emphasis) a violation of Article 6(1) of the ECHR'.[23] In other words, according to the majority opinion of the second section of the European Court of Human Rights,

> in principle a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 § 1 of the Convention. It follows that a violation of this principle, like the principles under the same provision that a tribunal shall be independent and impartial, does not require a separate examination of whether the breach of the principle that a tribunal be established by law rendered a trial unfair. Therefore, it is immaterial in the Court's assessment whether the violations adduced by the Supreme Court of the applicable rules in the appointment process had an impact on the fairness of the applicant's trial, as is argued by the Government. *The mere fact* (our emphasis) that a judge, whose position is not established by law within the meaning of Article

[19] For a rich discussion, see Opinion of Advocate General Sharpston delivered on 12 September 2019 in Joined Cases C-542/18 RX-II and C-543/18 RX-II, EU:C:2019:977, paras 97-111 and esp. para. 109: 'Where there is a 'flagrant' breach of the right to a tribunal established by law that operates to the detriment of the confidence which justice in a democratic society should inspire in litigants, the judgments affected by that irregularity should evidently be set aside without more ado. Where, however, the irregularity in question is of a lesser nature and does not constitute such a breach, the principle of legal certainty does not allow those judgments to be set aside automatically.'

[20] Ibid., para. 39.

[21] ECJ judgment in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 73.

[22] ECtHR, 12 March 2019, *Ástráðsson v. Iceland*, CE:ECHR:2019:0312JUD002637418.

[23] AG Opinion in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 70.

> 6 § 1 of the Convention, determines a criminal charge, suffices for a finding of a violation of that provision in conformity with the fundamental principle of the rule of law.[24]

This ruling has since been referred to the Grand Chamber of the Strasbourg Court and was, at the time of writing, still pending before it. In any event, for the Court of Justice, the 'Icelandic judges' ruling of 12 March 2019 confirms 'that the right to be judged by a tribunal 'established by law' within the meaning of Article 6(1) ECHR encompasses, by its very nature, the process of appointing judges'.[25] One must however keep in mind the possibility that the Grand Chamber of the Strasbourg Court might not agree and follow instead the approach of the two dissenting judges according to whom the majority has too broadly extended 'the scope of the concept of 'establishment' to the process of appointing judges'.[26]

Third, and most importantly, the Court has for the first time – to the best of our knowledge – comprehensively addressed the issue of when an irregularity committed in a judicial appointment procedure is such so as to entail a violation of Article 47(2) CFR. Before doing so, the Court dealt with the more technical issue of whether the legality of a judicial appointment can be reviewed incidentally. In this context, the Court, while confirming that a judicial appointment decision cannot be reviewed incidentally on the basis of the Article 277 TFEU as it does not constitute a measure of general application, offered the following and crucial interpretation of Article 47 CFR:

> [I]t follows from the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, guaranteed by Article 47 of the Charter, that everyone must, in principle, have the possibility of invoking an infringement of that right. Accordingly the Courts of the European Union must be able to check whether an irregularity vitiating the appointment procedure at issue could lead to an infringement of that fundamental right.[27]

This may be understood as the Court effectively creating 'a new remedy' on the basis of Article 47 CFR and, in doing so, the Court may be said to have finally 'unveiled the true implications' of the *Egenberger* judgment,[28] in which the Court established that 'Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.'[29] And since national courts are required to ensure within their jurisdiction the

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[24] ECtHR, 12 March 2019, *Ástráðsson*, op. cit., para. 114.

[25] ECJ judgment in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 74.

[26] ECtHR, 12 March 2019, *Ástráðsson*, op. cit., dissenting opinion of judges Lemmens and Griţco, 5: 'While certain illegalities affecting the appointment process may at the same time affect the 'legality' of the establishment of the court in which a candidate later sits as a judge, they must in our opinion be clearly circumscribed and in any event linked to the overall purpose of the requirement that the tribunal be 'established by law', namely that of ensuring that the court has the 'legitimacy' to decide cases.' The dissenting judges however do not make clear what they mean by legitimacy in this context and legitimacy according to whom? The requirement of 'established by law' being a legal requirement, it cannot depend on a person's belief that relevant judges are the rightful holders of judicial authority. In other words, while an illegally constituted court and/or illegally appointed judges are bound to lack the legitimacy required in a democratic society, but this is arguably primarily a political issue rather than a legal one.

[27] ECJ judgment in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 55.

[28] J. T. Nowak, 'The staff case that you will never forget! The review judgment of the Court in Simpson and HG', *EU Law Live*, 30 March 2020: <https://eulawlive.com/op-ed-the-staff-case-that-you-will-never-forget-the-review-judgment-of-the-court-in-simpson-and-hg-by-janek-nowak/>.

[29] C-414/16, *Egenberger*, EU:C:2018:257, para. 78. See subsequently, C-556/17, *Torubarov*, EU:C:2019:626, para. 56 and Joined Cases C-585/18, C-624/18 and C-625/18, *A. K.*, EU:C:2019:982, para. 162.

judicial protection for individuals flowing from Article 47 of the Charter, the Court's ruling in *Simpson* and *HG* ought to be understood as providing national courts, and particularly Polish courts, with an unambiguous legal mandate to review any irregularity in relation to national judicial appointment procedures in light of Article 47 CFR in disputes falling within the scope of EU law. In such a situation, as well established in the Court's case law, national courts may disapply, if need be, any contrary provision of national law which undermines the full effectiveness of Article 47 CFR. As astutely observed by Janek Nowak, '*Simpson* and *HG* thus puts further flesh on the bones of the second paragraph of Article 19(1) TEU and should therefore be read together'[30] with the Portuguese judges' ruling.

Another new, if not ground-breaking, aspect of the Court's judgment in *Simpson* and *HG* concerns the issue of whether a court is under an obligation or not to investigate the lawfulness of judicial appointments. For the Court of Justice, the General Court did not commit an error when it decided to examine *of its own motion* the regularity of the panel of CST judges that had adopted the contested decisions in light of the irregularity affecting the judicial appointments to the CST made by the Council. For the Court,

> [T]he guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that *every court is obliged* (our emphasis) to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court's own motion. [31]

This is yet another crucial development as this interpretation also undoubtedly 'creates obligations for national courts, both at first instance and on appeal.'[32] Any national legislation preventing the 'check' described above from taking place would be in obvious breach of Article 47 CFR.

Finally, the Court dealt with the issue of the irregularity in the appointment procedure at issue and its effect on the parties' right to a tribunal previously established by law and it began by summarising its well-established principles which establishes beyond any doubt that the requirements that courts be independent and impartial require rules protecting the independence of judges when it comes to appointment; composition of relevant body; length of service; grounds for abstention; rejection and dismissal. With respect to decisions appointing judges specifically, the Court outlined what it established in its seminal *A. K.* ruling as follows:

> [I]t is in particular necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with respect to the judges appointed.[33]

And when summarising both its own case law and the case law of the European Court of Human Rights, the Grand Chamber of the Court of Justice provided additional details when it comes to

[30] Op. cit.
[31] ECJ judgment in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 57.
[32] J. T. Nowak, op. cit.
[33] ECJ judgment in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 71.

establishing a violation of the right to a tribunal established by law in a situation where an irregularity has been established:

> It follows from the case-law […] that an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, *particularly* (our emphasis) when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, *which is the case* (our emphasis) when what is at issue are *fundamental rules* (our emphasis) forming an integral part of the establishment and functioning of that judicial system.[34]

The Court of Justice's phrasing could have been clearer. Indeed, the Court first holds that 'an irregularity committed during the appointment of judges' entails an infringement of the right to a tribunal established by law. This could be (mis)understood as meaning that every irregularity in this context automatically entails a violation of the first sentence of Article 47(2) CFR, which is not the case. The Court is instead concerned here with *one type of irregularity* ('of such a kind and of such gravity…') – but not necessarily the only one (see the use of 'particularly') – and makes explicit *one type of situation* in which one may *presume* a violation of the first sentence of Article 47(2) CFR. In other words, in a situation where any fundamental rule 'forming an integral part of the establishment and functioning of that judicial system' is violated, this amounts to an irregularity of 'of such a kind and of such gravity…' which simultaneously amounts to a violation of the right to a hearing by a tribunal previously established by law. Therefore, to establish a possible violation of this right as far as irregular judicial appointment procedures are concerned, we understand the Court's approach as requiring the application of the following test on a case-by-case basis:

> Does the irregularity concern fundamental rules forming an integral part of the establishment and functioning of that judicial system such as for instance, any fundamental rules applicable to the appointment of relevant judges or any fundamental rules in relation to the duration of judges' mandates?

If so, the right to a hearing by a tribunal previously established by law under EU law will be violated because in such a situation, the irregularity can be presumed to be of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, may have exercised undue discretion undermining the integrity of the outcome of the appointment process. This test closely reflects the one adopted by the European Court of Human Rights:

> The Court notes in this connection that it flows from the criteria in the Court's case-law that a violation of national law be 'flagrant' that only those breaches of applicable national rules in the establishment of a tribunal that are of a fundamental nature, and form an integral part of the establishment and functioning of the judicial system, can be considered to fulfil this criterion. In this context, the concept of a 'flagrant' breach of domestic law therefore relates to the nature and gravity of the alleged breach. Furthermore, in the Court's examination of whether the establishment of a tribunal was based on a 'flagrant' violation of domestic law, the Court will take into account whether the facts before it demonstrate that a breach of the domestic rules on the appointment of judges was deliberate or, at a minimum, constituted a manifest disregard of the applicable national law.[35]

[34] Ibid., para. 75.

[35] ECtHR, 12 March 2019, *Ástráðsson v. Iceland*, para. 102. Interestingly, the ECtHR refers in this context to the EU judgment of 23 January 2018, *FV v Council*, T-639/16 P, EU:T:2018:22 in which the General Court concluded that, 'having regard to the importance of compliance with the rules governing the appointment of a judge for the confidence of litigants and the public in the independence and impartiality of the courts, the judge at issue cannot

A case-by-case assessment, which presumes inter alia that there are still independent courts left to undertake it, is therefore required. In the two present cases, the Court of Justice found that the irregularity committed by the Council resulted *exclusively* from its disregard of the legal framework imposed by the public call for applications of 3 December 2013. For the Court, this does not amount to a violation of any 'fundamental rule of the procedure for appointing' EU judges – in the present instances CST judges – 'that is of such a kind and of such gravity as to create a real risk that the Council made unjustified use of its powers, undermining the integrity of the outcome of the appointment process', which could then give 'rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge appointed to the third post, or of the Chamber to which that judge was assigned'.[36]

3.2.2 The judgment's potentially unworkable aspects or prone to bad-faith misuse

The outcome of the Court's judgment in *Simpson* and *HG* is not surprising in light of the standard adopted by the Court. Even if the Council's disregard for the public call for applications of 2013 could be understood as a fundamental rule, which the Court did not, there was no evidence that the irregularity was 'the result of a manoeuvre of the appointing executive to exercise political influence over'[37] the relevant CST judges.

Our main concern is that the Court of Justice's approach, which requires parties to demonstrate a violation of at least one fundamental rule forming an integral part of the establishment and functioning of that judicial system, may not effectively protect parties faced with irregularly appointed judges in a broader context where these irregular appointments are the result of deliberately flawed procedures with the view of subverting judicial independence from within. This is not to say that it is unreasonable to provide 'that not every irregularity in a judicial appointment process is liable to affect that aspect of the right to a fair trial that pertains to the right to a 'tribunal established by law' to a sufficient extent to breach the right to a fair trial'.[38] By distinguishing between fundamental and non-fundamental rules, this approach may however incentivise executive and other branches of the State to disregard non-fundamental rules for reasons of pure convenience. Furthermore, the notion of 'fundamental' is not self-explanatory in this context and one may struggle, in practice, to distinguish between what may be viewed, for instance, as an essential part of the appointment procedure and a non-essential part. The use of the notion of 'real risk' that any irregularity will be used by an executive to exercise undue discretion also suggests that even fundamental rules could be breached without consequences as long as the breaches are not committed with the view of undermining the integrity of the outcome of the appointment process. But how can one prove this in practice? Wouldn't it be more appropriate to sanction any *deliberate*[39] irregularity regardless of the

be regarded as a lawful judge within the meaning of the first sentence of the second paragraph of Article 47 of the Charter' (para. 78) and set aside the CST's judgment. This General Court's judgment itself was not reviewed by the Court of Justice alongside *Simpson* and *HG* for purely procedural reasons. See AG Opinion in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 36 et seq.

[36] ECJ judgment in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 79.

[37] J. T. Nowak, op. cit.

[38] AG Opinion in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 65.

[39] 'By using the list of candidates at issue in order to make three appointments […] the Council did indeed *deliberately* (our emphasis) depart from the procedure which it had itself set out in the 2013 call for applications', AG Opinion in C-542/18 RX-II and C-543/18 RX-II, op. cit., para 43.

fundamental/non-fundamental nature of the rules which have been *intentionally* ignored by relevant authorities?

The standard established by the European Court of Human Rights ought to be viewed as a minimum standard. The Court of Justice is therefore not prevented from going beyond this standard and require for instance – in cases governed by EU law – that a national court ought to disqualify a person acting as a judge for reasons which do not meet the demanding threshold of a flagrant violation of law, e.g., in a situation where a person has been appointed judge within the framework of an irregular procedure *deliberately* organised as such by the executive whether it is to subvert the judiciary from within or not. This would avoid having to apply a potentially unworkable case-by-case test not unlike the test laid down in *Celmer* and whose impracticable nature has now been established beyond doubt.[40]

As a matter of judicial policy, we submit that the Court of Justice should adopt an 'Orbán/Kaczyński test' and always ask itself the following question when interpreting EU law and devising guiding principles and judicial tests to be followed in future similar cases:

What would Orbán/Kaczyński do were we to adopt this approach?

In other words, the Court of Justice must ask itself how legalistic autocrats[41] could abuse or avoid the definitions, guiding principles and other legal tests laid down in its case-law so as to protect judicial independence and impartiality. In this context, it is not difficult to foresee legalistic autocrats seeking to hide behind legal certainty to get away with deliberately irregular procedures when it comes to the appointment (or promotion) of judges and prosecutors. This is why we would submit that as far as EU law is concerned, any *deliberate* disregard of relevant norms and procedures, any *deliberate* irregularity when it comes to the appointment of any judge ought to amount to a violation of the right to a tribunal previously established by law.

You could then temperate the effects of such an approach by limiting the temporal effects of any finding that the right to a tribunal previously established by law and not automatically set aside past judgments delivered by and/or involving the irregularly appointed judge(s). Indeed, legal certainty is an important principle as well as a core and traditional sub-component of the rule of law. When in conflict with a fundamental right such as the right to a fair trial, which, as the Court itself recalled, is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States will be safeguarded, legal certainty must be considered a public interest which can justify limitations to the fundamental right to a fair trial. But these limitations must be narrowly construed and be proportionate, especially in a situation where specific, individual, procedural and/or substantive, irregularities are part of a wider pattern of systematic capture or dismantlement of all checks and balances by national authorities. The overriding principle should be in any event that legal certainty cannot be relied upon to save authorities from the

[40] P. Bárd and J. Morijn, 'Luxembourg's Unworkable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part I)', *VerfBlog,* 18 April 2020: <https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/>.

[41] See K. Lane Scheppele, 'Autocratic Legalism' (2018) 85(2) *The University of Chicago Law Review* 545, pp. 547-548 (because legalistic autocrats 'push their illiberal measures with electoral backing and use constitutional or legal methods to accomplish their aims, they can hide their autocratic designs in the pluralism of legitimate legal forms').

consequences of their own deliberately organised irregular appointment and/or promotion procedures. The consequences on individuals involved in previous proceedings decided by a court not established by law and therefore not a court *tout court*, could indeed be extremely significant but again it should be for the authorities responsible for the relevant irregularities to face up to the problems they have created in the first place.[42]

It is true that the case law of the Strasbourg Court requires a *flagrant* or *substantive* violation of relevant national provisions relating to the establishment and competence of judicial organs in order to subsequently undertake its review under Article 6(1) ECHR of a possible breach of the right to a fair trial. However, the Luxembourg Court is not in a similar position as the Strasbourg Court which can only act after domestic remedies have been exhausted. In other words, the Luxembourg Court does not and should not pay regard to the principles of subsidiarity and the margin of appreciation which the Strasbourg Court affords to the national courts in respect to irregularities committed by EU authorities or EU Member States when their actions fall within the scope of EU law or concern measures targeting courts falling within the fields of EU law. This is why as far as EU law is concerned, two rather than one guiding principle should be considered:

(i) The principle established in *Simpson* and *HG*: any irregularity which concerns any fundamental rule forming an integral part of the establishment and functioning of the relevant judicial system entails an infringement of the right to a tribunal established by law; and

(ii) The principle that any irregularity of any kind and any gravity committed in an appointment procedure in respect of judges should constitute a violation of Article 47(2) CFR whenever authorities *deliberately* disregard relevant rules notwithstanding their fundamental or non-fundamental nature. By contrast, a single procedural irregularity, which is not the outcome of a deliberate attempt to undermine or interfere with the integrity of the appointment process, should not amount to a violation of Article 47(2) CFR. This may go beyond what is required under ECHR law[43] but EU law can and must be more demanding.

Be that as it may, the situation in Poland will now be examined in light of the Polish Supreme Court's resolution of 23 January 2020 and the guiding principles established in the case law of both the European Court of Justice and the European Court of Human Rights with respect to both the right to a tribunal previously established by law and the requirements that courts be independent and impartial, which as the Court of Justice recalled in *Simpson* and *HG*, 'form part of the essence of the right to effective judicial protection and the fundamental right to a fair trial'.[44]

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[42] For further analysis, see AG Opinion in C-542/18 RX-II and C-543/18 RX-II, op. cit., paras. 106 et seq. AG Sharpston suggests a balancing exercise in a situation where an irregularity is found to have occurred with this balancing exercise to be primarily concerned about the nature of the irregularity at issue. In this respect, a distinction is made between de minimis irregularities and flagrant breaches of essential criteria. As regards the latter, the following example is given: manipulation of a procedure 'by political leaders in order to secure the appointment as judge of a supporter of theirs who does not have the legal qualification required by the call for applications but who would unquestionably sentence anyone opposed to the government to life imprisonment'. In such a situation, legal certainty cannot be used to prevent the automatic setting aside of relevant judgments.

[43] See AG Opinion in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 85: It follows from the judgment in *Ástráðsson* 'that, even though it is important to 'take into account whether the facts demonstrate that a breach of the domestic rules on the appointment of judges was deliberate', *this in itself is not enough* for an irregularity in the procedure for appointing a judge to constitute a *flagrant violation* of Article 6(1) of the ECHR'.

[44] ECJ judgment in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 71.

4. Application to situation in Poland in light of the Polish Supreme Court's resolution of 23 January 2020[45]

The following developments will be guided by one key question: Does the situation in Poland amount to one where the executive, with the complicity of the legislature and/or other bodies, can be said to have infringed fundamental rules applicable to the appointment of judges and used their powers in such a way as to jeopardise the integrity of the appointment procedures in respect of ordinary courts and Supreme Court judges as well as Constitutional Tribunal judges?

To quickly get a flavour of the extent of the rule of law breakdown in Poland,[46] and therefore be able to assess whether we are faced with flagrant breaches of the right to a tribunal established by law and/or the right to an independent and impartial tribunal, one may begin by referring to some recent facts submitted to the attention to the Court of Justice by the Polish Ombudsman in the cases of *Miasto Łowicz and Prokurator Generalny*.[47]

In his submission to the Court, the Polish Ombudsman first drew the Court's attention to an unprecedented development in the history of the EU: the increasing 'number of specific cases in which disciplinary proceedings have recently been brought against judges as a result of the content of decisions which they adopted and, in particular, decisions in which those judges intended to follow the lessons to be drawn' [48] from the *A. K.*[49] judgment of the Court of 19 November 2019.

Second, notwithstanding the repeated, unambiguous and strong warnings not to adopt what became known as the 'muzzle law',[50] Polish authorities pushed ahead and adopted a Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and several other laws. This 'muzzle law', which entered into force on 14 February 2020, provides, inter alia — in order to render the Court of Justice's judgment in *A. K.* ineffective — 'that, if the validity of a judge's appointment or the legitimacy of a constitutional body is called into question by a court, disciplinary measures will be taken against the judge or judges sitting in that court.'[51] The same law 'makes any examination of complaints relating to the lack of

[45] Supreme Court Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber), Case BSA I-4110-1/20, 23 January 2020. See English translation made available by Iustitia: <www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf>.
[46] For further analysis, see recently L. Pech and P. Wachowiec, '1460 Days Later: Rule of Law in Poland R.I.P', *VerfBlog*, 13 January 2020 (part I) and 15 January 2020 (part II).
[47] Joined Cases C-558/18 and C-563/18, EU:C:2020:234.
[48] Ibid., para. 24.
[49] Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982.
[50] An infringement action against the 'muzzle law' was launched by the European Commission on 29 April 2020: 'Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland', IP/20/772, 29 April 2020. For further analysis, see e.g. OSCE-ODHIR, *Urgent Interim Opinion on the Bill Amending the Act on the Organisation of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland* (as of 20 December 2019), Opinion Nr: JUD-POL/365/2019, 14 January 2020, para. 12: 'Several provisions reviewed are inherently incompatible with international standards and OSCE commitments on judicial independence. A number of the breaches of these standards are so fundamental that they may put into question the very legitimacy of the Bill, which should be reconsidered in its entirety and should not be adopted as it is.'
[51] Joined Cases C-558/18 and C-563/18, op. cit., para. 25.

independence of a judge or court subject to the exclusive jurisdiction'[52] of the Extraordinary Control and Public Affairs Chamber of the Supreme Court (hereinafter: ECPAC), which, similarly to the Disciplinary Chamber[53] (hereinafter: DC), is another body masquerading as a court.

Speaking of the DC, one must emphasise it has never ceased to function despite Poland's Supreme Court's repeated findings that it does not constitute a court within the meaning of Polish and EU law and most recently, the Court of Justice's interim ruling ordering it to stop its disciplinary activities in respect of judges.[54] One will therefore not be surprised to read that the resolution of Poland's Supreme Court of 23 January 2020, whose content will now be examined, has similarly been openly and defiantly ignored by Polish authorities.[55]

4.1 Overview of the *Supreme Court Resolution of 23 January 2020 adopted by the* formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber

This binding resolution, explicitly motivated by the need to apply and clarify the consequences of the Court of Justice's *A. K.* ruling of 19 November 2019 and whose content will be summarised below, has since been (unlawfully[56]) suspended by the captured[57] 'Constitutional

[52] Ibid.

[53] It may be worth recalling that three rulings of the Supreme Court have already established that the DC is not a court within the meaning of EU and Polish law: See rulings of 5 December 2019 (Case III PO 7/18) and of 15 January 2020 (Cases III PO 8/18 and III PO 9/18).

[54] See L. Pech, 'Protecting Polish Judges from the Ruling Party's 'Star Chamber': The Court of Justice's interim relief order in Commission v Poland (Case C-791/19 R)', *VerfBlog*, 9 April 2020: <https://verfassungsblog.de/protecting-polish-judges-from-the-ruling-partys-star-chamber/>.

[55] This is not however the first instance of deliberate lawlessness we can attribute to Poland's current ruling party. Indeed, the process of ignoring rulings started in 2016 with Polish authorities unashamedly refusing to publish and comply with several judgments of the not-yet-captured Constitutional Tribunal so as to more easily capture it in December 2016 in obvious violation of the Polish Constitution. See Council of Europe, PACE, *The functioning of democratic institutions in Poland*, Resolution 2316 (2020), para. 6: 'The constitutional crisis that ensued over the composition of the Constitutional Court remains of concern and should be resolved. No democratic government that respects the rule of law can selectively ignore court decisions it does not like, especially those of the Constitutional Court.'

[56] See Supreme Court Resolution, op. cit., paras 4, 6 and 8: 'Therefore, there is no room for any conflict of powers between the Supreme Court in its efforts to resolve the legal question referred to the Supreme Court in the petition of the First President of 15 January 2020 and the Sejm of the Republic of Poland or the President of the Republic of Poland. […] In that context, the Supreme Court not only had the right but also the obligation to disregard Article 86(1) of the Act on the organisation and functioning of the Constitutional Tribunal as a provision contradictory to Union law to the extent that the petition of the Speaker of the Sejm of 20 January 2020 opening a procedure with regard to an alleged conflict of powers would, be it temporarily, hinder the Supreme Court in enforcing the judgment of the Court of Justice of the European Union.'

[57] See e.g. European Commission, Article 7(1) TEU reasoned proposal, op. cit., para. 57: 'For this reason, the Commission considered that the independence and legitimacy of the Constitutional Tribunal are seriously undermined and, consequently, the constitutionality of Polish laws can no longer be effectively guaranteed. The judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review', and Council of Europe, PACE, *The functioning of democratic institutions in Poland*, Resolution 2316 (2020), para. 6: 'The full and unconditional implementation of all Constitutional Court decisions by the authorities, including with regard to the composition of the Constitutional Court itself, should be the cornerstone of the resolution of the crisis. The restoration of the legality of the composition of the Court in line with European standards is essential and should be a priority. The Assembly is especially concerned about the potential impact of the Constitutional Court's apparent illegal composition on Poland's obligations under the European Convention of Human Rights.'

Tribunal' on 28 January 2020,[58] before being (unlawfully[59]) nullified by the same body in April 2020. On these occasions, the Constitutional Tribunal (hereinafter: CT) was presided by its unlawfully appointed President with a bench which included three individuals masquerading as CT judges.[60] This shows, in passing, how bodies irregularly constituted attempt to bolster one another's legitimacy by providing a veneer of legality to what amount to obvious violations of EU law, including obvious defiance of the Court of Justice's rulings or orders.

Be that as it may, and as a prelude, one should note that the 'judges' appointed to the DC and the ECPAC were correctly excluded from resolving the legal dispute which was the subject matter of the Resolution as they 'were appointed to the office of a judge of the Supreme Court following a procedure affected by the same defect',[61] the legal effect of which was to be examined in the Resolution. The same rationale was applied to seven judges of the Civil Chamber of the Supreme Court appointed by the Polish President acting in direct violation of an interim relief order adopted by the Supreme Administrative Court and on the basis of the same controversial (not to say unconstitutional) law of 8 December 2017 amending the Act on the National Council for the Judiciary (hereinafter: NCJ) and certain other Acts.[62]

[58] The captured CT used the pretext of a competence dispute between, on the one hand, the Sejm and the Polish President, and, on the other hand, the Supreme Court, to suspend the resolution of the Supreme Court. See Case ref. Kpt 1/20, English translation made available by Rule of Law in Poland here: <https://ruleoflaw.pl/constitutional-cat-and-mouse-continues-with-tribunal-ruling/>. As the Supreme Court previously observed in its Resolution, this also constitutes another blatant violation of EU law, para. 4: 'effect of a resolution of the Supreme Court in application of Union law cannot be subsequently challenged by any legislative, executive or judicial act of other national bodies after such resolution is provided'.

[59] In the two rulings announced on 20 and 21 April 2020, the captured CT nullified the resolution of the Supreme Court inter alia on the basis of Articles 2 TEU and 4(3) TEU and also found that the Supreme Court had interpreted relevant legal provisions in 'a law-making manner' whatever this may mean. As far as EU law is concerned, the captured CT has blatantly violated it, including its duty to refer the matter to the Court of Justice. See 'Safjan on Constitutional Tribunal ruling: an extreme scenario, but even EU exist seems possible', *Rule of Law in Poland*, 27 April 2020 (reproducing text by M. Gałczyńska originally published in Polish at *Onet.pl*, 20 April 2020): <https://ruleoflaw.pl/safjan-on-constitutional-tribunal-ruling-an-extreme-scenario-but-even-eu-exit-seems-possible>. See also M. Mycielski and L. Pech: 'When Will the EU Commission Act?: An Open Letter', *VerfBlog,* 29 April 2020: <https://verfassungsblog.de/when-will-the-eu-commission-act/>. ('In these two 'decisions', *farcically relying in part on the EU Treaties to absurdly justify blatant violations of the said Treaties*, the 'Constitutional Tribunal' not only defiantly violated its obligation to refer the matter to the ECJ, it *blatantly violated the most fundamental principles and mechanisms underlying the whole EU legal order* by deliberately ignoring relevant ECJ rulings; denying the ECJ any authority to review Polish measures violating judicial independence; and prohibiting national courts from setting aside and/or referring questions to the ECJ regarding bodies and/or national measures which patently violate the principle of effective legal protection').

[60] See e.g. European Commission, Article 7(1) TEU reasoned proposal, op. cit., para. 57: 'The unlawful appointment of the President of the Constitutional Tribunal, the admission of the three judges nominated by the 8th term of the *Sejm* without a valid legal basis, the fact that one of these judges has been appointed as Vice-President of the Tribunal, the fact that the three judges that were lawfully nominated in October 2015 by the previous legislature have not been able to take up their function of judge in the Tribunal, as well as the subsequent developments within the Tribunal described above have *de facto* led to a complete recomposition of the Tribunal outside the normal constitutional process for the appointment of judges'.

[61] Supreme Court Resolution, op. cit., para. 3.

[62] Decision of the Supreme Administrative Court of 25 September 2018, II GW 22/18 and II GW 23/18. See also L. Woźnicki, 'Prezydent Duda skłamał w Watykanie w sprawie powołań sędziów SN', 15 November 2018: <https://wyborcza.pl/7,75398,24046862.html>. (a total of 27 individuals were appointed to the Supreme Court by the Polish President in direct violation of the freezing order issued by the Supreme Administrative Court with the Polish President claiming he was not made aware of the said order).

In addition to the Supreme Court's expressing serious doubts about its constitutionality,[63] as well as the legality[64] of the individual appointments made to it, the new NCJ is furthermore and once again[65] described by the Supreme Court as failing 'the test of independence'[66] from the legislature and the executive, a diagnosis previously adopted by the European Network of Councils for the Judiciary (ENCJ)[67] but also EU Advocate General Tanchev before the Court of Justice's *A. K.* ruling provided relevant guidance to the Supreme Court to enable it to decide this matter directly.

4.1.1 The Resolution's Scope

The Resolution addresses the two key issues: (i) To what extent does the participation of an individual appointed to the office of a judge by the Polish President, following the involvement of the new NCJ, constitute a breach of the Polish Constitution, Article 6(1) ECHR or Article 47 CFR and the second subparagraph of Article 19(1) TEU; and (ii) Assuming these provisions are violated, what ought to be the effect of such a finding in civil and criminal proceedings.

On several occasions, the Supreme Court repeats itself with the obvious intent to make clear beyond any doubt that it will not address the issue of whether individuals appointed on the basis of the procedure laid down in the Act of 8 December 2017 can be recognised as judges. For the purpose of the Resolution, the Supreme Court reiterates on several occasions that its Resolution reflects the assumption they have acquired, formally speaking, the status of judge until such time the Court of Justice may decide otherwise as this issue is the subject to two preliminary cases still pending at the time of writing.[68] One may note, in passing, that this

[63] See e.g. para. 31 of the Resolution where the Supreme Court finds that the legislator prematurely terminated the mandate of the judges sitting on the 'old' NCJ under false pretence and in breach of the Polish Constitution: the appointment of new members of the NCJ in accordance with the Act of 8 December 2017 amending the Act on the NCJ 'arouses *serious doubts* (our emphasis) as to compliance with Article 187(1) and (3) of the Constitution of the Republic of Poland and, consequently, *doubts as to the legality* (our emphasis) of the National Council for the Judiciary and the nomination of candidates for judges with the participation of the National Council for the Judiciary.' See also para. 35: Following the Act on 8 December 2017 amending the Act on the NCJ and the 2017 Act on the Supreme Court, the NCJ 'has not been duly appointed under the Constitution of the Republic of Poland.'

[64] Resolution, op. cit., para. 32: 'Given the refusal to comply with the judgment ordering disclosure […] of the details of the persons who signed the lists of endorsements for the individuals appointed to the National Council for the Judiciary by the parliamentary majority, it is not possible to verify whether the endorsement lists were signed by existing persons and whether such persons were judges at the time of giving endorsement and of appointment of members of the National Council for the Judiciary at a specific place of office, and whether the lists were signed by the number of persons required by law.'

[65] See judgment of the Supreme Court of 5 December 2019, III PO 7/18.

[66] Supreme Court Resolution, op. cit., para. 4.

[67] Having suspended the Polish neo-NCJ in 2018, the ENCJ has recently proposed its expulsion due to its lack of independence and unwillingness to remedy the serious breaches identified by the ENCJ. See 'ENCJ Board sends position paper on proposed expulsion to KRS', 22 April 2020: <www.encj.eu/node/554>.

[68] See pending cases C-487/19 (unique submitted question asks the Court of Justice whether Articles 2, 6(1) and (3) and the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 CFR and Article 267 TFEU, ought to be 'interpreted as meaning that a court composed of a single person who has been appointed to the position of judge in flagrant breach of the laws of a Member State applicable to judicial appointments — which breach included, in particular, the appointment of that person to the position of judge despite a prior appeal to the competent national court (the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)) against the resolution of a national body (the Krajowa Rada Sądownictwa (National Council for the Judiciary, Poland)), which included a motion for the appointment of that person to the position of judge, notwithstanding the fact that the implementation of that resolution had been stayed in accordance with national law and that proceedings

assumption is likely to prove misguided as the Court of Justice's jurisdiction in preliminary ruling cases, as shown in *A. K.*, is limited to providing interpretations of EU law to be subsequently applied by national courts to the cases pending before them. By the time the Court of Justice decides the cases originating from the Polish Supreme Court, this court will have ceased to be independent and will be de facto controlled by individuals whose status as judges is highly doubtful. Be that at it may, the Resolution does not similarly aim to determine whether the procedure for judicial appointments established on the basis of the law of December 2017 violates the 'right of access to public service of persons who stood as candidates for the office of a judge but were eventually unable to participate in a fair competition procedure.'[69]

According to the three not-yet-captured chambers of the Supreme Court, the key issue is instead to assess to extent and possible effect of the defects surrounding the nomination of candidates for the office of a judge by the neo-NCJ in light of relevant standards of independence and impartiality of judges and the right to a fair trial as protected in Polish constitutional law, ECHR law and EU law.[70]

4.1.2 Main findings

Following a careful examination of the case law of both the Court of Justice and the European Court of Human Rights, the Supreme Court explains how the impartiality and independence of judges can be reviewed at each stage of judicial proceedings in civil or criminal cases. The Supreme Court goes on to examine the multiple and serious legal defects as regards the establishment and functioning of the neo-NCJ, in particular during the period of time where the neo-NCJ had unlawfully disinvited the First President of the Supreme Court following her forced and unconstitutional dismissal on 4 July 2018.[71] The Supreme Court subsequently concludes that 'appointments granted by the National Council for the Judiciary are systemically not independent of political interest, affecting the fulfilment of the objective criteria of impartiality and independence by persons appointed to the office of a judge on the motion of the National Council for the Judiciary.'[72]

In another particularly important paragraph, the Supreme Court finds that the announcement of vacant judicial positions made by the Polish President on 24 May 2018 in respect of the Supreme Court – a power reserved to the First President of the Supreme Court until the 2017 Act on the Supreme Court – is unlawful as it failed to include the counter-signature of the Prime Minister and was furthermore used as 'a convenient means of exerting arbitrary influence on whether, and when, positions in the Supreme Court can be filled.'[73] The Supreme Court also

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before the competent national court (Supreme Administrative Court) had not been concluded before the delivery of the appointment letter — is not an independent and impartial tribunal previously established by law within the meaning of EU law?') and C-508/19 (one of the submitted questions asks the Court of Justice whether the second subparagraph of Article 19(1), Articles 2, 4(3) and 6(3) TEU, and Article 47 CFR ought to 'be interpreted as meaning that the principle of effective judicial protection is infringed by the failure to guarantee the right to effective judicial protection in the case where a document appointing a person to the position of judge of a court in a Member State is delivered following an appointment procedure carried out in flagrant breach of the laws of that Member State governing the appointment of judges?').

[69] Supreme Court Resolution, op. cit., para. 11.

[70] Ibid., para. 30.

[71] Ibid., para. 33 and para. 45: 'Those steps were taken in breach of the Constitution of the Republic of Poland.'

[72] Ibid., para. 36.

[73] Ibid., para. 34.

refers in this context to the order issued by the Supreme Administrative Court of 25 September 2018 which suspended relevant resolutions of the neo-NCJ, which the Polish President deliberately ignored 'being aware of the effect of his decisions that would be difficult to reverse *de lege lata*'.[74] For the Supreme Court, this means that

> Persons named in the lists of recommendations drawn up in a defective procedure of appointment for judicial positions cannot be considered to have been candidates for office duly presented to the President of the Republic of Poland whom the President of the Republic of Poland is competent to appoint to the office. Even assuming that presentation of an appointment to such persons formally makes them appointed to the office of a judge, it is necessary to determine whether, and to what extent, such persons may exercise judicial powers without infringing on the requirement of impartiality and independence of a court which administers justice.[75]

One may note in this respect that on 1 May 2020, the Polish President promoted to acting First President of the Supreme Court one of the individuals unlawfully appointed to the civil chamber of the Supreme Court in breach of the freezing order of the Supreme Administrative Court previously mentioned. Three days later and five days before the then expected first round of Poland's presidential election, following the same flawed and flagrantly irregular appointment procedure denounced by Poland's Supreme Court, the Polish President appointed one individual the Labour and Social Security Chamber, two to the Criminal Chamber and finally, three more individuals to the DC notwithstanding the ECJ order of 8 April 2020 suspending its disciplinary activities in respect of judges.[76]

Looking beyond the issue of the blatantly irregular appointments made to the Supreme Court, the Resolution offers particularly important developments regarding the defects and serious doubts surrounding the neo-NCJ in light of its manifest lack of independence from the executive in particular:

> [B]ecause the National Council for the Judiciary has been politicised, competitions for judicial positions are very likely to be decided not based on substantive criteria but depending on political loyalties or support for the reform of the judiciary pursued by the parliamentary majority in conflict with the Constitution of the Republic of Poland. In systemic terms, that undermines trust in the impartiality of persons so appointed. The lack of independence essentially consists in decisions of that body being subordinated to political authorities, in particular the executive.[77]
>
> [...]
>
> It is particularly relevant that doubts concerning the appointment of the members of the National Council for the Judiciary cannot be clarified, in particular their fulfilment of the formal criteria of appointment to the National Council for the Judiciary. This creates uncertainty as to the due appointment of the National Council for the Judiciary and consequently uncertainty about the validity of decisions of that body. Furthermore, it automatically creates uncertainty about the status of persons presented to the President of the Republic of Poland for appointment to the office of a judge. If acts of the National Council for the Judiciary are found to be defective, the authority of persons appointed to the office of a judge could be reviewed, opening the door to contesting the legality of decisions of such persons. A court is not

[74] Ibid., para. 35.
[75] Ibid.
[76] M. Galczyska, 'Sześć nowych osób w Sądzie Najwyższym. RPO: decyzja prezydenta to lekceważenie prawa UE', *Onet Wiadomosci*, 6 May 2020.
[77] Supreme Court Resolution, op. cit., para. 38.

> 'duly' appointed if it includes a person whose judicial powers could be contested in the future and it is not possible to objectively clarify doubts as to such person's appointment procedure.[78]

Having unambiguously established that all appointment procedures involving the neo-NCJ have been and will continue to be defective due to the numerous structural defects outlined in its Resolution, the Supreme Court has to state the obvious and make clear that the Polish President is no modern Sun King. In other words, the Polish President cannot obviously correct these defects by the mere exercise of his appointment power. As would be the case in any modern democratic state based on the rule of law, it is for courts to assess whether the principle of judicial independence and impartiality has been violated. The Supreme Court subsequently observes that 'the severity and scope of the procedural effect of a defective judicial appointment varies depending on the type of the court of appointment and the position of such court in the organisation of the judiciary',[79] and concludes that the most severe irregularities have been committed in relation to the appointments made to the Supreme Court whereas the Supreme Court may be considered the most important court from a constitutional and systemic point of view. In a particularly striking paragraph, the Supreme Court stresses in this context that the individuals who applied to the positions advertised (unlawfully) by the Polish President,

> being lawyers with an understanding of the applicable law and the capability to interpret it, [they] must have been aware of the fundamental doubts concerning the new procedures for the appointment to the office of a judge of the Supreme Court and the status and membership of the National Council for the Judiciary as a body participating in the procedure of judicial appointment. Those persons were also aware that resolutions of the National Council for the Judiciary presenting them as candidates to the President of the Republic of Poland had been appealed by other participants of the competitions with the Supreme Administrative Court. Candidates for the Civil Chamber, the Criminal Chamber, and the Extraordinary Control and Public Affairs Chamber knew that the Supreme Administrative Court had suspended the effect of the resolutions of the National Council for the Judiciary concerning them, and yet they accepted appointment to the position of a judge of the Supreme Court.[80]

Viewed in this light, one cannot help but being reminded of the English law concept of usurpers, persons 'who have sat on a panel of judges in full knowledge that they lacked authority to do so' and whose decisions ought to be automatically invalidated.[81]

4.1.3 Main outcomes

On the basis of the above analysis and findings, the Supreme Court concluded as follows:

First, the ECPA Chamber 'is comprised entirely of defectively appointed judges'.[82]

Second, the DC, itself already found not to constitute a court before the Supreme Court's resolution of 23 January 2020, is similarly composed of judges who do not satisfy the criteria of independence and impartiality and therefore, judgments of the DC cannot be considered 'judgments given by a duly appointed court'.[83]

[78] Ibid., para. 42.
[79] Ibid., para. 45.
[80] Ibid., para. 45.
[81] Opinion of AG Sharpston, op. cit., para. 100.
[82] Supreme Court Resolution, op. cit., para. 45.
[83] Ibid.

Third, with respect to judges of common courts and military courts, notwithstanding the 'fundamental doubts as to whether the criteria of impartiality and independence are met by a judge participating in a court formation due to his appointment to the office in a competition procedure defined in the Act of 8 December 2017',[84] a case-by-case approach must be adopted to assess 'the effect of the defective appointment procedure of a judge to the fulfilment of the criteria of impartiality and independence of a court adjudicating with the participation of such judge,' with more strident requirements of judicial independence to be satisfied the higher the court in the judicial structure.[85]

Fourth, this case-by-case assessment as regards judges of common courts and military courts must also distinguish between the situation of individuals appointed for the first time to the office of a judge and the situation of individuals previously appointed 'in incontestable procedures and who apply in a competition for the office of a judge in a higher-level court' as they 'already hold the status of a judge within the meaning of the Constitution'.[86] In the latter case, there is a presumption that these persons 'have already been duly vetted'.[87]

Fifth, 'if a court with the participation of a given judge is found not to fulfil the criteria of impartiality and independence in given proceedings, that determination in not binding in another case in which the same judge participates in a court formation; however, such assessment should always be taken into consideration'.[88]

Lastly, and in the name inter alia of 'the principle of stability of judgments issued by courts in the administration of justice in cases concerning individuals', the Supreme Court also decided to limit the temporal effects of its Resolution and held that with only two exceptions, the Court's Resolution shall only 'apply to court judgments issued after 23 January 2020'.[89] The two exceptions are: criminal proceedings pending as of 23 January 2020 (they should continue and be completed without being subject to the Supreme Court's Resolution) and the judgments issued by the DC which 'deserve no protection' whatsoever as they were never judgments to begin with.

4.2 Poland's 'de facto judges' and 'usurpers' and the fundamental right to an effective remedy before an *independent* and *impartial* tribunal previously *established by law*

As a prelude, one may briefly recall that the right to be judged by a tribunal 'established by law' encompasses the process of appointing judges. A procedural and/or substantive irregularity committed during the appointment of judges may therefore entail an infringement of this right. This is the case when the irregularity may be said to be *flagrant* in light of the national provisions relating to the establishment and competence of judicial organs (ECtHR flagrant violation of domestic law test), or when the irregularity is of such gravity so as to give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are *fundamental rules* forming an

[84] Ibid., para. 47.
[85] Ibid., para. 48.
[86] Ibid., para. 49.
[87] Ibid.
[88] Ibid., para. 53.
[89] Ibid., para. 55.

integral part of the establishment and functioning of that judicial system (ECJ violation of a fundamental rule test).

In essence, the ECJ test is similar to the ECtHR test to the extent that the ECtHR has established that by 'flagrant', one must understand 'breaches of applicable national rules in the establishment of a tribunal that are of a fundamental nature, and form an integral part of the establishment and functioning of the judicial system.'[90] In this context, the Strasbourg Court 'will take into account whether the facts before it demonstrate that a breach of the domestic rules on the appointment of judges was deliberate or, at a minimum constituted a manifest disregard of the applicable national law.'[91] Not every irregularity therefore amounts to a flagrant breach of the right to a tribunal by law established by law giving rise in itself to an infringement of the right to a fair trial.

In light of the findings of the Poland's own Supreme Court in its resolution of 23 January 2020[92] as well as the comprehensive assessments made by the European Commission and the Council of Europe, and drawing inspiration from the English law distinction between 'de facto judges' and 'usurpers', one may offer the following submissions as regards ordinary courts judges; Supreme Court judges and Constitutional Tribunal judges in light of the requirements relating to the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law:

(i) All individuals appointed to the ECPAC must be considered 'usurpers', or to put it more informally, 'fake judges', because they can be said to be persons who are sitting in the Supreme Court in full knowledge that they lack the authority to do so due to the flagrant defects which have marred their patently irregular appointments. As noted by the Supreme Court itself, candidates for the ECPAC knew inter alia 'that the Supreme Administrative Court had suspended the effect of the resolutions of the National Council for the Judiciary concerning them, and yet they accepted appointment to the position of a judge of the Supreme Court'.[93] Another important consideration is that these individuals furthermore accepted an appointment to a body which patently fails to meet the requirements relating to the concept of 'established by law'. In other words, ECPAC cannot be considered a court within the meaning of Polish, ECHR and EU law. In this respect, one may note that the system organised by the law of 8 December 2017 is blatantly perverse to the extent that the ECPAC 'which is comprised entirely of defectively appointed judges' – in manifest disregard of Polish, ECHR and EU law –

[90] Judgment in *Ástráðsson*, op. cit., para. 102.
[91] Ibid.
[92] While the Supreme Court indicated that it would not look in the issue of the status of relevant individuals/judges due to pending cases before the Court of Justice and instead analysed the defects which affected the process of judicial appointments in Poland post December 2017 in light of the principles of independence and impartiality, its findings can be used to examine the extent to which the same procedural defects or irregularities also lead to violations of the principle of a tribunal established by law. For a rewarding analysis of the 'independence test' vis-à-vis the 'establishment test', see P. Filipek, 'Only a Court Established by Law Can Be an Independent Court: The ECJ's Independence Test as an Incomplete Tool to Assess the Lawfulness of Domestic Courts', *VerfBlog,* 23 January 2020: <https://verfassungsblog.de/only-a-court-established-by-law-can-be-an-independent-court/> ('the two tests are not entirely separated from each other, as the 'independence test' may involve elements of the 'establishment test' … A finding that a court (a judge) is not established by law may be possible on the basis of objective criteria not directly related to the individual court (judge)').
[93] Supreme Court Resolution, op. cit., para. 45.

is the one reviewing 'the appointment of other judges on application of a National Council for the Judiciary formed in the same way'.[94]

(ii) All individuals appointed to the DC ought to be similarly considered 'usurpers' aka 'fake judges' due to the flagrant, deliberate and manifold procedural irregularities described in the Supreme Court's resolution and the fact that the concerned individuals, as the Supreme Court emphasised, 'must have been aware of the fundamental doubts concerning the new procedures for the appointment to the office of a judge of the Supreme Court and the status and membership of the National Council for the Judiciary as a body participating in the procedure of judicial appointment'.[95] Like the ECPAC, the DC itself is furthermore not a court established by law within the meaning of Polish, ECHR and EU law having been inter alia established in *manifest disregard* of the Polish Constitution and in *flagrant breach* of binding legal requirements relating to judicial independence and impartiality. It must therefore be considered a body masquerading as a court, if not a body reminiscent of England's medieval 'star chamber';

(iii) All individuals appointed to the Civil Chamber and Criminal Chamber following the entry into force of the law of 8 December 2017 in a procedure involving the neo-NCJ may likewise be considered 'usurpers/fake judges' to the extent that they also 'knew that the Supreme Administrative Court had suspended the effect of the resolutions of the National Council for the Judiciary concerning them, and yet they accepted appointment to the position of a judge of the Supreme Court';[96]

(iv) The new acting First President of the Supreme Court can be similarly considered an obvious 'usurper/fake judge' as he was first appointed by the Polish President in flagrant violation of a freezing order issued by the Supreme Administrative Court on 25 September 2018, the Polish President having previously violated a fundamental rule which requires the counter-signature of the Polish Prime Minister when making an announcement for vacant judicial positions at the Supreme Court on 24 May 2018. In addition, the Polish Constitution does not provide for the position of acting First President, a tactic which was however previously used by the same Polish President to unlawfully appoint a new 'President' of the CT as we will briefly explain below.[97]

(v) The three individuals currently occupying the positions of three judges lawfully nominated in October 2015 to the Constitutional Tribunal must similarly be considered 'usurpers' or 'fake

[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] At the time of writing, controversy has also arisen in respect of the procedural irregularities affecting the procedure to select the candidates for the position of First President of the Supreme Court. See Appeal of the Polish Judges Association Iustitia over the elections of the candidations for the position of the Firs President of the Supreme Court, 12 May 2020: https://www.iustitia.pl/en/activity/informations/3834-appeal-of-the-polish-judges-association-iustitia-over-the-elections-of-the-candidates-for-the-position-of-the-first-president-of-the-supreme-court. The new procedure itself is also not compatible with the Polish Constitution as well as EU and ECHR judicial independence standards. For further analysis, see L. Pech and P. Wachowiec, '1460 Days Later: Rule of Law in Poland R.I.P', *VerfBlog*, 15 January 2020 (part II): https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-ii/ ('Bearing in mind that at least 43 nominees of the (unlawfully operating) neo-NCJ are members of the Supreme Court, the new procedure virtually guarantees that the post will fall to one of (the ruling party's) chosen ones. And should the said procedure fail, which is unlikely but better safe than sorry as the saying goes, the President of the Republic will be given an exclusive right to appoint an interim First President').

judges'. The same labels can be used in respect of the current President of the CT due to the manifestly unlawful procedure leading to her appointment as President of the CT on 21 December 2016, starting with her unlawful appointment to the (non-existing) position of acting President of the CT on 19 December 2016[98] in another instance of manifest and obvious disregard of relevant fundamental rules.[99] One should note that the problem of the irregular composition of the CT has already reached the European Court of Human Rights.[100]

(vi) For individuals appointed for the first time to the office of ordinary court judges via procedures organised under the law of 8 December 2017, the situation is less straightforward. As the Supreme Court itself observed, 'the severity of irregularities in competition procedures for appointment of judges of common and military courts and judges of the Supreme Court … has varied' and 'was definitely more severe in the case of appointments for judicial positions in the Supreme Court.'[101] Arguably, this means that the individuals appointed judges of ordinary courts do not have to be viewed as usurpers notwithstanding the existence of 'fundamental doubts as to whether the criteria of impartiality and independence'[102] can be met by such persons due to their defective appointments to the office of judge following a competition procedure organised under the under the law of 8 December 2017. In this context, one may possibly seek inspiration from the English 'de facto judge' principle and assume, that the acts of the judge concerned and the establishment of the court they participate to do not violate the requirements of Article 6(1) of the ECHR and Article 47 CFR with parties however able to rebut this presumption a case-by-case basis.

(vii) As regards rulings adopted by courts or benches including one or more judges promoted to a higher-level court post April 2018 in a procedure involving the neo-NJC, which was inter alia established on the back of an obvious violation of Polish Constitution,[103] unlawfully

[98] While the initial appointment of this individual to the CT was procedurally speaking proper, her appointment to the position of acting President of the CT wasn't. In addition to the fact that the Polish Constitution does not provide for a position of acting President, she was elected by a mere 6 votes out of the 14 judges present at the rushed meeting organised by herself. These 6 judges consisted of the three unlawfully appointed judges and three judges appointed by the current governing majority. See European Commission, Article 7(1) TEU reasoned proposal, op. cit., para. 39.

[99] See e.g. European Commission, ibid., para. 57 which refers to 'the unlawful appointment of the President' of the CT and Council of Europe (PACE), *The functioning of democratic institutions in Poland*, Resolution 2316 (2020), para. 6: 'The restoration of the legality of the composition of the [Constitutional] Court in line with European standards is essential and should be a priority'.

[100] See e.g. application no 4907/18 which is mentioned in Council of Europe (PACE), *Report on the functioning of democratic institutions in Poland* (authors: Ms Gustafsson and Mr Omtzigt), op. cit., para. 43: 'there are three judges participating in the work of the Tribunal whose appointment […] is, per decision of the Constitutional Court itself, illegal. This, in turn, raises questions about the legality of any of the judgments in which these judges have participated, which undermines the principle of legal certainty in the country. The extend of this problem, is clear from the application Xero Flor w Polsce sp. z o.o. v. Poland, which was communicated by the Polish authorities on 2 September 2019. In this application, the applicant alleges that his rights under article 6§1 (right to a free trial) were violated because the bench of five judges of the Constitutional Court that examined his case was composed in violation of the Constitution, *'in particular, Judge M.M. had been elected by the Sejm (the lower house of the Parliament), despite that post having already been filled by another judge elected by the preceding Sejm'*.'

[101] Supreme Court Resolution, op. cit., para. 45.

[102] Ibid., para. 47.

[103] As previously noted, in March 2018, the four-year mandates of the 15 judges-members of the NCJ, established in the Polish Constitution, were prematurely and therefore unconstitutionally terminated and they were replaced with 15 new judges-members elected by the Sejm according to the new regime (yet another breach of Polish Constitution) whereas judges-members were previously elected by judges. As repeatedly noted by the European

composed,[104] and is now expected to be expelled from the ENCJ,[105] one may submit that we are not dealing with flagrant breaches of the right to a tribunal established by law. According, the standard case-by-case approach can be followed when it comes to assessing compliance with the principles of judicial independence and impartiality. This is not to say that the judges who accepted to be promoted in a procedure involving a blatantly defective if not manifestly unconstitutional body, did not violate their ethical obligations but in this instance, the nature and gravity of the infringements might be possibly held not to cross the threshold of a flagrant violation of fundamental legal rules resulting in an undermining of the integrity of the promotion process to an extent not envisaged by the national rules in force at the material time.

(vii) Speaking of promoted judges, special attention should be paid some specific categories of promoted judges. Without being exhaustive, it is submitted that any judge appointed/promoted to replace the presidents and vice-presidents of ordinary courts who were summarily 'dismissed under the six-month transitional regime which gave the Minister of Justice the power to arbitrarily dismiss them without any specific criteria, without justification and without judicial review'[106] in the period between 12 August 2017 and 12 February 2018, should be considered usurpers. This is not merely justified in light of the fact that they benefited from what amounts to a judicial purge in flagrant breach of Polish constitutional, EU and ECHR judicial independence standards but also due to their participation to what they must have known to be a flagrantly irregular procedure. The judges-members of the neo-NCJ who have been promoted by the very body they belong to must also be considered usurpers as far as their new functions are concerned.[107] As regards the judges seconded to the Ministry of Justice where they have traditionally played a leading role in the drafting of legislation, including the blatantly unconstitutional muzzle law and the measures later found by the Court of Justice to be in breach inter alia of the principle of judicial independence, while they may not necessarily

Commission, the 'new election regime of the judges-members of the National Council does not comply with European standards requiring that judges-members of Councils for the Judiciary are elected by their peers'. See Council, *Rule of Law in Poland / Article 7 (1) TEU Reasoned Proposal - European Commission contribution for the hearing of Poland on 26 June 2018*, 10351/18, 21 June 2018, p. 7.

[104] See Supreme Court Resolution, op. cit., para. 32 and see also on the invalid election of the new NCJ the interview with Ewa Łętowska who served as Poland's first Commissioner for Human Rights (1987-1992), judge of the Supreme Administrative Court (1999-2002) and judge of the Constitutional Tribunal (2002-2011), 'It was a "cooperative", and the judges were co-opted to offer support. A new Council must be chosen', *Rule of Law in Poland*, 21 February 2020: <https://ruleoflaw.pl/letowska-it-was-a-cooperative-and-the-judges-were-co-opted-to-offer-support-a-new-council-must-be-chosen> ('the publication of the lists further justifies not only the doubts about the legitimacy of the NCJ's appointment (procedural irregularities), but also provides evidence of its dependence on the executive power (the Ministry of Justice)').

[105] See 'ENCJ Board sends position paper on proposed expulsion to KRS', 22 April 2020: <www.encj.eu/node/554>. See also EAJ President letter to the ENCJ on 4 May 2020: <https://twitter.com/JoseIgrejaMatos/status/1257294375748546561> (considering that Poland's NCJ 'does not comply with the fundamental requirement for a Judicial Council of being independent from the executive and bluntly fails to uphold the independence of the judiciary, the EAJ board wants to publicly express its support to the proposal to expel KRS [Poland's NCJ] from ENCJ').

[106] Council, *Rule of Law in Poland / Article 7 (1) TEU Reasoned Proposal - European Commission contribution for the hearing of Poland on 26 June 2018*, 10351/18, 21 June 2018, p. 14.

[107] M Kryszkiewicz, 'Nominacje w pałacu, czyli po co była reforma', *Gazeta Prawna.pl*, 15 July 2019: <https://prawo.gazetaprawna.pl/artykuly/1421929,krs-duda-furmankiewicz-nawacki-kolodziej-michalowicz-so-nominacje.html>.

have to be considered usurpers, they should be considered to have manifestly acted in obvious violation of their professional ethics.

The so-called 'muzzle law', which eliminates 'the competence of the Polish courts to examine whether another court decision was issued by a person appointed as a judge in compliance with the Constitution, European law and other international legal standards' and significantly curtails 'the possibility to examine the question of institutional independence of Polish courts by those courts themselves. This approach raises issues under Article 6 § 1 of the ECtHR, since judicial review should involve examination of all relevant aspects of the independence of the tribunal, including institutional ones.'[108] The muzzle law however cannot constitute a lawful obstacle when it comes to dealing in particular with the usurpers identified above and more generally, assessing the lawfulness of any individual judicial appointment made by the Polish president. Indeed, the Court's ruling in *Simpson* and *HG* could not have made clearer. As a matter of EU law, 'everyone must, in principle, have the possibility of invoking an infringement' of the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, which means inter alia that the CJEU but also national courts of EU Member States '*must be able to check* (our emphasis) whether an irregularity vitiating the appointment procedure' in dispute 'could lead to an infringement of that fundamental right.'[109] As the 'guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial', Article 47 CFR also means that '*every court is obliged to check* (our emphasis) whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point'.[110]

In other words, the Court's ruling in *Simpson* and *HG* makes it clear beyond any doubt that the muzzle law is patently and fundamentally incompatible with Article 47 CFR, with this provision

[108] Venice Commission, *Joint urgent opinion on amendments to the law of the common courts, the law on the supreme court and some other laws*, Opinion no. 977/2019, CDL-PI(2020)002, 16 January 2020, paras. 31 and 36. See also OSCE/ODIHR, *Urgent interim opinion*, Opinion no. JUD-POL/365/2019 [AlC], 14 January 2020, paras 36 and 41: the muzzle bill inter alia limits 'the scope of judges' adjudicative functions by preventing them from ruling on the independence or impartiality of a tribunal, whereas this is a key component of the right to a fair trial guaranteed by Article 6 of the ECHR and Article 14 of the ICCPR. This provision also conflicts with Poland's obligation under EU law to guarantee the power of courts to refer cases to the CJEU if and when the issue of the status of a judge is linked with interpretation and/or requirement of the Treaties […] In light of the foregoing, **the provisions preventing judges or courts from questioning the powers of state bodies, including the review of the validity of judicial appointments** (Articles 1(19), 2(6), 3(2) and 4(1)(b) of the Bill) **should be removed in their entirety, as should the provisions imposing disciplinary liability for judges in such cases** (Articles 1(32), 2(8), and 3(3))'. Finally, see Commissioner for Human Rights Adam Bodnar, *Comments addressed to the Speaker of the Senate of the Republic of Poland*, VII.510.176/2019/MAW/PKR/PF/MW/CW, 7 January 2020, p. 6: the muzzle bill 'seeks to **intentionally exclude, from the scope of judicial review, the issue of legality of appointment and operation of judicial bodies, as well as the legality of appointment of judges**. (in bold in the original) The admissibility of and necessity for such review arises both from the Constitution of the Republic of Poland (the principle of the state ruled by law, Article 2; the principle of legality and the rule of law, Article 7; the right to a fair trial, Article 45(1); the principle of independence of courts and impartiality and independence of judges, Article 45(1) and Article 178(1) of the Constitution of the Republic of Poland), from the European Union law (the principle of effective legal protection, Article 19(1)(2) of the Treaty on the European Union; the right to a fair trial before an independent and impartial court, Article 47 of the Charter of Fundamental Rights of the European Union), and from the European Convention on Human Rights (Article 6(1) and Article 13). All the indicated sources of law take precedence over statutory norms, which the promoters of the bill failed to take into account.'

[109] ECJ judgment in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 55.

[110] Ibid., para. 57.

of EU primary law not merely directly entitling but imposing an obligation on every Polish judge/court to set aside relevant provisions of the muzzle law and verify the regularity of the judicial appointments made under the law of 8 December 2017, two pieces of legislation whose unconstitutionality, one should also note in passing, is also rather obvious.[111] However, in the absence of any effective constitutional review in Poland since December 2016,[112] their unconstitutionality cannot be remedied. However, their patent incompatibility with Article 47 CFR can be.

The Commission must therefore be commended for launching an infringement action against Poland in respect of the muzzle law and in particular, on the ground inter alia that this law 'prevents Polish courts from assessing, in the context of cases pending before them, the power to adjudicate cases by other judges'.[113] As rightly observed by the Commission, the muzzle laws 'impairs the effective application of EU law and is incompatible with the principle of primacy of EU law, the functioning of the preliminary ruling mechanism and requirements of judicial independence.'[114]

5. Conclusion

Considering the EU and ECHR law requirements relating to the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, it is submitted that every ruling involving the individuals classified as usurpers above must be presumed to have been rendered by a tribunal *not* established by law in violation of Article 47 CFR/Article 6(1) ECHR. This amounts, in turn, to a violation of the fundamental right to a fair trial under EU law (for cases governed by EU law) and/or ECHR law due to the *deliberate* and/or *flagrant* nature of the irregularities committed in relation to the appointments of the relevant individuals. In this context, it is important to recall that those who benefited from the irregular procedures could not have ignored that their appointments were *manifestly* made in *blatant* breach of *fundamental* rules forming an integral part of the establishment and functioning of Poland's judicial system.

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[111] On the law of 8 December 2017 and more generally the neo-NCJ, see P. Filipek, 'The new National Council of the Judiciary and its impact on the Supreme Court in the light of the principle of judicial independence', Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego, vol. XVI, A.D. MMXVIII, 177. For a more recent analysis, M. Matczak, 'Burning the Last Bridge to Europe', *VerfBlog,* 12 December 2012: <https://verfassungsblog.de/burning-the-last-bridge-to-europe> ('the neoKRS is an illegally constituted body that illegally appoints judges who deliver invalid judgments. The more illegally appointed judges, the greater the number of invalid judgments. Any government that valued the integrity of the nation's legal system would set about healing such a sick system without delay'). Finally, on the muzzle law, see P. Marcisz, 'Discipline and Punish: New Polish Reforms of the Judiciary', *VerfBlog,* 22 December 2019: <https://verfassungsblog.de/discipline-and-punish> ('The provisions in the bill are all designed as an assault on judicial independence. They aim at crushing the opposition against previous illegal reforms among the judiciary. No need to discuss their details: *res ipsa loquitur.* The bill is blatantly unconstitutional but without a functioning Constitutional Court it does not matter much. It is also contrary to EU law. Not only does it infringe the judicial independence protected under Article 19(1)(2) TEU, but also the principle of primacy of EU law').

[112] See e.g. European Commission, Article 7(1) TEU reasoned proposal, op. cit., para. 57.

[113] European Commission, 'Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland', IP/20/772, 29 April 2020: <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772>.

[114] Ibid.

Be that as it may, it is of the utmost importance that both the Court of Justice and the European Court of Human Rights do not 'reward repeated flagrant violations of national and European law in the name of legal certainty'.[115] If it means adjusting previously well-established guiding principles and tests to reflect the new autocratic reality of national authorities *deliberately* and *repeatedly* violating the basic tenets of the rule of law while also *knowingly* and *constantly* lying about it, so be it.

[115] P. Filipek, 'Only a Court Established by Law Can Be an Independent Court', op. cit.

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