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NOTE ON THE EFFECTS OF DECISIONS OF JUDGES APPOINTED IN A DEFICIENT MANNER

POLAND

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EXECUTIVE SUMMARY

As underlined in previous ODIHR opinions on judicial reform in Poland in 2017-2024, while every state has the right to reform its judicial system, such reforms should always comply with the country's constitutional requirements, adhere to rule of law principles, be compliant with international law and human rights standards, as well as OSCE commitments. These underlying principles should guide the legislative choices to be made by the Polish legislators to execute the judgments against Poland concerning judicial independence, including by addressing the status of decisions adopted with the participation of judges appointed in a deficient manner.

While acknowledging the complexity and scale of the reform required to address the systemic deficiencies of the judicial system in Poland as identified by the European Court of Human Right (ECtHR), the Court of Justice of the European Union (CJEU), international organizations, including ODIHR, as well as national observers, it is important that the chosen modalities for reform are duly justified in light of international human rights and rule of law standards, and that the legal drafters do not lightly invoke the existence of exceptional circumstances to resort to extraordinary measures. This would otherwise run the risk of setting a precedent whereby a changing political majority, which did not approve the reform, would be tempted to proceed the same way.

The present Note addresses the topic of the legal effects of judicial decisions rendered by defectively appointed judges, when irregularities in their appointment procedure were serious enough to entail a violation of the right to an independent and impartial tribunal established by law. It is prepared with a view to inform the reform process as the Polish authorities are considering legislative and policy options to address existing deficiencies in the judicial system as outlined in the abundant caselaw of the ECtHR and the CJEU.

The Note does not pronounce itself on the status of judges appointed involving the National Council of the Judiciary (NCJ) as composed after the entry into force of the Act 8 December 2017 Amending the Act on the NCJ.

As the Note addresses the topic *in abstracto*, it does not aim to establish whether identified irregularities in appointment process should lead to the loss of judicial status of these appointees under Polish law, nor does the reference to "judges" confer any indication as to their status.

The issue of the effects of decisions of defectively appointed judges raises a number of interrelated questions about the individual right to a fair trial by an independent and impartial tribunal established by law, and the requirements of the rule of law, in particular legal certainty, including the principle of *res judicata*, as well as the efficiency of the justice system and good administration of justice in general. It is important to balance the individual right with these considerations of legal certainty and the public interest in the good administration of justice.

It is clear that the ECtHR and CJEU caselaw does not require a state to pronounce all judgments or decisions rendered by defectively appointed judges void ex tunc – from the outset, and hence non-existent, nor to re-open automatically all cases decided by defectively appointed judges. It gives a rather wide margin of appreciation or acknowledges the state's autonomy in the way it decides to cure the violations of the right to a fair trial by an independent and impartial tribunal established by law. However, this margin of appreciation may

be limited in case of pressing need of a substantial and compelling character, especially in case of miscarriage of justice or serious violation of international human rights standards, which would call for reconsideration of a judicial decision.

There may be circumstances where such a re-opening would be the most effective solution or the only way to ensure reparation, and the correction of fundamental defects or a miscarriage or denial of justice. Where rulings show patterns of systemic violations of international human rights standards, including discrimination against certain persons or minority groups, re-examination or re-opening of proceedings may also be justified. Otherwise, the full effectiveness of international human rights law would be called into question and the protection of human rights of individuals would be weakened if there were no possibility to obtain reparation when the rights of individuals are affected by an infringement of international human rights standards.

In accordance with the international norms and caselaw, when assessing the effects of decisions of judges appointed in a deficient manner, a balancing test should be carried out between individual interest in the right to a tribunal established by law and public interest in legal certainty, including of the stability of judgments and respect for the principle of *res judicata*. At the same time, as the ECtHR has indicated, with the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant's right to a 'tribunal established by law' in the balancing exercise that must be carried out.

Where a possibility to submit a request for re-opening is provided, a number of considerations should be taken into account, including but not limited to the effect of the re-opening and of any subsequent proceedings on the applicant's individual situation and on the rights and interests of bona fide third parties, the need to clearly define the legal grounds for re-examination or re-opening and admissibility requirements, the need to limit the possibility to re-open cases by reasonable time, the existence and operation of substantive and procedural safeguards in the domestic legal system capable of preventing abuse of that procedure by the domestic authorities, and other pertinent considerations. Where re-opening and 'restitutio in integrum' is not possible, pecuniary compensation may be an alternative remedy providing that the individual demonstrates a direct causal link between the violation and the loss or damage s/he sustained, beyond the harm resulting from the defective judicial appointment.

Furthermore, policy and legislative options chosen should, to the extent possible, rely on existing mechanisms already provided by the legislation to ensure reparation for the said violations. However, if this proves impossible or ineffective, establishing a separate, special mechanism can also be considered.

Whatever the policy and/or legislative options that are chosen, they should be based on a proper assessment of their potential impact in terms of financial and human resources required for their implementation and their human rights impact. Furthermore, the executive and the legislative branches must adhere to principles designed to uphold respect for the independence of the judiciary and to preserve the separation of powers.

As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing laws to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 28 May 2024, the Undersecretary of State of the Ministry of Justice of the Republic of Poland sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") a request for a legal analysis on the topic of the effects of decisions of judges appointed in a deficient manner.
2. On 20 June 2024, ODIHR responded to this request, confirming the Office's readiness to prepare a Note on the effects of decisions of judges appointed in a deficient manner from the perspective of international human rights standards and OSCE human dimension commitments.
3. The present Note should be read in light of the several opinions on judicial reform in Poland published by ODIHR between 2017 and 2024.[1]
4. This Note was prepared in response to the above request and aims to outline key principles related to the above topic with a view to inform possible policy and/or legislative choices for reform. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.[2]

II. SCOPE OF THE NOTE

5. The scope of this Note deals exclusively with the issue of the effects of decisions of judges appointed in a deficient manner with a view to identify relevant international standards and OSCE human dimension commitments to inform possible policy and/or legislative choices for reform. The Note aims to answer a question *in abstracto* with respect to the legal effects of decisions of defectively appointed judges and thus does not constitute a full and comprehensive review of the entire legal and institutional framework regulating judicial independence and the rule of law in Poland. However, where needed and as applicable, the Note takes into account the Polish context and the situation of judges (hereinafter referred to as "defectively appointed judges"), who were appointed or promoted to judicial positions by the National Council of the Judiciary (NCJ) as composed following the entry into force of the Act of 8 December 2017 amending the Act on the NCJ and certain other Acts (2017 NCJ Amending Act) that changed the modalities of appointing the judge members of this body. The specific issue of the status of judgments rendered by benches of the Constitutional Tribunal is covered in greater details in the *ODIHR Opinion on Two Bills of the Republic of*

1 *ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland* (5 May 2017, also in Polish here); *ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017), in English and in Polish; *ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (proposed by the President, as of 26 September 2017), 13 November 2017, in English and Polish; *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act* on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019), 14 January 2020, in English and Polish; ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Supreme Court and Certain other Acts of Poland (as of 16 January 2023), 25 January 2023, in English and Polish; *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the National Council of the Judiciary of Poland*, 8 April 2024.

2 See especially *OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area* (2008), point 4, where the Ministerial Council *"[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]"*.

Poland on the Constitutional Tribunal.[3] The assessment of compliance with international standards and good practices of the procedures currently in place in Poland whereby parties may challenge the independence or impartiality of a judge hearing their case in the course of ongoing litigation is outside the scope of this Note.

6. The ensuing legal analysis and key principles outlined in the Note are based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Note also highlights, as appropriate, comparative practices from other OSCE participating States in this field. When referring to national legislation, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[4] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[5] and commitments to mainstream gender into OSCE activities, programmes and projects, the Note integrates, as appropriate, a gender and diversity perspective.

8. The Note is also available in Polish. However, the English version remains the only official version of the Note.

9. In view of the above, ODIHR would like to stress that this Note does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Poland in the future.

III. BACKGROUND

10. As part of a series of judicial reforms in 2017-2018, the 2011 Act on the NCJ was amended several times, including by the Act of 8 December 2017 amending the 2011 Act on the NCJ and certain other Acts, which entered into force on 17 January 2018 (hereinafter "2017 NCJ Amending Act").[6] These amendments introduced changes to, among others, the power to elect the fifteen judge members of the NCJ, which was transferred from the respective assemblies of judges to the *Sejm*, the structure and decision-making of the NCJ and the procedure for selecting judges and trainee judges. Following the 2017 Amendments, the new judge members elected by the *Sejm* took office in March 2018 while the term of office of the judge members appointed under

3 The 2011 Act on the NCJ as last amended is available at: <Akty prawne (en) (krs.pl)>. See also <Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (sejm.gov.pl)>.

4 UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW"), adopted by General Assembly resolution 34/180 on 18 December 1979. Poland ratified this Convention on 30 July 1980.

5 See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

6 The Act Amending the 2011 Act on the NCJ was enacted on 8 December 2017 and entered into force on 17 January 2018, except for certain provisions which became effective earlier; further, the Act of 12 April 2018 amending various acts including the 2011 Act on the NCJ, entered into force on 23 May 2018, and vested in the NCJ the power to decide on the extension of the term of office of a judge beyond retirement age.

the previous provisions terminated the day preceding the term of office of the new judge members of the NCJ.[7]

11. ODIHR, the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), and other regional and international bodies and national observers have expressed concern regarding legislative changes during this period concluding that following the change of modalities of electing the judge members of the NCJ, also in light of contextual factors, the NCJ no longer offered sufficient guarantees of independence from the legislative and executive powers.[8] The ECtHR underlined in particular "*that the violation of the applicants' rights originated in the amendments to Polish legislation which had deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges so appointed*."[9] The Court also emphasized that the defective procedure for judicial appointment arising from the lack of independence of the newly composed NCJ "*inherently and continually affects the independence of judges so appointed*".[10]

12. In its pilot judgement in the case of *Wałęsa v. Poland* of 23 November 2023, the ECtHR fully endorsed the indications as to the general measures given to Poland by the Council of Europe Committee of Ministers in the decision adopted at its 1468th Meeting on 5-7 June 2023, calling upon Poland to "*rapidly elaborate measures to (i) restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ; (ii) address the status of all judges appointed in the deficient procedure involving the NCJ as*

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7 See, for a detailed overview of this issue, ODIHR Urgent Interim Opinion on the Bill Amending the Act on the National Council of the Judiciary of Poland (8 April 2024), paras. 15-25.

8 See in particular, ECtHR, *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, especially paras. 269-276, concluding that the NCJ lacked sufficient guarantees of independence from the legislature and the executive following the 2017 Amendments; *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021, para. 353, underlining that the NCJ, as established under the 2017 Amending Act, is "*a body which no longer offered sufficient guarantees of independence from the legislative or executive powers*" and calling upon Poland under Article 46 of the ECHR to undertake "a rapid remedial action" noting that the 2017 Amendments to the 2011 Act enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, "thus systematically compromising the legitimacy of a court composed of the judges so appointed"; *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 318, reiterating the "inherent lack of independence of the NCJ" and concluding that "it is an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuates the systemic dysfunction as established above by the Court and may in the future result in potentially multiple violations of the right to an 'independent and impartial tribunal established by law', thus leading to further aggravation of the rule of law crisis in Poland"; *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, para. 307, underlining that where a judicial council is established, "*the State's authorities should be under an obligation to ensure its independence from the executive and legislative powers in order to, inter alia, safeguard the integrity of the judicial appointment process*", and paras. 310-322 where the ECtHR concluded that "*the fundamental change in the manner of electing the NCJ's judicial members, considered jointly with the early termination of the terms of office of the previous judicial members […] means that its independence is no longer guaranteed*"; the pilot judgement in the case of *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329, whereby the Court fully subscribed to and endorsed the indications as to the general measures given to Poland by the Council of Europe Committee of Ministers in the decision adopted at its 1468th Meeting on 5-7 June 2023, calling upon Poland to "rapidly elaborate measures to (i) restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ"; see also ECtHR, *Juszczyszyn v. Poland*, no. 35599/20, 30 April 2021 (the Disciplinary Chamber of the Supreme Court lacking attributes of an "independent and impartial tribunal established by law); and *Tuleya v. Poland*, nos. 21181/19 and 51751/20, 6 July 2023 (the Disciplinary Chamber of the Supreme Court lacking attributes of an "independent and impartial tribunal established by law"). See also CJEU, *A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy* [GC], C-585/18, C-624/18 and C-625/18, 19 November 2019, especially, paras. 137-154 regarding the elements to take into account to assess the independence of the judicial council vis-à-vis the executive and the legislative branches; and *A.B. and Others v Krajowa Rada Sądownictwa and Others*, C-824/18, 2 March 2021, paras. 131-139, further elaborating on other relevant contextual factors which may also contribute to doubts being cast on the independence of the NCJ and its role in judicial appointment processes and, consequently, on the independence of the judges appointed at the end of such a process. See also ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland, of 5 May 2017, here in English and here in Polish, whereby ODIHR concluded that the (then draft) 2017 Amendments would place "the procedure of appointing members of the Judicial Council primarily in the hands of the other two powers, namely the executive and/or the legislature (apart from the ex officio members, 21 members would now be appointed by the legislative branch and one by the executive), increase the influence of these powers over the appointment process of its members, thereby threatening the independence of the Judicial Council, and as a consequence, judicial independence overall" (para. 40).

9 ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021, para. 368.

10 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(a).

constituted under the 2017 Amending Act and of decisions adopted with their participation; and (iii) ensure effective judicial review of the NCJ's resolutions proposing judicial appointments to the President of Poland, including the Supreme Court."[11]

13. In order to restore the independence of the judiciary in Poland in compliance with international standards and the jurisprudence of the ECtHR and the CJEU, the Polish government is currently undertaking a number of legislative and practical reforms related to the functioning of the judiciary, including to reform the NCJ and the system of appointment of judges.[12] This will eventually require Poland to "*address the status of all judges appointed in deficient procedures involving the NCJ as constituted after March 2018 and of decisions adopted with their participation*" as underlined in the *Wałęsa* pilot judgment.[13]

14. Given the high proportion of Polish judges appointed or promoted involving the deficiently composed NCJ since March 2018, a body whose independence is no longer guaranteed according to the ECtHR, the status of the decisions taken by these judges are potentially impacted, and therefore restoring the independence of the NCJ should be among the priorities to avoid perpetuating the systemic dysfunction established by European courts.

15. Since the NCJ was first formed according to the new modalities for electing the judge members as provided by the 2017 NCJ Amending Act in March 2018, it is estimated that between 2,200 and 3,500 judges (out of approximately 10,000 judges in Poland) have been appointed or promoted by this body.[14] ODIHR does not possess statistics regarding the number of decisions and judgments issued by defectively appointed judges during this period, but statistics from 2021 indicate that the number of total cases resolved by Polish judges of all courts of all levels per year numbers in the millions.[15]

16. It must be underlined that Polish legislation already provides rules regarding the consequences of judgments rendered by an improperly composed tribunal. Article 379 § 4 of the Code of Civil Procedure provides that *"[p]roceedings shall be null and void: […] if the composition of the adjudicating court was inconsistent with the provisions of law, or if a judge excluded [from sitting in the case] by virtue of the law took part in the examination of the case*". Article 439 § 1 (2) of the Code of Criminal Procedure lists shortcomings which a court of appeal dealing with a case must take into account of its own motion, including when *"(2) the court was unduly composed or any of its members were not present at the entire hearing*". There also exist other mechanisms in the Polish legal framework that could be used as extraordinary remedies or one of the remedies available beyond appeal or that regulate the reopening of cases, including cassation appeals in criminal and civil proceedings,[16] provisions

11 See ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

12 See here for the current status of the execution of the ECtHR judgment in *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, including a summary of the Action Plan published by the Ministry of Justice of Poland on 24 May 2024 with regard to implementation of the judgment, especially to address the systemic problems at the root of the violations of Article 6 (1) of the ECHR as listed in para. 324, including (a) the defective procedure for judicial appointments involving the NCJ as established under the 2017 Amending Act; (b) the status of the Supreme Court's Chamber of Extraordinary Review and Public Affairs (CERPA) since it is not an independent and lawful court under the ECHR; (c) the extraordinary appeal procedure as currently operating in Poland since it is incompatible with the fair trial standards and the principle of legal certainty on account of several defects, themselves examined by the CERPA, which has exclusive competence.

13 See repeated exhortation of the Committee of Ministers regarding execution of the Reczkowicz group of cases in December 2023, Interim Resolution CM/ResDH(2023)487.

14 The website of the Chancellery of the President of the Republic indicates, as of 16 July 2024, 3,213 judges and assessors have been appointed between 2018 and 2024. See also Helsinki Foundation for Human Rights (HFHR), Nowa KRS: krajobraz po reformie – opracowanie HFPC | Helsińska Fundacja Praw Człowieka (hfhr.pl) for an analysis of appointments by the President of the Republic of Poland to judicial positions at the request of the NCJ from 2018 to August 2023.

15 See the chart 'judiciary at a glance in Poland' here: 1680ab89c2 (coe.int)

16 See Article 524 of the Code of Criminal Procedure and Article 3985 of the Code of Civil Procedure

governing the reopening of civil and criminal proceedings,[17] and the declaration of a final civil decision as unlawful.[18]

17. On 8 December 2017, a new Act on the Supreme Court was adopted which established two new Supreme Court Chambers: the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs ("CERPA")), the latter being competent to examine "extraordinary appeals"– aiming to re-introduce into the Polish legal system a form of extraordinary revision that used to be in place.[19]

18. In its *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (proposed by the President, as of 26 September 2017), ODIHR concluded that the introduction of this extraordinary review of final court decisions raised serious prospects of incompatibility with key rule of law principles, including the principle of *res judicata* and the right to access justice.[20] The subsequent case-law of the ECtHR concluded that the CERPA was not an independent body and lawful court, confirming that the extraordinary appeal procedure was incompatible with the fair trial standards and the principle of legal certainty under Article 6 (1) of the ECHR on account of several defects.[21]

19. With respect to the different measures that can be taken to address the "…*legal and practical consequences for final judgments already delivered by formations of judges appointed upon the NCJ's recommendation and the effects of such judgments in the Polish legal order…*", the ECtHR noted in the case of *Advance Pharma sp. z o.o v. Poland* that "….*one of the possibilities to be contemplated by the respondent State is to incorporate the necessary general measures the Supreme Court's conclusions regarding the application of its interpretative resolution of 23 January 2020 in respect of the Supreme Court and other courts and the judgments given by the respective court formations.*"[22] The Supreme Court resolution of 23 January 2020[23] in its relevant parts held that:

> *"…45. Lack of independence of the [NCJ] leads to defectiveness in the procedure of judicial appointments. However, such defect and its effect undermining the criteria of independence and impartiality of the court may prevail to a different degree.* ***First and***

17 Article 408 of the Code of Civil Procedure, which provides that "After the expiry of ten years from the date of the judgment becoming final, no reopening may be sought, except where the party was prevented from acting or was not duly represented"; and Article 542 § 5 of the Code of Criminal Procedure, which provides that "It is inadmissible to reopen proceedings ex proprio motu to the detriment of the accused after the expiry of one year from the date on which the decision (orzeczenie) has become final."

18 Article 4241 of the Code of Civil Procedure.

19 The system of extraordinary revision (rewizja nadzwyczajna) was abolished in 1995 and replaced by cassation proceedings. A motion for extraordinary revision could be brought by the Minister of Justice, the Attorney General, the First President of the Supreme Court, the Minister of Social Affairs for social security-related matters (but also by the Commissioner for Human Rights of Poland since 1 January 1988) against any final judgment, including judgments by the Supreme Court.

20 *ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (proposed by the President, as of 26 September 2017), para. 57.

21 Including in particular, "*[t]he CERPA, a body which is not, as said above, an independent and "lawful" court under the Convention has exclusive competence to deal with any motion for the exclusion of judges involving a plea of lack independence of a judge or a court, including – as shown by the facts of the present case – the situation where the motion is directed against them personally. This, as also emphasised by the Supreme Court in its resolution of 23 January 2020 (…) gives no guarantee that the matter will be heard objectively as the CERPA judges themselves do not possess the required independence and, in cases where their own independence is being challenged on the basis of the defective appointment, they will be judges in cases concerning themselves, in breach of the fundamental principle nemo iudex in causa sua*" and. *"(i) the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for appeal to the authorities and bodies involved in the procedure; (ii) the possibility of using in practice this exceptional remedy as an 'ordinary appeal in disguise' and obtaining through it a fresh examination of the case, including re-determination of facts, with the adjudicating body acting as a tribunal of fact at the third or fourth level of jurisdiction; (iii) the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Prosecutor General and the Commissioner to contest judgments that became final before the entry into force of the 2017 Act on the Supreme Court; (iv) the lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure (e.g. for political reasons, as currently demonstrated by entrusting the Prosecutor General – who is an active politician and at the same time the Minister of Justice wielding considerable authority over the courts – with extensive powers in respect of questioning the finality of judicial decisions by means of an extraordinary appeal)*"; see ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324 (b) and (c).

22 ECtHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 365.

23 Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, 23 January 2020, see <BSA I-4110-1_20_English.pdf (sn.pl)>.

> ***foremost, the severity and scope of the procedural effect of a defective judicial appointment varies depending on the type of the court and the position of such court in the organisation of the judiciary. The status of a judge of an ordinary court or a military court is different from the status of a judge of the Supreme Court....The severity of irregularities in competition procedures*** *for the appointment of judges of ordinary and military courts and judges of the Supreme Court, since the normative changes implemented in 2017, has varied;* ***however, it was definitely more severe in the case of appointments for judicial positions in the Supreme Court […]***
> *[…]*
> *60. The question of preventive or subsequent guarantees that a case will be heard and a judgment issued by an independent and impartial court is not a new question in the light of civil and criminal procedural regulations applied by common courts, military courts, and the Supreme Court. As has been mentioned,* ***many instruments provide guarantees that a judgment will be issued by an independent and impartial court: recusal of a judge, regulations concerning the allocation of cases, the option of changing court in order to ensure objective conditions that the court will be perceived as impartial and independent, conditional and unconditional grounds for annulment of a judgment, invalidity of proceedings, annulment of a judgment ex officio as manifestly unfair beyond the scope of an appeal, reopening proceedings.*** *Such regulations must be interpreted in such a way that ensures to the best extent possible the fulfilment of the requirements under Article 45(1) of the Constitution of the Republic of Poland, Article 6(1) ECHR and in particular Article 47 of the Charter within the meaning provided in the case-law of the Court of Justice of the European Union, in particular the judgment of 19 November 2019 in cases C-585/18, C-624/18 and C625/18…."*

20. Systemic reforms of the functioning of the judiciary in Poland, in line with international human rights and rule of law standards, caselaw of international courts and tribunals, as well as the previous recommendations of ODIHR, and clear guidance regarding the effects of decisions issued by defectively appointed judges are needed in order to avoid the perpetuation of the issuance by Polish courts of judgments whose legal effects could later be called into question.

IV. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

21. As underlined in previous ODIHR opinions on judicial reform in Poland in 2017-2024, while every state has the right to reform its judicial system, such reforms should always comply with the country's constitutional requirements, adhere to the rule of law principles, be compliant with international law and human rights standards, as well as OSCE human dimension commitments. These underlying principles should guide the legislative choices to be made by the Polish legislators to execute the judgments against Poland concerning judicial independence, including by addressing the status of decisions adopted with the participation of judges appointed in a deficient manner. ODIHR acknowledges the complexity and scale of the reform required to address the systemic deficiencies of the judicial system in Poland as identified by the ECtHR, the CJEU, international organizations, as well as national observers. At the same time, it is important that the chosen modalities for reform are duly justified in light of international human rights and rule of law standards, and that the legal drafters

do not lightly invoke the existence of exceptional circumstances to resort to extraordinary measures. This would otherwise run the risk of setting a precedent whereby a changing political majority, which did not approve the reform, would be tempted to proceed the same way.

22. The Note deals with the effects of decisions of defectively appointed judges, which raise a number of interrelated questions about the individual right to a fair trial by an independent and impartial tribunal established by law, and the requirements of the rule of law, in particular as concern legal certainty, access to justice and the separation of powers, as well as the efficiency of the justice system and good administration of justice in general.

1. Right to a Fair Trial by an Independent and Impartial Tribunal Established by Law

23. The rule of law is an inherent element of democracy and is fundamental to a system of functioning and effective checks and balances between branches of state power.[24] The independence of the judiciary constitutes a fundamental principle and an essential element of any democratic state based on the rule of law.[25] The requirement that courts be independent forms part of the essence of every person's right to a fair trial, i.e., to a fair and public hearing by a competent, independent and impartial tribunal established by law and by an accountable judiciary. The principle of judicial independence is also crucial to upholding other international human rights standards.[26] This independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced by the executive or legislative branches or other external sources.

24. The independence of the judiciary is also essential to engendering public trust in and the credibility of the justice system in general, so that everyone is seen as equal before the law and treated equally, and that no one is above the law. Litigants in both criminal and civil matters have the right to a fair hearing before an "independent and impartial tribunal" as guaranteed by Article 14 of the International Covenant on Civil and

24 The "rule of law" has been defined at the U.N. level as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency", see "The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General" (S/2004/616, 23 August 2004), para. 6. See also UN Human Rights Council, Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, A/HRC/29/L.11, 30 June 2015, which stresses "*the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards".* At the OSCE level, OSCE participating States have affirmed that *"the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression*"; see CSCE/OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, para. 2. See also Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, Part II, Sections B, D and E, as endorsed by the Parliamentary Assembly of the Council of Europe (PACE) on 11 October 2017 (see *PACE Resolution 2187(2017)*).

25 See UN Human Rights Council, Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, A/HRC/29/L.11, 30 June 2015, which stresses "*the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards".* As stated in the OSCE Copenhagen Document 1990, *"the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression*" (para. 2).

26 See e.g., *OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems*, 6 December 2005.

Political Rights (hereinafter "the ICCPR")[27] and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[28] (hereinafter "the ECHR"). The European Court of Human Rights (ECtHR) in its *Ástráðsson* case developed a test to determine whether defects in judicial appointment procedure constitute violation of the right to a "tribunal established by law" based on three cumulative criteria: (1) there was a manifest breach of the domestic law; (2) the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges; and (3) the allegations regarding the right to a "tribunal established by law" were not effectively reviewed and remedied by the domestic courts.[29]

25. As a Member State of the European Union (EU), Poland is also bound by EU treaties and is obliged to respect the common values upon which the EU is based, including the rule of law, as enshrined in Article 2 of the Treaty on European Union (TEU).[30] Article 47 of the *EU Charter of Fundamental Rights*, which is binding on Poland, reflects the ECHR's fair trial requirements pertaining to "*an independent and impartial tribunal previously established by law*". In that respect, the Court of Justice of the European Union (CJEU) has held that *"[the] guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it".*[31] Moreover, pursuant to Article 19(1) sub-para. 2, EU Member States are to provide remedies sufficient to ensure effective legal protection for individuals in the fields covered by EU law.

26. The CJEU, in the *Simpson* ruling,[32] also explicitly confirmed that the right to an independent court established by law also covers the process of appointing judges. It developed a similar assessment test as the ECtHR, namely relying on the nature and gravity of the irregularity and whether it creates a (real) risk of undue influence of other State authorities on the appointment. In the joined cases of *AK v. Krajowa Rada Sądownictwa and CP, DP v. Sąd Najwyższy,* the CJEU underlined that the determination of whether a court is independent is based upon the objective circumstances in which the court is formed, the way and circumstances in which its members are appointed, and the features of the court that could give rise to "*legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law*".[33] The CJEU in the case of *W.Ż.* also held that "*an irregularity committed during the appointment of judges within the judicial system concerned*

27 UN International Covenant on Civil and Political Rights (hereinafter "ICCPR"), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICCPR on 18 March 1977. See also UN Human Rights Committee, *General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, which provides guiding interpretation of Article 1 of the ICCPR.

28 The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), signed on 4 November 1950, entered into force on 3 September 1953. The Republic of Poland ratified the ECHR on 19 January 1993.

29 ECtHR, Ástráðsson v. Iceland, application no. 26374/18, 1 December 2020, paras. 243-252.

30 See the consolidated versions of the Treaty on European Union, OJ C 326, 26 October 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>. Article 2 of the Treaty on European Union states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." See also Court of Justice of the European Union (CJEU), *European Commission v. Republic of Poland*, C-619/18, 24 June 2019, para. 42.

31 See e.g., CJEU, *H. & D. v Refugee Applications Commissioner*, C-175/11, 31 January 2013, para. 97.

32 CJEU, *Simpson v. Council* [GC], C-542/18, 26 March 2020, para. 75.

33 CJEU, *A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd NajwyższyA. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy* [GC], C-585/18, C-624/18 and C-625/18, 19 November 2019.

entails an infringement of the requirement that a tribunal be established by law particularly 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 when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system".[34] The appointment of judges in flagrant breach of domestic law, as a result of undue discretion exerted by the executive, if without effective review and remedy by domestic courts, may constitute violation of the right to a tribunal established by law.[35] Recent jurisprudence of the ECtHR and the CJEU provides further significant and more detailed guidance with respect to defects in judicial appointment procedures, their impact on the right to a fair trial by an independent and impartial tribunal established by law, and the consequences flowing from decisions made by defectively appointed judges. Key principles will be drawn from this jurisprudence in this Note.

27. With respect to the judicial reforms in Poland since 2017 and their impact on judicial independence more generally, ODIHR's Opinions of March, May, August and November 2017, January 2020, January 2023 and April 2024[36] are of relevance as are the Venice Commission's Opinions,[37] in relation to the proposed amendments to the 2011 Act on the National Council of the Judiciary, to the Act on the Supreme Court, and to the Act on the Organization of Common Courts and some other laws.

2. PRINCIPLE OF LEGAL CERTAINTY

23. Legal certainty is one of the fundamental rule of law principles, and requires, among others, that where courts have finally determined an issue, their ruling should not be called into question. This is the principle of *res judicata*.[38] This means that final judgments must be respected, unless there are cogent reasons for revising them.[39] The ECtHR also emphasized that *"[t]he reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law*".[40]

24. In principle, in an efficient judicial system, errors and shortcomings in court decisions, including those allegedly affecting the rule of law and 'social justice', should be addressed through ordinary appeal and/or cassation proceedings before the judgment becomes final, thus avoiding the subsequent risk of frustrating the parties' right to rely

34 CJEU Grand Chamber, W.Ż., C-487/19, preliminary ruling request by the Supreme Court (Civil Chamber) of Poland (regarding the Chamber of Extraordinary Control and Public Affairs of the Supreme Court), 6 October 2021, para. 130. See also CJEU, *Simpson v. Council* [GC], C-542/18, 26 March 2020,, para. 75.

35 See ECtHR, *Ástráðsson v. Iceland [GC]*, no. 26374/18, 1 December 2020, paras. 243-252, for the three part threshold test for determining when flaws in the procedure of appointment of judges rise to the level of violation of a litigant's right to have his or her case heard before a tribunal established by law.

36 See the list of ODIHR opinions on judicial reform in Poland in *op. cit.* footnote 1.

37 Available at: <Venice Commission :: Council of Europe (coe.int)>.

38 See e.g., ECtHR, *Brumărescu v. Romania*, no. 28342/95, 28 October 1999, para. 61; and *Ryabykh v. Russia*, no. 52854/99, 24 July 2003, paras. 51-52. See also e.g., Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, Part II, Sections B, D and E, as endorsed by the Parliamentary Assembly of the Council of Europe (PACE) on 11 October 2017 (see *PACE Resolution 2187(2017)*), pages 25-27.

39 See Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, para. 63.

40 ECtHR, Stere and Others v. Romania, no. 25632/02, 23 February 2006, para. 53. See also *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 222, where the Court underlined that respect for the principle of *res judicata* "*by safeguarding the finality of judgments and the rights of the parties to the domestic proceedings – including any persons involved as victims – serves to ensure the stability of the judicial system and contributes to public confidence in the courts*".

on binding judicial decisions.[41] Otherwise, "extraordinary reviews" (or equivalent procedures), where they exist, or other procedure or mechanism for re-examination or re-opening of cases, should only be lodged to correct fundamental judicial errors and miscarriages of justice, in other words, when made necessary by circumstances of a substantial and compelling character, but not to carry out a fresh examination of a case, or some form of "disguised" appeal.[42]

25. The principle of legal certainly should be weighed in when considering the effects of any judgments by judges whose appointments were defective, or issued by certain panels in which these judges took part

26. When addressing the consequences of a judge being appointed in a manner that was defective, in *Ástráðsson v. Iceland*, the ECtHR observed that several interrelated and often complementary equally important rule of law principles, including the principle of legal certainty and the right to "a tribunal established by law", need to be balanced, even where they may in some circumstances come into competition.[43] The Court further underlined, however, that the principles of legal certainty and *res judicata* are not absolute.[44] The ECtHR concluded that "…*upholding those principles at all costs, and at the expense of the requirements of 'a tribunal established by law', may in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary. As in all cases where the fundamental principles of the Convention come into conflict, a balance must therefore be struck in such instances to determine* ***whether there is a pressing need – of a substantial and compelling character – justifying a departure from the principle of legal certainty and the force of res judicata*** *[…], as relevant, in the particular circumstances of a case*",[45] such as to correct "*fundamental defects or a miscarriage of justice*".[46] Situations in which a case was incomplete or one-sided or where the proceedings led to an erroneous outcome, cannot of and by itself, "…*in the absence of jurisdictional errors or serious breaches of court procedure, abuses of power, manifest errors in the application of substantive law or any other weighty reasons stemming from the interests of justice, indicate the presence of a fundamental defect in the previous proceedings*".[47]

27. The CJEU adopts a similar approach and has held that to ensure the stability of the law and legal relations and sound administration of justice, final decisions should not in principle be reversed.[48] The CJEU further underlined that "*in the absence of EU legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness*".[49] The CJEU also specifically recognized a decision adopted by defectively appointed judges, in that case the Disciplinary Chamber of the Supreme Court of Poland, to be ineffective, on the ground that it was contrary to the second subparagraph of Article 19(1) TEU and that an applicant must be allowed to

41 See Committee of Ministers of the Council of Europe, *Resolution on the Execution of the Judgments of the European Court of Human Rights in the Ryabykh Group (113 cases) against Russian Federation*, 10 March 2017, Appendix 2, Part III (A). See also ECtHR, *Nelyubin v. Russia*, no. 14502/04, 2 November 2006, para. 28, where it is specifically noted that "supervisory reviews" (or equivalent procedures) should in principle not be possible if a defect could have been rectified in appeals proceedings.

42 See e.g., ECtHR, *Ryabykh v. Russia*, no. 52854/99, 24 July 2003, paras. 51-52.

43 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 237.

44 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 238.

45 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 240.

46 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, paras. 238 and 240; and *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 224.

47 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 225.

48 See CJEU, *Dragoș Constantin Târșia v. Statul român, Serviciul public comunitar regim permise de conducere și înmatriculare a autovehiculelor* [GC], case no. C-69/14, 6 October2015, para. 28; CJEU, *XC and Others* [GC], case no. C-234/17, 24 October 2018, para. 52; CJEU, *Oana Mădălina Călin v Direcția Regională a Finanțelor Publice Ploiești – Administrația Județeană a Finanțelor Publice Dâmbovița and Others*, case no. C-676/17, 11 September 2019, para. 26.

49 CJEU, *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, C-213/13, 10 July 2014, para. 54.

invoke such ineffectiveness before other national authorities or jurisdictions.[50] The Court further acknowledged the possibility of declaring "null and void" a decision of a judge "*if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU.*"[51]

28. At the same time, the CJEU also recognized that "*if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of res judicata in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue in the main proceedings is brought back into line with the EU legislation*".[52] As also stated by the CJEU in its caselaw, "*the principle of res judicata does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance*", since the protection of human rights of individuals would be weakened if "*individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by […] a decision of a court of a Member State adjudicating at last instance*".[53]

29. In light of the foregoing, when assessing the effects of decisions of judges appointed in a deficient manner, **a balancing test should be carried out between the individual interest in the right to a tribunal established by law and public interest in legal certainty, including of the stability of judgments and respect for the principle of *res judicata*.** The application of such a balancing test implies an individualized approach which adequately takes into account the access to justice needs of all parties and also the rights and interests of third parties.

3. COMPARATIVE PRACTICES ACROSS OSCE PARTICIPATING STATES

30. In the *Ástráðsson* judgment, the ECtHR surveyed the practices of Council of Europe member states with respect to their legal requirements for a 'tribunal established by law'. From this survey it appeared that in states where the requirement of a "tribunal established by law" clearly extends to the rules relating to the appointment of judges, *"…the legal consequences regarding a judgment given by (or with the participation of) a judge who was appointed in breach of the relevant rules vary*".[54] The Court found that in most of these states, it is possible in certain circumstances to request the annulment or quashing of the judgments adopted by such a judge. In other states (for example Austria, Belgium, Georgia, Norway, Sweden), the breach of domestic law must be of a particular gravity in order for the relevant judgment to be annulled or quashed. Further, in certain other states (for example Croatia, France, Italy, the United Kingdom), "*if judicial appointments are quashed or annulled due to the irregularities*

50 CJEU, *W.Ż., AS, Sąd Najwyższy and Others*, cases nos. C-491/20-C-496/20, C-506/20, C-509/20 and C-511/20, Order of 22 December, para. 85.
51 CJEU, W.Ż. [GC], C-487/19, 6 October 2021, para. 161.
52 CJEU, *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, C-213/13, 10 July 2014, para. 62.
53 CJEU, *Gerhard Köbler v. Republik Österreich*, C-224/01, judgment of 30 September 2003, paras. 33 and 40.
54 ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para 152.

in the appointment procedure, it would not necessarily mean that all acts or judgments adopted by the judge in question would be annulled or quashed." Finally, this survey also showed that in almost all CoE member States the requirement of a tribunal established by law *"…extends to the procedure for the appointment of judges, (…) the reopening of proceedings is a possibility, and in some instances an obligation, where a judgment has been annulled or quashed due to an irregularity in the appointment of a judge who participated in its delivery*."[55]

31. In the case of *Moreira Ferreira v. Portugal (no. 2)*, the ECtHR also provides an overview of state practices pertaining to the re-examination or reopening of a criminal case which has been the subject of a final judicial decision following a finding by the ECtHR of a violation of the ECHR, noting that many states have introduced such mechanisms, though with a variety of modalities in terms of competent bodies and admissibility criteria.[56] At the same time, the re-examination or reopening of cases is not the one and only means of implementing ECtHR judgments and the CoE Committee of Ministers' practice shows a variety of practices.[57]

32. Following the *Ástráðsson* judgment, no automatic reopening of all cases decided by the four defectively appointed judges was required. But, when choosing the modalities of implementing the ECtHR judgment, the Icelandic authorities offered the possibility for the parties to similar cases to request a reopening of their case. In this particular situation, Iceland established a new Court on the Reopening of Judicial Proceedings which is not subject to any time limit to decide whether a case should be reopened. The reopening may occur, amongst others, on grounds of the submission of new information which is likely to have had a significant impact on the outcome of the case if it had been available when the case was first tried. This category of 'new information' also covers judgments of international courts, including the ECtHR.

33. The measures adopted by Iceland in the implementation of the *Ástráðsson* judgment illustrates a manner in which a state can deal with unlawful appointments and the rulings made by flawed court benches although acknowledging the different scale of the issue compared to the situation of Poland. These measures include (i) the defectively appointed judges not participating in hearings; (ii) the carrying out of new nomination procedures to fill judicial positions left by the defective appointed judges; (iii) the setting up of the Court on the Reopening of Judicial Proceedings to decide on the reopening of proceedings for similar cases at the request of parties to a case.[58]

34. In light of the foregoing and mechanisms already available in Poland, the decision-makers **may opt for a variety of combination of policy tools and legislative solutions to address the consequences and impact of the decisions taken by defectively appointed judges.** At the same time, given the sheer number of judgments that are potentially affected, it is fundamental that these solutions **do not lead to the dysfunction or overburdening of the judiciary** and bring a halt to or considerably delay the ongoing legal procedures, access to courts or otherwise be detrimental to the delivery of justice whilst implementing any measures that are opted for. These measures addressing the effects of decisions of defectively appointed judges also cannot be seen in isolation from other ongoing reforms in the field of the judiciary, including the reform of the NCJ, for which legislative solutions have been initiated

55 ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, paras. 152-153.
56 ECtHR, *Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, 11 July 2017, paras. 34-39. See also CoE, *Thematic Factsheet on the Reopening of Domestic Judicial Proceedings following the European Court's Judgments* (October 2022).
57 Council of Europe/Council of Ministers, Steering Committee for Human rights, Overview of the exchange of views held at the 8th meeting of DH-GDR on the provision in the domestic legal order for the re-examination or reopening of cases following judgments of the Court, 12 February 2016, para. 5.
58 P. Filipek, Defective Judicial Appointments and their Rectification under European Standards, 2023, p. 466. See also: CoE Search - CM with communications from Iceland to the Committee of Ministers.

and are at different stages of the lawmaking process and should themselves respect the principle of legal certainty.

V. LEGAL ANALYSIS AND KEY PRINCIPLES

4. PRELIMINARY CONSIDERATIONS

35. Generally, in the context of the judgments of international courts finding violations of the right to a "tribunal established by law", it is important to establish whether the grounds for violation were of a systemic or of individual nature. For instance, in the case of Poland, from the CJEU and ECtHR judgments concerning judicial reforms in Poland and their effects, it can be discerned that the irregularities in the appointment process of certain judges, or panels/chambers, involving the post-2017 NCJ, amongst others, led to the finding of a violation of the right to a "tribunal established by law".[59] The question then arises whether these judgments of international courts and respective conclusions can be considered to extend beyond those specific defectively appointed judges and the respective categories/judicial level they belong to and in effect touch on *all* judges that were appointed with the involvement of the NCJ post-2017. In *Wałęsa v. Poland,*[60] with reference to the systemic problems pertaining to the judiciary in Poland, the ECtHR specifically endorsed "*the indications as to the general measures given to the respondent State by the Committee of Ministers […] whereby it exhorted Poland to, among other things, rapidly elaborate measures to […] (ii) address the* ***status of all judges*** *appointed in the deficient procedure involving the NCJ as constituted under the 2017 Amending Act* ***and of decisions adopted with their participation***",[61] without distinguishing the categories of judges, levels of jurisdiction or their decisions.

36. Therefore, even where the ECtHR has not ruled on the issue of defective appointment of a particular judge, due to the systemic issues stemming from judicial appointment processes involving the NCJ from March 2018 onwards,[62] the remedying of for the defects should also be approached in a systemic manner. At the same time, the right to a "tribunal established by law" should not be construed in an overly expansive manner, whereby any and all irregularities in a judicial appointment procedure would be liable to compromise that right. A degree of restraint should instead be exercised when dealing with this matter.[63]

37. In its caselaw, the ECtHR acknowledged that "*the lack of independence of the reformed NCJ generally results in defects undermining the independence of and impartiality of a court, the effects thereof vary depending on the type of court and its position within the judiciary*".[64] Hence, **this would suggest that there may or should be differentiation in the legal effects of decisions taken by judges depending on**

59 Applying the Ástráðsson test the ECtHR concluded in Wałęsa that the flawed NCJ was a body no longer offering sufficient guarantees of independence from the legislative or executive powers; that its appointment procedure disclosing undue influence of the legislative and executive powers amounted to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of the judges so appointed; and that there was an absence of procedure before domestic courts to challenge the defects in the process of appointing the judges.

60 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

61 The decision of the Committee of Ministers of the Council of Europe adopted at its 1468th meeting can be consulted here: <https://www.consilium.europa.eu/pl/meetings/>. Another consequence was the NCJ being suspended from membership in the European Network of Council of the Judiciary (ENCJ) on 17 January 2018 in light of its lack of actual and perceived independence.

62 See e.g., ECtHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 318.

63 See ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 236.

64 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324 (a).

their bench and level. In *Dolińska-Ficek and Ozimek* and *Advance Pharma* cases, it seems that the ECtHR observes that **the rule of law issues went beyond the Supreme Court and may also affect the legality of the appointment of other judges in Poland**[65] and as a consequence the legal effects their respective decisions may have. **Thus, some differentiation between the types and levels of courts seems necessary, distinguishing between the rulings by higher courts, especially the Supreme Court, and the effects of decisions by lower courts.**

38. Whatever the policy and/or legislative options chosen, they should be based on a proper assessment of their potential impact in terms of financial and human resources required for their implementation and human rights impact, especially from the perspective of right to access to a court, to be tried within a reasonable time and good administration of justice in general. **A rule of law-based approach would suggest that the policy and legislative options chosen should to the extent possible rely on existing mechanisms already provided by the Polish legislation**.

39. Finally, this Note is concerned with **decisions and judgments which are already *res judicata***. There are several ways in which the finality of judgments may be reached. These include when a case is appealed to the highest domestic court and it disposes of all the issues (sometimes the domestic court will dispose only of some issues and remit the case to a lower court for further consideration), where the time for lodging an appeal expires without an appeal being brought, or where an application is made to lodge the appeal but the court responsible for determining the application refuses permission to appeal (in some circumstances, there is a right to appeal without permission being required). The question is whether the judicial system, in its entirety, was capable to remedy the deficiency or alleged violation of the right to a "tribunal established by law". For example, where a decision taken by a defectively appointed judge or court was appealed and where the higher court considering appeal was saved from same type of deficiencies, the upper court may be considered to have offered an effective remedy, even if the decisions by the defectively appointed judges were upheld or their status was not challenged or addressed. What matters is whether the final court of appeal, constituting an independent and impartial tribunal 'established by law', had an opportunity to review the decision of a defectively appointed judge (or court), as well as whether it had full jurisdiction and could examine all questions of fact and law relevant to the dispute, thereby making reparation for the initial violation of Article 6 (1) of the ECHR.[66] Hence, there may be circumstances where a remedy may still be required. For example, if the court of first instance is the only court to verify facts and gather evidence, and appeal has a limited scope, a party to a case could argue that a judgment based on facts established by a court consisting of a defectively appointed judge cannot serve as the basis of a lawful judgment by a higher court.

5. Overview of Potential Effects of Decisions Rendered by Defectively Appointed Judges and Possible Remedies and Policy Options

40. Decisions rendered by defectively appointed judges may potentially have different effects. Such effects may include considering or declaring the decision *"null and void" ex tunc* – from the outset, meaning that the decision and its legal effects are considered to have never existed, when the irregularity of the appointment procedure is

65 ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, no. 49868/19 and 57511/19, 8 November 2021, para 368; ECtHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 364-365.

66 See e.g., ECtHR, *De Haan v. The Netherlands*, 26 August 1997, para. 54; and *Pişkin v. Turkey*, no. 33399/18, 15 December 2020, paras. 137-151. See also ECtHR, *Gradinger v. Austria*, no. 15963/90, 23 October 1995, para. 44.

fundamental and undermines the integrity of the outcome of that procedure, giving rise to reasonable or serious doubt as to the independence and impartiality of the judge concerned in the case in which their judgment or decision is being challenged.[67] A decision may also be considered *ineffective*, when rendered by a body that cannot be regarded as independent and impartial and established by law, which an applicant must be able to invoke before a court or other national bodies and that precludes such courts/bodies from having to recognize, enforce or give effect to this ruling.[68] At the same time, such a decision would continue to exist in the legal order but would not have legal effects and in order to remove it from the legal order, it may be necessary to initiate another available national judicial procedure leading to its review or annulment, if available.

41. The effects of decisions may be determined in variety of ways, including *ex lege* or by decisions of a court, or other bodies or institutions, according to a procedures and/or mechanisms established by law, such as through extraordinary review (by a specially established tribunal or a chamber within the highest court) or re-examination / re-opening[69] of a case by ordinary courts, generally on the request of a party concerned. The re-examination or re-opening of a case is not normally granted automatically, and is generally subject to pre-conditions and the application should generally satisfy admissibility criteria, while certain safeguards should also be in place to avoid abuse of such procedures / mechanisms (see para. 41 and Sub-Section 7 below). Only under exceptional circumstances could a final judgment later be reviewed or re-opened when a pressing need of a substantial and compelling character justifies a departure from the principle of legal certainty and the force of *res judicata*, such as when implementing decisions of the international courts, correcting fundamental defects or a miscarriages of justice (see Sub-Section 7.1 below).

42. Generally, re-examination or re-opening may be the most effective, if not the only, means of achieving *restitutio in integrum*, especially in the field of criminal law, when implementing decisions of the international courts. However, states are under no obligation to re-open all cases decided by deficiently appointed judges, and if they do so, certain limitations to *re-examination* should be applied, for instance with regard to the rights of *bona fide* third parties in civil cases, the respect for the principle of *no reformatio in peius* in criminal cases[70] and the passage of time (see Sub-Section V.7 below). The nature, scope and specific features of the relevant procedure/mechanism in the legal system concerned may vary considerably.[71] When the said procedure or mechanism leads to a full reconsideration of the case, thus being similar in nature and scope to ordinary appeal proceedings, Article 6 of the ECHR applies as usual to such proceedings.[72] When re-examination / re-opening is not possible and when no other

67 CJEU, W.Ż. [GC], C-487/19, 6 October 2021, para. 161, where the Court specifically acknowledged the possibility of declaring "null and void" a decision of a judge "if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU."

68 CJEU, *Euro Box Promotion*, joined cases C-357, 379, 547, 811 and 840/19, judgment of 21 December 2021, para. 230. See also CJEU, *W.Ż., AS, Sąd Najwyższy and Others*, cases nos. C-491/20-C-496/20, C-506/20, C-509/20 and C-511/20, Order of 22 December, paras. 80–85.

69 For the purpose of this Note, ODIHR seeks to use the terminology of the CoE *Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights*, where "re-examination" is used as the generic term, while the term "re-opening" refers to the re-opening of court proceedings, as a specific means of re-examination, which may take other forms than re-opening, such as administrative re-examination of a case (e.g., granting a residence permit previously refused); see Council of Europe, Committee of Ministers, *Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights*, adopted on 19 January 2000, para. 5 of the Explanatory Memorandum.

70 i.e., that a person should not be placed in a worse position as a result of the appeal or re-opening.

71 See e.g., ECtHR, *Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, 11 July 2017, para. 60.

72 See e.g., ECtHR, *Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, 11 July 2017, para. 60.

remedy is available and an individual may qualify as a victim and demonstrates a direct causal link between the violation and the loss or damage sustained by the individual, *pecuniary compensation* should be possible.

43. Other alternatives to extraordinary review or re-examination / re-opening may also be envisaged to remedy or limit the effects of the decisions of defectively appointed judges, depending on the criminal, civil or administrative nature of the cases, including amnesty, grace, rehabilitation, un-conditional release, restoration of rights, abstention from execution of certain decisions, liability for damages or the correction of information in the public records such as removal from the judicial record, public excuse or pardon.

44. Another option that may be potentially applied in the present circumstances, would be the automatic (*ex lege*) quashing of (all, or certain categories) decisions taken by defectively appointed judges. Although this measure, depending on the nature and its extent, may potentially fall within the State's margin of appreciation, it carries a substantial risk of the legislature excessively intervening in or impacting specific cases, thereby harming the principle of separation of powers and judicial independence, and ultimately the rule of law, and thus may be considered to exceed the margin of appreciation. As a matter of principle, the legislative power should show restraints in the exercise of its constitutional functions and duly respect the principle of separation of powers and judicial independence when legislating this matter.[73] Such an approach may also set a precedent that may be applied arbitrarily with future changes of governments whereas the pursuance of the reforms should seek to increase public trust in the judiciary and rule of law compliance.

6. Margin of Appreciation and Procedural Autonomy of States

45. In general, it is "*primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention*".[74] Article 41 of the ECHR provides that *"[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party*."

46. A key principle in the ECtHR's caselaw is the margin of appreciation that States have when designing their legal system with respect to certain aspects of their human rights legal framework. In the *Ástráðsson* judgment, the ECtHR emphasized that states should be afforded a certain margin of appreciation to address the consequences of the violation of Article 6 of the ECHR, since the national authorities are in principle better placed to assess how the interests of justice and the rule of law – with all its components that sometimes stand in tension with each other – would be best served in a particular situation. [75]

47. In various judgments against Poland, the ECtHR noted that it is up to the authorities to enact the necessary measures to address the situation that has led to the findings of violations in respect of Article 6 of the ECHR. In *Wałęsa*, the ECtHR held that it is not up to the Court "…*to elaborate further on what would be the most appropriate way to put an end to the systemic situation […]; under Article 46 the State remains free to choose the means by which it will discharge its obligations arising from the execution*

73 See e.g., CCJE, *Opinion no. 18 (2015) on "The position of the judiciary and its relation with the other powers of state in a modern democracy"*, paras. 39 and 43.
74 See e.g., ECtHR, *Assanidze v. Georgia* [GC], no. 71503/01, 08 April 2004, para. 202.
75 See ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 243.

of the court's judgments".[76] It follows, that the State is obliged to take general and/or, if appropriate, individual measures to put an end to the violation found by the Court and to redress so far as possible the effects "…*provided that such means are compatible with the conclusions set out in the Court's judgment*."[77]

48. Similarly, as noted above, the CJEU also underlined that the rules implementing and protecting the principle of *res judicata* are a matter to be decided by the national legal order, in accordance with the principle of procedural autonomy of the EU Member States, but must be consistent with the principles of equivalence and effectiveness.[78] At the same time, the CJEU also recognized that "*if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of res judicata in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue in the main proceedings is brought back into line with the EU legislation*".[79]

49. As noted above, to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the expiry of the time limits provided for in that connection can no longer be called into question.[80] In this respect, the right to fair trial by an independent and impartial tribunal established by law does not entail a right to re-opening of cases on the basis of a finding by the ECtHR of a violation of the ECHR.[81] Even where it concerns pilot judgments, no obligation exists to re-open all domestic cases that are *res judicata*. Similarly, when a certain structural deficiency leads to a great number of violations of the ECHR, it is, in principle, left to the State to decide whether re-opening is realistic.[82] Many states allow for requests, on the basis of a finding of such an ECHR violation, for the re-examination or re-opening of a criminal case which has been the subject of a final judicial decision as a means to ensure the principle of *restitutio in integrum* ("restoration to the original condition").[83]

50. In *Gurov v. Moldova*, the ECtHR found a breach of Article 6 of the ECHR owing to the fact the tribunal hearing the applicant's cases was not established by law as the term of office of one of the judges had expired. In this instance, the ECtHR noted that the most appropriate form of relief would be to ensure that the applicant was granted a re-hearing and this was based upon the fact that a re-hearing was possible under Moldovan law; it therefore declined to issue damages.[84] At the same time, this case can be distinguished from the issue in Poland. Firstly, this case was isolated and therefore granting a re-trial would not undermine the administration of justice or place the justice system under undue strain. Secondly, the purpose of the Court's reasoning was to

76 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, paras. 329 and 332.
77 ECtHR, *Broniowski v. Poland*, no. 31443/96, 22 June 2004, para. 196.
78 CJEU, *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, C-213/13, 10 July 2014, para. 54.
79 CJEU, *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, C-213/13, 10 July 2014, para. 62.
80 See CJEU, *Dragoş Constantin Târşia v. Statul român, Serviciul public comunitar regim permise de conducere şi înmatriculare a autovehiculelorDragoş Constantin Târşia v. Statul român, Serviciul public comunitar regim permise de conducere şi înmatriculare a autovehiculelor* [GC], C-69/14, 6 October2015, para. 28; CJEU, *XC and Others* [GC], C-234/17, 24 October 2018, para. 52; CJEU, *Oana Mădălina Călin v Direcţia Regională a Finanţelor Publice Ploieşti – Administraţia Judeţeană a Finanţelor Publice Dâmboviţa and Others*, C-676/17, 11 September 2019, para. 26.
81 In the Ástráðsson case, the ECtHR held that the finding of a violation of the right to tribunal established by law on the basis of flaws in judicial appointment procedure does not always impose the obligation to reopen all similar cases that have become res judicata. See ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 314.
82 Council of Europe, Department For The Execution of Judgments of the ECtHR, *Thematic Factsheet on the Reopening of Domestic Judicial Proceedings following the European Court's Judgments* (October 2022), p. 3.
83 See ECtHR, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, 11 July 2017, para. 34. See also Council of Europe, Department For The Execution of Judgments of the ECtHR, *Thematic Factsheet on the Reopening of Domestic Judicial Proceedings following the European Court's Judgments* (October 2022).
84 ECtHR, *Gurov v. Moldova*, no. 36455/02, 11 July 2006, para. 44.

explain the ECtHR's refusal of an award of damages in this particular instance, rather than to set down a general principle requiring a retrial in all instances where a violation of Article 6 of the ECHR has occurred.

51. The CJEU emphasized that "*the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness*".[85] The EU law does not require to call in question the administrative or judicial decisions taken in violation of EU law although if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to re-open or reverse a judicial decision having the authority of *res judicata* in order to render the situation arising from that decision compatible with EU law, this option should be used.

52. **While there is no automatic obligation to re-open all cases, there may be circumstances where, to achieve *restitutio in integrum*, re-examination of the final judgment, including re-opening of proceedings, is the most appropriate option** (see Sub-Section V.7.1. below). **The legislation should therefore ensure the possibility of re-examination of case in exceptional circumstances as clarified below to remedy the effect of decisions taken by defectively appointed judges and if it is not possible, other measures may be warranted for redress** (see Sub-Section V.7.2).

7. Criteria and Guiding Principles for the Balancing Test between the Right to a Fair Trial, the Principle of Legal Certainty and the Public Interest in the Good Administration of Justice and Possible Redress

53. There are several general guiding principles that follow from the caselaw of the CJEU and the ECtHR that may be considered when determining the status of decisions taken by certain judges that were appointed with the involvement of the NCJ composed according to the 2017 NCJ Amending Act.

7.1. Re-examining or Re-opening in Case of Pressing Need of a Substantial and Compelling Character

54. As mentioned above, according to the ECtHR caselaw, a violation of Article 6 of the ECHR does not automatically require the re-examination or re-opening of the domestic criminal proceedings. At the same time, the re-opening of domestic proceedings, if requested, "*is in principle an appropriate way, and often the most appropriate, of putting an end to the violation and affording redress for its effects*".[86] Especially, the caselaw of the ECtHR makes it clear that a departure from the legal certainty and *res judicata* principles is justified when there is a **pressing need necessitated by circumstances of a substantial and compelling nature, such as the correction of fundamental defects of the proceedings before the lower courts, such as abuse of process, manifest errors in the application of substantive law, serious breaches of court procedure leading to a miscarriage or denial of justice**.[87] The CJEU has acknowledged in certain cases that while in principle an EU Member State is not, under

85 CJEU, *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, C-213/13, 10 July 2014, para. 54.
86 See ECtHR, *Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, 11 July 2017, paras. 50 and 52.
87 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, paras. 238 and 240; and *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, paras. 224 and 250. See also ECtHR, *Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, 11 July 2017, para. 97, referring to "the result of a manifest factual or legal error leading to a 'denial of justice'."

EU law, obliged to call in question judicial decisions that have become final under the applicable national rules, this would be otherwise in exceptional circumstances, where there have been **administrative measures or judicial decisions, in particular of a coercive nature, which would compromise fundamental rights**.[88]

55. The Council of Europe Committee of Minister's *Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgements of the ECtHR*, underlines that **in exceptional circumstances, the re-examination of a case or the re-opening of proceedings had proved the most efficient, if not the only, means of achieving *restitutio in integrum*.**[89] It therefore invited states to introduce **mechanisms for re-examining cases** following the finding by the ECtHR of a violation of the ECHR, especially where: *"(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgement of the Court leads to the conclusion that "(a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."*

56. With respect to the latter, the Explanatory Memorandum to the Recommendation No. R (2000) 2 provides a number of examples of the kind of violations in which re-examination of the case or re-opening will be of particular importance, including "*criminal convictions violating Article 10 [of the ECHR] because the statements characterised as criminal by the national authorities constitute legitimate exercise of the injured party's freedom of expression or violating Article 9 because the behaviour characterised as criminal is a legitimate exercise of freedom of religion. Examples of situations aimed at under item (b) are where the injured party did not have the time and facilities to prepare his or her defence in criminal proceedings, where the conviction was based on statements extracted under torture or on material which the injured party had no possibility of verifying, or where in civil proceedings the parties were not treated with due respect for the principle of equality of arms.*"[90] Any such shortcomings must, as mentioned in the text of the Recommendation itself, be of such a gravity that serious doubt is cast on the outcome of the domestic proceedings. Beyond the examples listed in the Explanatory Memorandum, in the Polish context, there may be other examples of criminal convictions in case of legitimate exercise of fundamental freedoms that may justify re-opening of the cases.

57. The re-opening of cases may also be required as the only appropriate solution in case of decisions that are shown to be *"'grossly arbitrary' or as entailing a 'denial of justice'"*, resulting in raising reasonable doubts regarding the impartiality of the judges dealing with the case.[91] **Any patterns of systemic violations of international human rights standards, including discrimination against certain persons or groups, or abuse of power by the state, would justify re-examination or re-opening of proceedings**.

88 See e.g., CJEU, *Skoma-Lux sro v. Celní ředitelství Olomouc* [GC], case no. C-161/06, 11 December 2007, paras. 71-72.

89 Council of Europe, Committee of Ministers, *Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights*, adopted on 19 January 2000. See also Council of Europe, Department For The Execution of Judgments of the ECtHR, *Thematic Factsheet on the Reopening of Domestic Judicial Proceedings following the European Court's Judgments* (October 2022), p. 3.

90 See Explanatory Memorandum to Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights, para. 12.

91 See e.g., ECtHR, *Bochan v. Ukraine* (No. 2) [GC], no. 22251/08, 5 February 2015, para. 64: where the decision could "be construed as being "grossly arbitrary" or as entailing a "denial of justice", […] the applicant's doubts regarding the impartiality of the judges dealing with the case, including the judges of the Supreme Court, had been objectively justified".

58. **Overall, re-opening of cases adjudicated with the involvement of defectively appointed judge can be considered (and justified), specifically in cases when a clear violation of the right to a fair trial by a tribunal established by law and the undermining of judicial independence are evidenced by the caselaw of the ECtHR and CJEU, and where re-examination of the judgment is the only possibility to achieve *restitutio in integrum* in case of pressing need of a substantial and compelling nature, including in case of violation of international human rights standards.** Otherwise, the full effectiveness of international human rights law may be called into question and the protection of human rights of individuals would be weakened if there would be no possibility to re-open such cases and/or obtain reparation when the rights of individuals are affected by a serious infringement of international human rights law. It would not build public confidence in the courts that where unlawfulness occurred, no adequate remedy is provided. Other aspects, such as the passage of time, nature of the case and the impact of re-examination or re-opening on *bona fide* third parties should also be factored into decisions regarding re-opening as explained below.

59. How the reopening of proceedings is to be regulated falls within the margin of appreciation of the State. In the *Wałęsa* case, the ECtHR specified the relevant factors to be taken into account to justify a departure from the principle of *res judicata* and a re-opening of a final case, in particular, (i) the effect of the re-opening and of any subsequent proceedings on the applicant's individual situation, (ii) whether the re-opening resulted from the applicant's individual situation, and whether the re-opening resulted from the applicant's own request; (iii) the grounds on which the domestic authorities overturned the judgment in the applicant's case; (iv) the compliance of the procedure at issue with the requirements of domestic law; (v) the existence and operation of procedural safeguards in the domestic legal system capable of preventing abuse of that procedure by the domestic authorities; (vi) and other pertinent circumstances of the case.[92]

60. In any case, it is fundamental that the legal grounds for re-examination or re-opening and admissibility requirements are clearly specified in the legislation. As to the modalities of the re-examination, it could be carried out before the ordinary court that heard the initial case, by a panel composed differently, or considered under the extraordinary review mechanism by a specially established tribunal or a chamber within the higher court. However, the legislator should be wary of not perpetuating the defects identified with respect to the extraordinary appeal procedure[93] (see Sub-Section 7.6.1 below). It is also fundamental to clearly state in the legislation the effects of re-examination, including whether the challenged judgment will be null and void (non-existent), or ineffective, and whether the case will be remanded to the competent court for retrial or whether there may be circumstances where the court or body in charge of re-examination may simply adopt a new decision.

92 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 226.

93 In particular with respect to "*(i) the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for appeal to the authorities and bodies involved in the procedure; (ii) the possibility of using in practice this exceptional remedy as an "ordinary appeal in disguise" and obtaining through it a fresh examination of the case, including re-determination of facts, with the adjudicating body acting as a tribunal of fact at the third or fourth level of jurisdiction; (iii) the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Prosecutor General and the Commissioner to contest judgments that became final before the entry into force of the 2017 Act on the Supreme Court; (iv) the lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure (e.g. for political reasons, as currently demonstrated by entrusting the Prosecutor General – who is an active politician and at the same time the Minister of Justice wielding considerable authority over the courts – with extensive powers in respect of questioning the finality of judicial decisions by means of an extraordinary appeal)*"; see ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(c).

7.2. Re-examination or Re-opening in Other Cases and Other Remedies

61. The legal drafters should assess whether to grant the possibility of re-examination or re-opening in cases other than where there is a pressing need of a substantial and compelling character, noting that the ECtHR and CJEU do not require re-opening of all cases. As noted above, this Note is concerned with the effects of decisions of defectively appointed judges that are *res judicata* and for which there was no review of questions of fact and law by a higher court constituting an independent and impartial tribunal 'established by law', thereby making reparation for the initial violation of Article 6 (1) of the ECHR. Where the time for lodging an appeal against a decision, taken by a defectively appointed first instance judge, has expired without an appeal being brought, or where an application was made to lodge the appeal but the court responsible for determining the application or to hear the appeal was involving defectively appointed judges, an option may be to grant an extension of time to lodge an appeal or offering a new opportunity to apply for permission to appeal.

62. In this case, the appellate court should itself not involve defectively appointed judges when adjudicating and the appellate and further reviews should allow for the correction of both errors of fact and errors of law (see para. 39 above). Such an option should however be balanced against the interests of good administration of justice since it may potentially imply the re-opening of a large number of judgments, and the overburdening of the judiciary. This risk could be addressed by considering admissibility requirements such as the provision of elements demonstrating that their case may have been decided differently had the judge in question been correctly appointed, or had a different, correctly appointed judge heard their case,[94] though this may prove difficult in practice. Other considerations such as the nature of the case, the impact on the rights of *bona fide* third parties and the passage of time should also be taken into account (see Sub-Sections 7.4 and 7.5). Should such an option be considered, an extension of time for bringing an appeal may be provided for many or all litigants in the aforementioned situations, where the court that originally heard their case, or any intermediate court that heard an appeal, included a defectively appointed judge.

63. When re-opening is not possible or no other remedy is available, another manner of redress consists of providing pecuniary compensation in case of damages,[95] when an individual may qualify as a victim, not simply when an individual may have suffered some form of harm as a result of the state's actions or failure.[96] The status of victim would require the demonstration of a direct causal link between the violation and the loss or damage sustained by individuals.[97] In this regard, there may be a question as to whether the mere fact that a ruling is given by a court, involving a defectively appointed judge, which is then not an independent and impartial tribunal established by law causes in itself harm to an individual in a situation where the substantive effect

94 See e.g., ECtHR, *Findlay v. UK*, no. 22107/93, 25 February 1997, paras. 85 and 88, where the Court underlines, with respect to the allocation of pecuniary and non-pecuniary damages that it was not possible to speculate as to whether the proceedings would have led to a different outcome had they fulfilled the requirements of Article 6 (1) of the ECHR.

95 See ECtHR, *Scozzari and Giunta v. Italy*, nos. 39221/98 and 41963/98, 13 July 2000, paras. 248-250, where the Court held: "the purpose of awarding sums by way of just satisfaction is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied."

96 It is noted that in the context of cases involving Article 6 ECHR the Court has often stated that the finding of the violation in and of itself constitutes just satisfaction.

97 See Article 34 of the ECHR. At the EU level, the CJEU has repeatedly held that individuals who have been harmed have a right to reparation if three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by those individuals; see e.g., CJEU, *Gerhard Köbler v. Republik Österreich*, C-224/01, judgment of 30 September 2003, para. 51; and Tomášová, case no. C-168/15, judgment of 28 July 2016, para. 22. This does not mean that a Member State cannot incur liability under less strict conditions based on national law (see CJEU, *Gerhard Köbler v. Republik Österreich*, C-224/01, judgment of 30 September 2003, para. 57).

of the flawed judicial decision itself is likely to have been the same. In any case, it may be difficult for anybody challenging a decision of a defectively appointed judge to demonstrate that their case may have been decided differently had the judge in question been correctly appointed, or had a different, correctly appointed judge heard their case.[98]

7.3. Addressing the Effects of Judgments of Certain Supreme Court Chambers

64. The effects of decisions issued by defectively appointed judges may vary depending on the type of court and position within the judiciary. In this respect, as regards the legal and practical consequences for final judgments already delivered by formations of defectively appointed judges and the effects of such judgments in the Polish legal order, the ECtHR noted in the case of *Advance Pharma sp. z o.o v. Poland.* that "*….one of the possibilities to be contemplated by the respondent State is to incorporate the necessary general measures the Supreme Court's conclusions regarding the application of its interpretative resolution of 23 January 2020 in respect of the Supreme Court and other courts and the judgments given by the respective court formations*"[99] (see para. … above). In its Resolution, the Supreme Court takes a clear position that where a judge was appointed to the Supreme Court by the NCJ composed according to the 2017 NCJ Amending Act, that a court formation should be considered unduly appointed or unlawful according to applicable legal provisions for all decisions rendered from the date of the Resolution, or irrespective of the date for judgments issued with the participation of judges of the *[now abolished]* Disciplinary Chamber (and then by the newly formed Chamber of Professional Responsibility). Where it concerns panels in ordinary or military courts, the Supreme Court underlined that such a conclusion can only be reached where the deficiency of the appointment process leads, in specific circumstances, to a violation of the guarantees of independence and impartiality.

65. In its Council Implementing Decision (EU) No 9728/22 of 14 June 2022 approving the Assessment of the Recovery and Resilience Plan for Poland (hereinafter "Council Implementing Decision"),[100] Poland is specifically called upon to have the judgments of (in the meantime) abolished Supreme Court's Disciplinary Chamber re-examined by a court meeting the requirements of Article 19 (1) TEU, thereby singling out such decisions by defectively appointed judges.

66. In light of the foregoing, **the legislator should assess whether the existing mechanisms provided by the legal framework with respect to the unlawful composition of a court formation are sufficient to ensure an effective remedy. Especially, with respect to the decisions issued by the Supreme Court's [now abolished] Disciplinary Chamber (and then by the newly formed Chamber of Professional Responsibility) and the Chamber of Extraordinary Review and Public Affairs (CERPA), seeing that the ECtHR unequivocally acknowledged that "*all the judges appointed to two entire chambers of the Supreme Court – the [now abolished] Disciplinary Chamber and the CERPA […] do not meet the***

98 See e.g., ECtHR, *Findlay v. UK*, no. 22107/93, 25 February 1997, paras. 85 and 88, where the Court underlines, with respect to the allocation of pecuniary and non-pecuniary damages that it was not possible to speculate as to whether the proceedings would have led to a different outcome had they fulfilled the requirements of Article 6 (1) of the ECHR.

99 ECtHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 365.

100 See Council Implementing Decision (EU) No 9728/22 of 14 June 2022 approving the assessment of the recovery and resilience plan for Poland and its Annex, indicating among the key milestones, that disciplinary cases shall be examined by an independent and impartial court established by law, which shall not be the Disciplinary Chamber; the need to clarify the scope of disciplinary liability of judges and to specify that the content of judicial decisions is not classified as a disciplinary offence, and more generally strengthening the procedural guarantees and powers of parties in disciplinary proceedings concerning judges; ensuring that judges affected by decisions of the Disciplinary Chamber of the Supreme Court have access to review proceedings of their cases by an independent and impartial tribunal established by law, among other.

requirements of an 'independent and tribunal established by law'",[101] **the status and effects of the judgments of these Chambers could be distinguished and dealt with separately. A distinct, independent mechanism to review if such judgments should have legal effect and the related consequences could be created, but only if such a solution would be compliant with the Polish Constitution, and if it is established that the existing mechanisms would be ineffective or would risk over-burdening the work of the judiciary.**

7.4. Nature of the Case and Impact on the Rights and Interests of Third Parties

67. Another key element that can be discerned from the caselaw of the ECtHR and the CJEU is that the nature of the case may also determine the possible means of addressing any violations of Article 6 of the ECHR, including in case of irregularities during the judicial appointment process. It is therefore permissible for the legislation to distinguish between the types of cases based on the subject matter of the case, especially where questions as to the independence and impartiality of the tribunal hearing the case give rise to fundamental questions as to the legitimacy of the constitutional order as a whole. Whether it is a criminal law[102] or a civil law or administrative law case, there may different ways to find redress for each situation.

68. In the *Moreira Ferreira* case, the ECtHR held that in the criminal-law sphere, the **requirements of legal certainty are not absolute**. Specifically concerning reopening of cases, it held that considerations such as the emergence of new facts, the discovery of a **fundamental defect in the previous proceedings that could affect the outcome of the case – especially to correct judicial errors and miscarriages of justice, or the need to afford redress,** particularly in the context of the execution of the Court's judgments, all militate in favour of the reopening of criminal proceedings.[103]

69. The power to re-open criminal proceedings must be exercised, to the maximum extent possible, by striking a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.[104] At the same time, in the criminal sphere, there may be circumstances where the negative consequences of a violation of the ECHR may not necessarily appear to be very serious but still call for re-opening.[105] It is generally within the margin of appreciation of states to determine who can initiate the re-opening. Any time limit accorded for the possibility to seek re-opening should be reasonable, taking into account the length of the proceeding before the ECtHR (or any other international body) where relevant, or a person seeking re-opening becomes aware of it.[106] Re-opening should not, at the same time, go as far as to imply any risk of deterioration of the applicant's situation (*non reformatio in peius*).[107]

70. Civil proceedings are of particular nature compared to criminal or administrative court proceedings; a departure from the principle of *res iudicata* in such proceedings could affect not only the relations between the parties to the proceedings but also the rights

101 See ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(a).
102 34 countries, including Poland, allow for reopening of domestic criminal proceedings following a judgment of the ECHR. See: att_1669984063.pdf (ajee-journal.com)
103 ECtHR, *Moreira Ferreira v. Portugal (no. 2)Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, 11 July 2017, para. 62.
104 ECtHR, *Nelyubin v. Russia*, no. 14502/04, 2 November 2006, para. 26.
105 See e.g., ECtHR, *Bucur and Toma v. Romania*, no. 40238/02, 8 January 2013, Notes to the decision adopted by the CoE Council of Ministers in December 2016, CM/Notes/1273/H46-21 (in that case, the domestic court found that the applicant had been fully rehabilitated to address the violation, but that this still had not erased all its negative consequences, and decided to reopen the case).
106 See Pilkov Kostiantyn, Reopening Cases Following Judgments Of The European Court Of Human Rights: Room For A European Consensus?, 2022 4(16) Access to Justice in Eastern Europe 7-31, 15 November 2022 with a comparative research on practices in various countries. att_1669984063.pdf (ajee-journal.com)
107 See e.g., ECtHR, *Pfeifer v. Austria*, no. 12556/03, 15 November 2007; and CoE Council of Ministers, Final Resolution CM/ResDH(2018)322.

and legal situation of *bona fide* third parties and the burden of such departure would be shifted to third parties. Thus, in civil proceedings it may be more appropriate to establish adequate compensatory procedures instead. Of note, as mentioned above, some possibilities to seek compensation in case of unlawful final judgments are already secured under the Polish law. In certain countries reopening is for example not possible in civil cases, as it is considered that the damage can be adequately remedied by alternative means, for example, by adequate just satisfaction.

71. With respect to administrative cases, the legislative practices concerning the possibility to seek reopening varies amongst states who are members of the Council of Europe. Whatever remedy is available under national law, it should assure *restitutio in integrum* by way of restoration of violated rights or provides adequate compensation. Around twenty member states of the Council of Europe allow access to the re-opening of civil and administrative proceedings following an individual application or the request of a public authority.[108]

72. In light of the foregoing, **when reconsidering the binding force of a decision of a defectively appointed judge would as a consequence adversely affect the rights or the legal situation or interests of a party to the proceedings or of *bona fide* third parties, this could be compensated by damages liability of the state (see Sub-Section V.3.3. below), but the flawed judicial decision would remain valid and unfold its legal effects.**

7.5. Passage of Time

73. A key factor in considering when measures are deployed to address the effects of decisions taken by defectively appointed judges is the time that has passed since these decisions were taken. In the *Ástráðsson* case, the ECtHR emphasized that "…***with the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant's right to a 'tribunal established by law' in the balancing exercise that must be carried out".***[109] In the case *Besnik Cani*, the Court found that "*an irregularity in the appointment procedure of a judge may not necessarily be open to a challenge by an individual relying on the 'tribunal established by law' right* ***in an indefinite or unqualified manner****. With the passage of time, the* ***preservation of legal certainty and the security of judicial tenure will carry increasing weight*** *in relation to the individual litigant's right to a 'tribunal established by law' in the balancing exercise that must be carried out".*[110]

74. **Thus, outside of the cases of pressing need of a substantial and compelling character, when considering the measures to address the consequences of a decision taken by a judge who had been appointed involving the NCJ as established under the 2017 Amendments, it is important to see to what extent the time that has passed weighs in on balancing of the individual right to a tribunal "established by law" and the principle of legal certainty, though regard must be had to the circumstances such as where objective impediments were created by the state where the consideration of the passage of time may have an unfair outcome. In this respect, the passage of time would generally not be a valid consideration in case of a pressing need of a substantial and compelling character as outlined under Sub-Section 7.1.**

108 See Pilkov Kostiantyn, Reopening Cases Following Judgments Of The European Court Of Human Rights: Room For A European Consensus?, 2022 4(16) Access to Justice in Eastern Europe 7-31, 15 November 2022, p. 30.
109 ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 252.
110 ECtHR, *Besnik Cani v. Albania*, no. 37474/20, 4 October 2022, para. 113.

7.6. Procedural Considerations

7.6.1 Possible Establishment of a Separate, Special Mechanism if Existing Mechanisms are Deemed Insufficient or Ineffective

75. Given the margin of appreciation and procedural autonomy left to states to address the violations of the right to a fair trial, there is no requirement to establish an additional mechanism to cure the violations of international human rights standards. As underlined above, a rule of law-based approach would suggest that the policy and legislative options chosen should to the extent possible rely on existing mechanisms already provided by the Polish legislation.

76. At the same time, should the policy- and law-makers assess that existing mechanisms would be insufficient or ineffective to ensure reparation for the said violations, especially in light of the magnitude of the Polish situation and number of decisions potentially concerned, they may eventually consider establishing a separate, special mechanism. Another option as mentioned above may be to grant an extension of time to lodge an appeal or offering a new opportunity to apply for permission to appeal.

77. If this option is chosen, the new, special mechanism should be designed with caution, in full compliance with international fair trial standards and the principle of legal certainty, and the legislator should be wary of not perpetuating the defects identified with respect to the extraordinary appeal procedure.[111] In particular, it will be essential to ensure the foreseeability of the legal provisions and define clear and precise legal grounds for potential *ex lege* annulment or ineffectiveness of the decisions, or for re-opening of cases in case of pressing need of substantial and compelling character clearly defined in the law, to avoid unfettered discretion in interpreting such grounds; the determination of reasonable time-limit for lodging a request for re-opening, depending on the cases; the inclusion of sufficient safeguards against a possible abuse of process and the instrumentalizing of the procedure; clarity as to the legal consequences and effects for the parties to the initial proceedings and third parties (see the recommendations highlighted in bold in the preceding Sub-Sections).

78. It is noted that the ECtHR has acknowledged that Article 6 of the ECHR is not applicable to proceedings concerning an application for the re-opening of proceedings after the ECtHR has found a violation of the ECHR.[112] However, should the re-opening of terminated judicial proceedings result in practice in reconsidering the case afresh, Article 6 of the ECHR would then be applicable; this will depend on the nature, scope and specific features of the contemplated special mechanism.[113]

7.6.2 Applicants

111 In particular with respect to "*(i) the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for appeal to the authorities and bodies involved in the procedure; (ii) the possibility of using in practice this exceptional remedy as an "ordinary appeal in disguise" and obtaining through it a fresh examination of the case, including re-determination of facts, with the adjudicating body acting as a tribunal of fact at the third or fourth level of jurisdiction; (iii) the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Prosecutor General and the Commissioner to contest judgments that became final before the entry into force of the 2017 Act on the Supreme Court; (iv) the lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure (e.g. for political reasons, as currently demonstrated by entrusting the Prosecutor General – who is an active politician and at the same time the Minister of Justice wielding considerable authority over the courts – with extensive powers in respect of questioning the finality of judicial decisions by means of an extraordinary appeal)"*; see ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(c).

112 See ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, 4 October 2007, para. 24. See also ECtHR, *Moreira Ferreira v. Portugal (no. 2)Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, 11 July 2017, paras. 60-61.

113 ECtHR, *Bochan v. Ukraine* (No. 2) [GC], no. 22251/08, 5 February 2015, para. 50.

82. The parties to the proceedings involving defectively appointed judges should have standing to request the re-examination or re-opening of the case, or other remedies as outlined above. The question arises as to whether other public bodies should also have standing. As this may increase the risk of possible abuse of process and the instrumentalising of the re-examination or extraordinary appeal procedure, this should be approached with caution. If this is being considered by the legal drafters, at a minimum, there should be sufficient safeguards against a possible abuse of process and the possible instrumentalizing of the procedure by the public authorities.[114]

7.7. Summary and Overview of Key Principles

83. The issue of the status of judges appointed or promoted by the deficiently composed NCJ is inextricably linked to the questions regarding the legal consequences of the potentially millions of judgments rendered by them, in so far as by not resolving the issue of defective appointments, this will perpetuate and amplify the issue of issuance of defective judgments. At the same time, the two issues are distinct and may be addressed separately because the origin and legal basis of the problems are different.

84. Moreover, in light of the need for legal certainty, there is no requirement that all judgments rendered by defectively appointed judges should be void *ex tunc* – from the outset, and/or ineffective, and/or that all such cases should be re-examined or reopened and/or that reparation or pecuniary compensation should be granted. The caselaw of the ECtHR and CJEU gives a rather wide margin of appreciation and acknowledges the state's autonomy in the way it decides to cure the violations of the right to a fair trial by an independent and impartial tribunal established by law, including with respect to the effects of decisions of judges appointed in a deficient manner. However, there may be circumstances where such a margin of appreciation or autonomy may be limited, for instance when serious human rights violations are at stake or when the annulment, re-examination or re-opening is the only way to obtain reparation. Otherwise, the protection of human rights of individuals would be weakened if there would be no possibility to obtain reparation when the rights of individuals are affected by an infringement of international human rights law attributable to a decision of court adjudicating at last instance.[115]

85. Thus, **automatically reopening all 'affected' cases is not warranted nor justified as the participation of a deficiently appointed judge in and of itself is not sufficient to set aside the *res judicata* force given to domestic rulings.** In light of the systemic issue of defectively appointed judges in Poland, and the sheer number of judgments previously handed down, **there is a strong case to be made that '*restitutio in integrum*' is not possible in each and every circumstance, or, indeed, in the majority of circumstances**. To do so could undermine the certainty of the rule of law, access to justice, and more generally, the good administration of justice.

86. There are however cases of pressing need of substantial and compelling character calling for the re-opening of cases, for instance to **correct fundamental defects, such as abuse of process, or a miscarriage or denial of justice or judicial decisions, in particular of a coercive nature, which would compromise fundamental rights.**

87. Where a possibility to submit a request for re-opening is provided, a number of considerations should be taken into account, including but not limited to the effect of the re-opening and of any subsequent proceedings on the applicant's individual situation and on the rights and interests of *bona fide* third parties, the need to clearly

114 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324.
115 CJEU, *Gerhard Köbler v. Republik Österreich*, C-224/01, judgment of 30 September 2003, para. 33.

define the legal grounds for re-examination or re-opening and admissibility requirements, the need to limit the possibility to re-open cases by reasonable time, the existence and operation of substantive and procedural safeguards in the domestic legal system capable of preventing abuse of that procedure by the domestic authorities, and other pertinent considerations.

88. **Where re-opening and '*restitutio in integrum*' is not possible, pecuniary compensation may be an alternative remedy**. At the same time, if an individual does not satisfy the qualification of victim, demonstrating a direct causal link between the violation and the loss or damage s/he sustained, they would in principle not be entitled to damages, notwithstanding the fact that they may have suffered some form of harm as a result of the defective judicial appointment. It may however be difficult for anybody challenging a decision of a defectively appointed judge to demonstrate, without reopening the case, that they have suffered damage because their case would have been decided differently had the judge in question been correctly appointed, or had a different, correctly appointed judge heard their case.

8. Recommendations Related to the Process of Preparing and Adopting Relevant Measures

89. The scale of the needed reform to address the systemic deficiencies of the judicial system in Poland is immense and requires a thorough and coherent policy underpinning the reform process to prevent a piecemeal and fragmented approach to legislative changes that may be detrimental to reform efforts. At the same time, given the urgency to address certain systemic dysfunctions in order not to further aggravate the situation, a sequenced approach to legislative reform could be justifiable in the circumstances, providing that it is accompanied by an in-depth reflection on a comprehensive reform of the judicial system that is prepared in a participatory and inclusive manner, including with active and meaningful involvement of representative of the judiciary, civil society and the public, ensuring that the contemplated policy and legislative options are debated at length.[116]

90. As done in previous opinions,[117] ODIHR would like to reiterate that is a good practice when initiating fundamental reforms of the judicial system, for the judiciary and civil society to be consulted and play an active part in the process. With regard to the judiciary's involvement in legal reform affecting its work, the CCJE has expressly stressed "*the importance of judges participating in debates concerning national judicial policy*" and the fact that "*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*".[118] The 1998 European Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change to their statute or other issues affecting their work, to ensure that judges are not left out of the decision-making process in these fields.[119] Given the sensitivity and importance of such a reform, it is fundamental that all voices are heard, even those that may be critical of the proposed initiatives with a view to address the issues being raised and achieve

116 See *Guidelines on Democratic Lawmaking for Better Laws*, ODIHR, 2024, Principle 8.
117 See e.g., Urgent Interim Opinion on the Bill Amending the Act on the National Council of the Judiciary of Poland, OSCE/ODIHR, 8 April 2024.
118 See Opinion no. 18, Council of Europe, CCJE, 2015, para. 31, which states that "the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system".
119 European Charter on the Statute for Judges, European Association of Judges, Strasbourg, 8-10 July 1998, para. 1.8. See also Magna Carta of Judges, CCJE, 2010 para. 9, which states that "[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)"; and Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate, ENCJ, 2011, Recommendation 5, which states that "[j]udiciaries and judges should be involved in the necessary reforms".

broad political consensus and public support within the country about such a reform. Ultimately, this tends to improve the implementation of laws once adopted, and enhance public trust in public institutions in general.

91. It will be useful to initiate an in-depth reflection of the necessary changes to avoid multiple amendments to legislation with appropriate transitional period allowing for a gradual change to prevent a situation in which it is used or perceived to be used by the political majority to reform the system to its advantage.[120] This is notwithstanding potential imminent changes that may be required exceptionally. However, in all cases, respect for the principle of judicial independence should be upheld and an open, transparent, inclusive and participatory process throughout the development of policy and legislative options should be ensured, whilst these changes should be implemented in line the constitutional provisions and norms of international law.

92. In light of the foregoing, the upcoming reform process of the judiciary, especially of this scope and magnitude, should be open, transparent, inclusive, and involve effective and extensive consultations, including with representatives of the judiciary, professional community of judges and of lawyers, the academia, civil society organizations and the public, should allow sufficient time for meaningful discussions in the legislative body and should involve a full impact assessment including of compatibility with relevant international human rights and rule of law standards, according to the principles stated above. Adequate time should also be allocated for all stages of the policy- and law-making process, yet the urgent nature of the issue at hand and the continued legal uncertainty that people will remain in would warrant a more expeditious approach without resorting to a shortened legislative process. It would be advisable for relevant stakeholders to follow such principles in future rule of law reform efforts. ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary.

[END OF TEXT]

120 See e.g., Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court or Armenia, Venice Commission, CDL-AD(2020)016, para. 38.