The independence and impartiality of the judiciary is a prerequisite and a fundamental guarantee of the rule of law. Briefs remarks stemming from the Wałęsa v. Poland pilot-judgement of the ECHR

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Title: L'indipendenza e l'imparzialità della magistratura sono un prerequisito e una garanzia fondamentale dello Stato di diritto. Brevi osservazioni a partire dalla sentenza pilota Wałęsa c. Polonia della Corte EDU

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1. – The assurance of the rule of law within Poland, specifically regarding the independence of the judiciary, has become a focal point of discussion among legal scholars (see *inter alia* M. Cartabia, *The Rule of Law and the Role of Courts*, in *Italian Journal of Public Law*, 1, 2018; M.A. Orlandi, *La "democrazia illiberale". Ungheria e Polonia a confronto*, in *Diritto pubblico comparato ed europeo*, 1, 2019, 167; S. Sciarra, *Identità nazionale e corti costituzionali. Il valore comune dell'indipendenza*, in B. Carotti (ed.), *Identità nazionale degli stati membri, primato del diritto dell'unione europea, stato di diritto e indipendenza dei giudici nazionali*, Roma, 2022).

Indeed, judicial independence constitutes a fundamental pillar of the rule of law and democratic governance. It ensures that judges can operate impartially, free from inappropriate interference by the executive branch, thereby protecting individual rights and fostering public trust in the judicial system (cf. G. Silvestri, *Organizzazione giudiziaria e indipendenza della magistrature*, in *Ritorno al diritto*, 2, 2005, 1-32).

In recent years several rulings of European courts have recognised violations of the fundamental values of the EU and the rights guaranteed by the European Convention on Human Rights in connection with the judicial reforms undertaken by the Polish authorities and the resulting attempts to limit the independence of the Polish courts (e.g. *inter alia* European Court of Justice, G.C., judgement of 5th June 2023, C-204-21, *European Commission v. Republic of Poland*, and European Court of human rights, *Dolinska-Ficek and Ozimek v. Poland*, cases nos. 49868/19 and 57511/19).

Among the most recent judgments is the decision of the European Court of Human Rights (hereinafter "ECtHR"), case no. 50849/21, in which the Court ruled that Poland had violated the rights of the former politician Lech Wałęsa under the European Convention on Human Rights.

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What is relevant to the discussion of the rule of law and the guarantee of the independence of judges in the long decision of the ECtHR is the Court's reasoning that Poland was in breach of the ECHR because Wałęsa's rights to an independent court were infringed.

Notably, the Court reiterated that the Polish Chamber of Extraordinary Review and Public Affairs (hereinafter "CERPA"), which reviewed Wałęsa's case, failed to meet the criteria of an "independent and impartial tribunal established by law", thereby infringing upon the principle of legal certainty (cf. the ECtHR press release issued by the Registrar of the Court).

More importantly, in the case of *Wałęsa v. Poland*, the Court implemented the pilot-judgment procedure as outlined in Rule 61 of the Rules of Court. This decision was made in recognition of systemic infringements of Article 6.1 of the European Convention on Human Rights. Consequently, the Court mandated Poland to adopt suitable measures intended to re-establish the independence of judicial entities and ensure legal certainty.

The case under review not only provides further evidence of the Polish authorities' multiple violations of the values of the rule of law, but also potentially paves the way for interesting developments. This is the case with regard to the impact of the implementation of the pilot judgment procedure and the recommendations made by the Court, especially in the light of recent developments in the aftermath of the October 2023 elections.

Furthermore, the decision underscores a well-established and effective "dialogue" between the European Court of Human Rights and the European Court of Justice (ECJ) concerning the safeguarding of the independence of European judicial bodies (Cf. in general L.A. Jiménez, *Constitutional empathy and judicial dialogue in the European Union*, 24(1) *Eur. Pub. L.* 24-57 (2018) and L. Tremblay, *The Legitimacy Of Judicial Review: The Limits Of Dialogue Between Courts And Legislatures*, in 3(4) *Int. J. Const. L.* 617-648 (2005). This interaction, indeed, seems suitable to serve as a solid defence against illiberal efforts to compromise the principles of the rule of law and avoid misinterpretations of the counter-limits doctrine based on misleading readings of the national constitutional identities. Unsurprisingly, the ruling was widely criticised by the Polish authorities and former members of the PiS-led government, who also claimed that the rules governing the composition of the court had been violated.

Before delving into the merits of the case and its points of interest, it seems appropriate to provide the reader with brief remarks on the context of Polish democratic regression in which the case may be set, as well as the reactions of supranational bodies and the figure of the applicant, Lech Wałęsa.

2. – The organisation of the judiciary, as outlined in the Polish Constitution of 1997, was already characterised by certain flaws in the separation of the judicial and executive branches. However, from 2015 onwards, the Polish material constitution began to show significant deviations from its original design.

The parliamentary elections of 2015 marked the victory of the right-wing coalition and the rise of *Prawo i Sprawiedliwość* (Law and Justice party, (Law and Justice party, hereinafter "PiS"), which secured an unprecedented absolute majority, emerging from a period of initial self-exclusion from public life (A. Di Gregorio, A. Angeli, J. Sawicki, *Il costituzionalismo "malato" in Ungheria e Polonia*, in A. Di Gregorio (ed.), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica*, Padova, 2019, 378 ff.).

The government, supported by the PiS majority repeatedly implemented measures that profoundly changed the Constitutional Tribunal, the National Council of the Judiciary (hereafter "NCJ") and the entire Polish judicial system,

including the Supreme Court, the Prosecutor General's Office and the prerogatives of judges.

In contrast to Hungary, however, the PiS-led government in Poland did not secure a sufficient majority to implement a far-reaching constitutional reform agenda. As a result, constitutional guarantees relating to the judiciary have simply been eroded or downgraded (see G. Delledonne, *Ungheria e Polonia: punte avanzate del dibattito sulle democrazie illiberali all'interno dell'Unione Europea*, in *DPCE Online*, S.l., 3, 2020, 3999 and T. Drinóczi, A. Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, 20(8) *German Law Journal* 1140-1166 (2019) as per the common elements between the Polish and the Hungarian case).

The initial reforms of the government targeted the Constitutional Tribunal and provoked a constitutional crisis (see *amplius* Č. Pištan, *Giustizia costituzionale e potere giudiziario. Il ruolo delle corti costituzionali nei processi di democratizzazione ed europeizzazione*, in A. Di Gregorio (ed.), *I sistemi costituzionali*, cit., 357 ff.). The measures adopted by Polish authorities resulted in a profound overhaul of the functioning of the Constitutional Tribunal. Among the various measures, the reform introduced a qualified majority for decisions on constitutional illegitimacy, placing the Constitutional Tribunal in a state of substantial *impasse* (cf. M. Cartabia, *I giudici e lo stato di diritto*, in G. Lattanzi, M. Maugeri, G. Grasso (eds.), *Il giudice e lo stato di diritto. Indipendenza della magistratura e interpretazione della legge nel dialogo tra le Corti*, Milano, 2024; with respect to the similarities to the case of Israel see L. Pierdominici, *La riforma della giustizia israeliana: cronache dall'ultima frontiera costituzionale*, in *Giustizia Insieme*, 1, 2023).

Nevertheless, the Constitutional Tribunal censured the government's amendments in judgment K 47/15 of March 9, 2016. The Pis-led executive, in turn, refused to publish the ruling in the Polish Official Gazette, eliciting criticism from the Venice Commission (see Opinion no. 833/2015).

Attempts of court-packing addressed to the Constitutional Tribunal continued throughout 2016, profoundly affecting the entire functioning of the body, including the status of the judges.

In parallel with the "capture" of the constitutional judge, the government led by Law and Justice ensured the restoration of the previous overlap between the Ministry of Justice and the Office of the Prosecutor General, which had ceased in 2010 and was reinstated by the law of January 28, 2016. This appears as problematic due to its impact on the separation of powers and the independence of the judiciary. In fact, the Polish legal system grants the General Prosecutor supervisory powers over the activities of prosecutors' offices, as well as the ability to issue instructions on the conduct of cases. In addition, according to the Constitution, the Minister of Justice - Prosecutor General also sits as an ex officio member of the self-governing body of the judiciary, i.e. the NCJ (See M. Mazza, *Le garanzie istituzionali della magistratura in Polonia: un presente difficile, un futuro incerto*, in *DPCE online*, 4, 2020, 4971).

However, the challenge to the independence of the Polish judiciary was far from over. This hostility towards the judiciary was politically justified by the fight against the alleged corruption and inefficiency of the system, which was seen as a corporative resistance to the supposedly necessary renewal of Poland. In 2017, a comprehensive reform of justice was adopted, accompanied by a chorus of criticisms and concerns from the European Union and observers (See A. Di Gregorio, A. Angeli, J. Sawicki, *Il costituzionalismo "malato" in Ungheria e Polonia*, cit., 38 ff.).

Among the most significant changes were measures relating to disciplinary proceedings and the Supreme Court (*Sąd Najwyższy*). With regard to the latter, two new chambers were created: a Disciplinary Chamber (*Izba Dyscyplinarna*), which was responsible for deciding on the imposition of disciplinary measures against judges, including on appeal, and a Chamber for Extraordinary Review and

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Public Affairs of the Supreme Court (hereinafter "CERPA"), which is central to the ECtHR's findings in the case here commented.

The changes to the disciplinary procedure have been substantial and have also raised the concerns of GRECO (The Group of States against Corruption), a monitoring body of the Council of Europe, which noted an excessive involvement of the executive in the disciplinary proceedings. Similar concerns have been raised by the EU Commission in its Rule of Law Report.

Moreover, the Supreme Court Act of December 8, 2017, reduced the retirement age for Supreme Court judges by five years. As a result, about 40% of the Court's members were replaced, with new judges appointed by the President of the Republic based on the recommendations of the National Council of the Judiciary. This amounted to a judicial "purge" which Supreme Court judges could only avoid by requesting an extension from the President of the Republic, who could grant it at his sole discretion.

Lower court judges were not spared by the judicial reform package. The sudden lowering of the retirement age was again used as a legislative tool to "renew" the ranks of the judiciary and to select those judges who could remain in office following an application for extension, granted at the sole discretion of the Minister of Justice.

In addition, in 2019 the *Sejm* passed another piece of legislation also known as the "muzzle law" since it enabled the government to dismiss judges, reduce their salaries and question new judicial appointments (see A. Duncan, J. Macy, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, in 104 (3) *Judicature* 41-48, 2001).

The National Council of the Judiciary (NCJ) was also profoundly renewed. In December 2017 (Dz.U. 2018 poz. 3), a new reform was approved providing for the termination of the Council's members within three months. The reform also innovated the election methods of the judicial members who were previously elected by the judiciary and further to the approval of this piece of legislation by the lower house of the Polish Parliament (*Sejm*). This allowed the PiS-led majority to secure the election of most of the judicial members of the Council. In addition, being the former President Duda (re-elected in the 2020 elections) a PiS representative, the majority had the ability to influence the election of around 22 out of 25 members of the Polish self-governance body which, in turn, is responsible for proposing the appointments of the new judges to the President.

The separation of powers, although affirmed by Article 10 of the Polish Constitution, appears in this context to be little more than a formal clause (Cf. the Compilation of Venice Commission opinions and reports concerning separation of powers, endorsed by the Venice Commission at its 124th Plenary Session of 8-9 October 2020).

3. – Following the reforms adopted and the regression of judicial guarantees, the EU institutions intervened by employing all "external antibodies" available under EU law. Among these, the traditional infringement procedure under Article 258 TFEU has been widely used. This resulted in several judgments of the European Court of Justice (hereafter "ECJ") condemning Poland (see ECJ, 24 June 2019, C-619/18, on the independence of the Polish Supreme Court, and ECJ, 15 July 2021, C-791/19, on disciplinary proceedings).

These decisions were largely ignored by Polish authorities, despite the presence of significant daily fines imposed by the Court of Justice in certain cases, pushing the EU institutions to evaluate unprecedented measures under Article 7(1) TEU (Cf. L. Pech, *Article 7 TEU: From Nuclear Option to Sisyphean Procedure?*, Oxford 2020, G. Ragone, *La Polonia sotto accusa. Brevi note sulle circostanze che hanno*

indotto l'Unione europea ad avviare la c.d. opzione nucleare, in *Osservatorio costituzionale*, 1, 2018).

Another key stage in the response to Poland's breach of the rule of law was the adoption of EU Regulation 2020/2092 of 16 December 2020. The latter introduced a general system of conditionality for the protection of the Union budget, which includes, *inter alia*, respect for the principles of legal certainty, prohibition of executive arbitrariness, effective judicial protection, independent and impartial courts and separation of powers (see *amplius* A. Baraggia, M. Bonelli, *Linking Money to Values: the new Rule of Law Conditionality Regulation and its constitutional challenges*, in *German Law Journal*, 2, 2022,131-156).

Significantly, responses to the attacks to Polish judiciary also came from other European institutions and judges from other member states. The European Network of Councils for the Judiciary (ENCJ) suspended the Polish National Judiciary Council from the European network due to declining judicial independence. Additionally, some member state courts have referred cases to the Court of Justice under Article 267 TFEU to avoid "unintentional complicity" in violating judicial independence principles during cooperation with Polish authorities (*see inter alia* the *LM* case, ECJ, 25 July 2018, C-216/18 PPU, originating from the Irish Supreme Court, involved a European Arrest Warrant issued by Poland).

Parallel to the aforementioned initiatives, the Polish government also sought to undermine international obligations concerning the rule of law and fundamental EU principles, such as the supremacy of EU law over national law. This has occurred through an illiberal interpretation of the Polish Constitution, emphasizing constitutional identity, culminating in the K-3/2021 decision of 7 October 2021 by the Polish Constitutional Tribunal. In this ruling, the Tribunal declared certain TEU provisions incompatible with the Polish Constitution, asserting the latter's supremacy over EU law. Similarly, in decisions K-6/21 of 24 November 2024 and 7/2021 of 10 March 2022, the Polish Constitutional Tribunal, in the name of an alleged defence of Polish constitutional identity, asserted the primacy of the Polish Constitution over Article 6 of the ECHR and international obligations arising from the Treaties (cf. E. Albanesi, *National Identity (under Art. 4(2) TEU) and Constitutional Identity (as counter-limits) Are Not The Same*, in M. Belov (ed.), *Peace, Discontent and Constitutional Law*, London, 2021). These rulings resulted in a reversal of the principle of EU law primacy and a substantial abuse of the counter-limits doctrine (see L. Acconciamessa, *Nessuna "eccezione costituzionalmente giustificata" alla Cedu*, in *SidiBlog*, 8 March 2024).

The emphasis on national identity under Article 4 TEU partially reflects the Hungarian case, but conveniently ignores that the independence of the judiciary is a common EU value, crucial for the interpretation and application of the principle of primacy of EU law. Conversely, national identity cannot be used as an "opt-out" clause from treaty obligations under the guise of a cultural exemption from EU rules (see E. Albanesi, *National Identity*, cit., *passim* and S. Sciarra, *Identità nazionale e corti costituzionali. Il valore comune dell'indipendenza*, in Vv. Aa., *Identità nazionale degli stati membri, primato del diritto dell'unione europea, stato di diritto e indipendenza dei giudici nazionali*, 6 ff., in www. cortecostituzionale.it).

4. – Having introduced the context of the Polish regression in the field of judicial independence, it is worth introducing the figure of Lech Wałęsa, the claimant in the ECtHR ruling here commented, to better understand the context of the case.

Lech Wałęsa is a well-known Polish politician, statesman and former activist who played a central role in the country's transition from Communist rule (see A. Angeli, *La sentenza della prima sezione della Corte europea dei diritti umani del 23*

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novembre 2023 nel caso Wałęsa c. Polonia, in *Diritti comparati*, 12 February 2024, 3). Wałęsa also co-founded the *Solidarność* movement, which catalysed much of the discontent and fuelled the events that contributed to the fall of Communism in Poland (cf. M. Mazza, *Le garanzie istituzionali della magistratura*, cit., 4970 ff. and with respect to the democratic transitions of the area see *ex multis* S. Bartole, P. Grilli Di Cortona (eds.), *Transizione e consolidamento democratico nell'Europa centro-orientale*, Torino, 1997 and D.L. Epstein, et al., *Democratic Transitions*, in 50(3) *American journal of political science* 551-569 (2006).

The former president of Poland from 1990 to 1995, Wałęsa was awarded the Nobel Peace Prize in 1983. Retired from official politics since the 2000s, he has remained a central figure in Polish politics, despite criticism and lack of consensus in recent years. Wałęsa's figure has been surrounded by suspicion over his alleged links to the secret police and communist security service in the early stages of his career.

It is indeed in this context that the case brought before the ECtHR arose. The judgement stemmed from a long-pending judicial dispute between Lech Wałęsa and Krzysztof Wyszkowski, a former associate in *Solidarność* and a PiS member, who publicly accused Wałęsa of having collaborated with communist secret services.

A legal action brought by Wałęsa claiming that the allegations were false and seeking payment to charity as compensation was upheld (after an initial rejection) by the Gdańsk Court of Appeal. The Court also ordered a public apology on television on the part of Krzysztof Wyszkowski. It is noteworthy that Wyszkowski's legal attempts to have the decision of the Gdańsk Court reformed or appealed were unsuccessful.

Further to the approval of the controversial Polish reform of the Supreme Court (i.e. the Supreme Court Act of 2017), however, the decision in favour of Wałęsa was overturned by an extraordinary appeal lodged by the General Prosecutor Zbigniew Ziobro. This appeal was examined by the newly established Chamber of Extraordinary Review and Public Affairs of the Supreme Court (CERPA) introduced by the recent reform. Mr Wałęsa argued that this appeal was unconstitutional and inconsistent with the principle of legal certainty and challenged the composition of the judicial body, objecting that it was neither impartial nor independent, especially from the government.

The Chamber overturned the judgment of the Court of appeal in favour of Wałęsa in 2021, despite the time limit to lodge the extraordinary appeal against such a judgement (in that case, five years from the date the decision has become final) had already elapsed (see § 236). The Polish judicial body noted, *inter alia*, that "in the light of the importance of public debate for a democratic State governed by the rule of law, the impugned judgment should be reversed and there was nothing which justified granting precedence to the principle of res judicata" (see § 43 of the judgment).

5. – Following this last decision, on 5 October 2021 Mr Wałęsa's lodged an application to the European Court of Human Rights, invoking Article 6.1 (i.e. the right to a fair trial) of the ECHR and claiming that the Chamber of Extraordinary Review and Public Affairs did not constitute an independent and impartial tribunal established by law. In the applicant's perspective, the members of the Chamber did not adhere to the standard of judicial independence, as their appointments were determined by a procedure heavily influenced by the executive and legislative branches. In addition, the applicant purported that one of the judges of the Chamber

was partial to the case and that the extraordinary appeal violated the principle of legal certainty.

A second argument was focused on the infringement of Article 8 ECHR (i.e. the right to respect for private and family life). According to Mr Wałęsa, the annulment of the Court of Appeal's decision by a non-independent judicial body had damaged his reputation in the country and thus violated his rights under Article 8 of the Convention.

Thirdly, based on Article 18 of the ECHR (i.e. limitations on the use of restrictions of rights), the claimant held that the extraordinary appeal was used as a "retaliatory measure" against him, in reaction to his public criticism of the current political situation in the country.

6. – Before delving into the Court's reasoning, it is worth recalling some of the key material referred to in the decision. This will help to understand the general context in which the case arose. One could note that the lack of independence and the failure to respect the principle of separation of powers of the Chamber of Extraordinary Review have already been highlighted by various authorities. First, the Organization for Security and Cooperation in Europe OSCE's Office for Democratic Institutions and Human Rights (ODIHR), which pointed out that the extraordinary review of final court decisions "raises serious prospects of incompatibility with key rule of law principles, including the principle of *res judicata* and the right of access to justice" (opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland - JUD POL/315/2017). In addition, the ODIHR recognised the risk of possible influence of the branches of government on the judiciary, thus jeopardising the principle of the separation of powers (which is explicitly affirmed in the Polish Constitution).

The Parliamentary Assembly of the Council of Europe ("PACE") has also raised concerns about the state of the rule of law in Poland, as the Central European country is the only member of the Council subject to a PACE monitoring procedure (see § 114 of the decision of the ECtHR). Notably, in a 2020 Resolution, the PACE underlined that Polish authority repeatedly failed to comply with the recommendations issued by the Venice Commission and expressed further concerns regarding the extraordinary appeals chamber and "vulnerability to politicisation and abuse" (Cf. § 7 and ff. of the Resolution 2316 2020 of the PACE).

The Venice Commission was also highly critical of the newly created judicial body, concluding that "the mechanism of the extraordinary control, as designed in the Draft Act, jeopardies the stability of the Polish legal order and should be given up" (see § 63 of the Opinion No. CDL-AD(2017)031 of the Commission).

Similarly, the GRECO (Group of States against Corruption) expressed several concerns addressed to Poland, requiring the latter to reconsider the introduction of the Chamber.

On the other hand, various concerns have been raised also by the European union in the 2018 Recommendation regarding the rule of law in Poland, in which the EU Commission recalled the aforementioned documents and shared the overall critical evaluation of the Polish reform, but also in the EC rule of law reports (Cf. F. Spagnoli, *Polonia 2020-2022: lo Stato di diritto secondo la Commissione europea*, in R. Tarchi, A. Gatti (eds.), *Il Rule of Law in Europa*, Genova, 2023; A. Angeli, *La sentenza*, cit., 4 ff.).

7. – Staying in the EU context, it is worth noting that Poland's judicial reforms have been the subject of numerous rulings by the European Court of Justice (ECJ) over the past decade (see *inter alia* ECJ cases C-619/18, C-791/19, C-204/21 and cf. *amplius* E. Ceccherini, *L'indipendenza del potere giudiziario come elemento essenziale*

dello stato di diritto, in *DPCE Online*, 3, 2019, 2037-6677; E. Albanesi, *Pluralismo costituzionale e procedura d'infrazione dell'Unione Europea*, Torino, 2018, A. Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: on Judicial Reform Reversing Democratic Transition*, in 7 *German Law Journal* 1839-1870 (2018).

The most recent chapter in the case law of the ECJ in the Polish "saga" is the judgment of the Grand Chamber of the ECJ of 5 June 2023, which is explicitly mentioned by the ECtHR (§ 128) in the case here commented (case C-204/21 on which see C. Curti Gialdino, *La "legge bavaglio" polacca viola l'indipendenza, l'imparzialità e la vita privata dei giudici ed è incompatibile con principi fondamentali del diritto dell'Unione europea*, in *federalismi.it*, 12.07.2023).

The ECJ found that Poland had failed to fulfil its obligations under Article 19(1) TEU, Article 47 of the Charter of Fundamental Rights of the European Union and Article 267 TFEU. This was partly due to the fact that Poland has established the exclusive competence of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court to deal with motions for the exclusion of judges involving a plea of lack of independence of a judge or a court.

The case centred on the Polish judicial reform adopted in December 2019 (also known as the "Muzzle Law") and the powers vested in the Disciplinary Chamber of the Supreme Court, which was given the authority to impose disciplinary measures on Polish judges, potentially affecting both their professional and personal lives (e.g. initiating criminal proceedings and reducing judges' remuneration).

According to the Luxembourg Court, Article 19 of the Treaty on European Union (TEU) requires that the powers of the disciplinary bodies must not be used to exercise political influence on the judiciary of the Member States. The Court also found that the Polish legal framework did not provide adequate safeguards to prevent the possibility of political manipulation and coercion of judges by the Chamber, thereby undermining the confidence that the judiciary is supposed to inspire in individuals in a democratic society based on the rule of law (see ECJ case C-791/19 and case C-204-21).

8. – Turning to the ECtHR's reasoning in Mr Wałęsa's claim, the Strasbourg Court first focused on the issue of the violation of Article 6.1 of the ECHR, recalling its previous relevant jurisprudence.

The Court addressed the complaint by two different angles: first, the determination of whether the Chamber of Extraordinary Review and Public Affairs meets the established criteria for being an "independent and impartial tribunal established by law" pursuant to the Convention; second, the Court examined the validity of the allegations regarding the purported lack of independence and impartiality of one of the components of the Chamber.

As per the first part of the complaint, the Court recalled its previous rulings on the concept of "tribunal established by law" in *Guðmundur Andri Ástráðsson v. Iceland* (ECtHR case no. 26374/18, 20th December 2020) and *Xero Flor w Polsce sp. z o.o.v. Poland* (case no. 4907/18, 7 May 2021 with comment by M. Coli, *The Judgment of the Strasbourg Court in Xero Flor v. Poland: The Capture of the Polish Constitutional Court Condemned by a European court, at last!*, in *Diritti comparati*, 1 July 2021). In these precedents, the Court adopted a three-step threshold test to determine whether procedural and substantive irregularities give rise to a violation of the ECHR.

In applying the *Guðmundur Andri Ástráðsson* test in *Dolińska-Ficek and Ozimek v. Poland* (decision of 8 November 2021, applications nos. 49868/19 and 57511/19) the Court had already reached the conclusion that the CERPA could not be considered as a tribunal established by law in the meaning of Article 6 of the ECHR.

CERPA failed the threshold test, as the Court found a manifest breach of domestic law in the appointment of judges to the Chamber. On the one hand, the members were appointed on the recommendation of the National Council of the Judiciary (NCJ), a body that was no longer independent of the executive and the legislative branches. On the other hand, the President of Poland appointed the CERPA members despite an interim order by the Supreme Administrative Court suspending the NCJ's decision to recommend candidates. In the Court's opinion, CERPA's extensive powers, especially after the 2019 Amending Law, underlined the gravity of these violations.

In these cases, the Court also expressed concern that the General Prosecutor, a member of the Government, was empowered to appeal against decisions taken by Polish courts. According to the Court, this extremely general power, together with the possibility of appealing against old final judgments, could lead to a generalised instrument of political manipulation by the Polish executive.

In the present case, moving from the conclusions reached in these rulings, the Court upheld Mr. Wałęsa's application, confirming that the Polish Chamber could not meet the standards of an independent and impartial court established by law. The ECtHR reached this conclusion applying again the *Andri Ástráðsson* threshold test. But the Court also referred extensively to the case law of the ECJ (especially the ruling of 6 October 2021, *W.Ż.*, case C-487/19, see § 171 ff.). Relying on these precedents, in the case here commented, the ECtHR confirmed that "the above irregularities in the appointment process compromised the legitimacy of the CERPA to the extent that, following an inherently deficient procedure for judicial appointments, it had lacked and continued to lack the attributes of a "tribunal" which was "lawful" for purposes of Article 6 § 1 of the Convention" (see § 175 of the Wałęsa's case).

On the issue of the purported lack of impartiality of one of the components of the CERPA in Wałęsa's case, the Court also upheld the applicant's complaints. In fact, Mr. Wałęsa reported that he had challenged the impartiality of Judge Stępkowski and applied for his removal from the bench, given that his judicial legitimacy was under review by the ECJ in the *W.Ż.* case and considering his extreme views, which could negatively affect his impartiality. The application was dismissed, but it is worth noting that it was also Judge Stępkowski who rejected the application for his own exclusion, without giving any motivation.

The position of the Strasburg judge is severe on this point: "The Court finds it unacceptable from the point of view of the fair trial standards that in the present case the ruling was given by the person who, by virtue of the fundamental principle *nemo iudex in causa* sua, should have been prevented from dealing with the matter" (§ 180).

The alleged violation of Article 6.1. ECHR in relation to the principle of legal certainty was also upheld by the Court. The judgment considers that the facts reported by the applicant point to an "abuse of the legal procedure by the State authority in pursuance of its own political opinions and motives". In other words, the Court found that the Government had made political use of a legal instrument designed as an extraordinary appeal. This remedy presented many similarities with the model of extraordinary appeal adopted in former communist systems, which allowed to overturn a final judgement for the sake of social justice, thus with a broad margin of discretion in its interpretation (§ 233 and A. Angeli, *La sentenza*, cit., 6). In the view of the Court, the extraordinary appeal could be invoked against numerous decisions several years after they had become final and was subject to a very general burden of appreciation, in the absence of any circumstances of a substantial and compelling nature justifying such use, thus violating the principle of legal certainty.

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9. – The Court then examined the purported violation of article 8 ECHR. According to the Court of Strasburg, Mr. Wałęsa was acknowledged both within Poland and internationally as a distinguished figure, notably for his leadership in the *Solidarność* movement and his anti-communist commitment. The Court determined that Mr. Wyszkowski's allegations of Wałęsa's collaboration with the secret services challenged what was widely regarded as his reputation. In such concern, the overturning of the final judgment by a court lacing the requisites of an independent tribunal significantly impacted the personal life of the applicant, thus constituting an infringement upon his right to privacy.

To determine the actual violation of Article 8 ECHR, the Court had to question whether the interference could be justified under Article 8.2 ECHR, as being "in accordance with the law", and "necessary in a democratic society" (see § 284). Pursuant to the relevant case law of the ECHR, to establish whether the measure is "in accordance with the law" the Court should assess that (i) the measure has a legal basis in the domestic system and (ii) that such legal basis is "accessible to the person concerned", in a way that it guarantees proper "safeguards against arbitrariness" (see ECtHR *Fernández Martínez v. Spain* (GC), no. 56030/07, and *De Tommaso v. Italy* (GC), no. 43395/09).

Given the Court's assertion that "the independence and impartiality of the judiciary is a precondition and a fundamental safeguard for the rule of law" (§ 290) and considered that the ECtHR had already identified a breach of Article 6.1. due to a judicial entity not meeting the criteria for an independent tribunal established by law, the outcome of the evaluation in this instance is of no surprise: the Court concluded that, emanating from the principle of the rule of law, for a decision to be deemed "lawful" it must originate from an entity that is itself "lawful" (*quod non*).

Therefore, since in the present case the infringement originated from the decision of a judicial body not recognized as a "lawful" tribunal under the Convention (i.e. the CERPA), the Court determined that Article 8 of the Convention had been violated.

10. – The last complaint of the applicant was referred to the violation of Article 18 of the ECHR. According to Mr. Wałęsa, the exceptional appeal brought by the Prosecutor General was driven by political retribution rather than by genuine concerns in law, thus restricting his liberties under the Convention for a purpose other than those for which limitations area allowed.

Given the arguments presented by the involved parties and Court's conclusions regarding Article 6.1 and 8 of the Convention, the ECtHR deemed that the complaint was absorbed by the principal legal issues posed by the application. Consequently, it found no further need to examine the additional grievance under Article 18 in the merits.

11. – The judgment of the ECtHR in the Wałęsa case was strongly criticised by the outgoing Polish Minister of Justice and the Polish National Council of the Judiciary for allegedly violating the rules governing the composition of the European Court of Human Rights. The complaint regarded the appointment of Greek Judge Ioannis Ktistakis as an *ad hoc* judge by the Court's Chamber President. According to the aforementioned subjects, the Court purportedly violated the ECHR by not including a Polish judge in the panel (cf. A. Drzemczewski, *Designation of ad hoc Judge by the ECtHR in Wałęsa v. Poland*, in *Rule of Law*, 6 December 2023). The complaints were challenged by many scholars as grounded on a misreading of the Court's procedural standards. In fact, the originally appointed Polish judge, Mr. Krzysztof Wojtyczek, was unable to attend, leading to

an attempt to appoint Mr. Michal Kowalski as an *ad hoc* judge. However, due to potential conflict from Mr. Kowalski's acquaintance with a figure involved in the case, the Court could not appoint him. In addition, the Chamber perused the list of the *ad hoc* judges indicated by Poland, but it noticed that less than three of them fulfilled the requirements of the Rules of the Court (See A. Drzemczewski, *Designation of Ad Hoc Judge*, cit., *passim*).

Therefore, pursuant to Rule 29.2.b, which allows the appointment of another elected judge to sit as an *ad hoc* judge where the President of the Chamber finds that less than three of the persons indicated satisfy the conditions required to be an *ad hoc* judge, the President opted for the appointment of Judge Ktistakis, always informing the involved parties of the developments.

Hence, the composition of the Court was fully in line with the applicable rules and the attempt to delegitimise the judgment appears to be without legal foundation, while the whole issue underlines the Court's efforts to ensure the impartiality and integrity of its members.

12. – The interest (also under a comparative law point of view) of this decision, besides reiterating the strict connection between independence and impartiality of the judiciary as a prerequisite and guarantee of the rule of law, lies in the application of the pilot-judgement procedure. As it is well known, according to Article 61 of the Rules of the Court when a case discloses the presence of a structural or systemic anomaly, leading to multiple applications, the Court may opt for a pilot-judgment procedure (see A. Angeli, *La sentenza*, cit., 2 ff. and A. Drzemczewski, *Designation*, cit., *passim*).

The function of the procedure is to individuate the essence of a systemic or structural violation carried out by a state party and the corrective actions the latter should undertake. In addition, these measures should be addressed to rectify the origin of the infringement and compensate previous injustices experienced not merely by the applicants in the pilot case but also by other individuals affected by the same violation. Thus, the pilot-judgement allows to encompass all present and potential affected parties under the comprehensive and general measures the respondent State is mandated to implement as well as to facilitate their execution (see J. Czepek, *The Application of the Pilot Judgment Procedure and other forms of Handling Large-Scale Dysfunctions in the Case Law of the European Court Of Human Rights*, in 3 *International Community Law Review*, 347-373 (2018).

Notably, considering the multiple violations of the provisions of Article 6.1. ECHR, the numerous applications pending before the Court (the Court mentioned 492 cases) and the resistance of Polish authorities to adopt corrective actions, the Court identified an urgent need for intervene due to the systemic violations identified.

In continuity with its precedents, the Court determined that the infringement of the right to a fair trial under Article 6.1 was deeply rooted in systemic deficiencies within the Polish domestic legal framework. These flaws were expressly identified by the Court (see § 324) and attributed to:

(i) a defective mechanism for the appointment of judges, involving the National Council of the Judiciary, a body which could not be considered as fully independent from the executive (see L. Pech, P. Wchowiec, D. Mazur, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action*, in 1 *Hague J. Rule of Law*, 1-43 (2021);

(ii) The compromised autonomy of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which has been ascertained not only by the ECtHR but also by the ECJ (see case C-204-21 cited above);

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(iii) the exclusive authority of the CERPA (a body that could not be considered as lawful and independent) to deal with motions for the exclusion of judges involving a plea of lack of independence of a judge or a court;

(iv) the procedural shortcomings identified in the extraordinary appeal process as delineated in the ruling here commented.

(v) and, finally, the exclusive jurisdiction of the CERPA over extraordinary appeals (apart from the defective nature of such kind of remedy).

Given these structural shortcomings of the Polish legal system, the Court made detailed recommendations to Poland regarding the general measures to be taken to avoid systemic violations of the ECHR. These include, *inter alia*, the restoration of the independence of the National Council of the Judiciary (NCJ) in order to have the members elected by the Polish judiciary and the facilitation of an effective legal review of the NCJ's recommendations for judicial appointments addressed to the President of Poland (including those of the Supreme Court).

As per the functioning of the CERPA, the Court recommended additional legislative actions to ensure that such a judicial body meets the criteria for an "independent and impartial tribunal established by law". Furthermore, regarding the extraordinary appeal process, according to the Court the Polish authorities must intervene to limit the broad margin of discretion on such appeals and prevent the potential use of the remedy as a general and ordinary appeal. Additional actions are also needed regarding the wide time limit available to the Prosecutor General to lodge an extraordinary appeal.

Given the need to adopt swift and general measure to resolve the systemic issues outlined, the Court decided to apply Article 61, paragraph 6 of the Rules of the Court in order to adjourn the examination of similar cases for a period of one year from the issuance date of the judgment, pending the adoption of the remedial measures indicated (with the exception of judgments which are ready for review, see § 335). As noted by early commentators, Polish authorities, however, maintain a discretion over the choice of the measures to comply with the Court's recommendations (A. Angeli, *La sentenza*, cit., 7).

13. – The Court's ruling provides elements to strengthen the ongoing discourse on the rule of law in Poland *vis-à-vis* the "alternative model" presented by illiberal democracies. It also confirms the central value of the dialogue between European Courts and their convergence in responding to democratic backsliding in the realm of judicial independence in Europe (cf. R. Tarchi, *L'approdo europeo del Rule of* Law, cit., 21 ff.). In this regard, the ECtHR also rejected the illiberal reading of the counter-limits doctrine purported by the Polish Constitutional Tribunal, thus reaching conclusions which appear to be partially in line with the ECJ jurisprudence. In addition to reaffirming the primacy of international law obligations over domestic law, the Court reminded the Polish authorities that states cannot invoke their own constitutions to avoid obligations under international law and treaties. According to the Court, "the acceptance of the State's obligations under the Convention may not be selective" while "the Constitutional Court's judgment cannot be considered anything other than an attempt to restrict the Court's jurisdiction" (See § 143-144 and L. Acconciamessa, *Nessuna "eccezione"*, cit., 3 ff.).

Undoubtedly, the application of the pilot-judgment procedure by the European Court of Human Rights, in response to systemic infringements of Article 6.1 of the European Convention on Human Rights, underscores the gravity of the situation in the country and the urgent need for comprehensive reforms.

In this respect, the recent results of the last elections should be taken into account, as they could represent a potential turning point. Indeed, in the October 2023 elections, the pro-European opposition parties secured a clear victory over the

PiS and gained the majority in the Sejm. The opposition included the Civic Coalition led by Donald Tusk, who was eventually appointed prime minister by a reluctant President Duda and formed a new government that seemed committed to restoring the rule of law in the country.

While the Court's decision in this case mandates Poland to implement measures aimed at reinstating the independence of judicial bodies, affected by *circa* a decade of attempts of "court-packing", it seems that the Government led by Donald Tusk not only should seek to rectify the specific violations identified by the ECtHR but also to restore confidence in the Polish legal system. In this context, it is worth noting the recent dialogue between the Polish government (in particular the new Polish Minister of Justice, Adam Bodnar) and the EU Commission and the announcement of an Action Plan to restore the rule of law in Poland (Cf. *Politico*, February 20, 2024).

This apparent new course of Polish justice agenda was welcomed by the European Commission, which recently committed to release the EU the funds destinated to Poland seized after the rule of law crisis (around 137 billion euros from the Next Generation EU and the Cohesion fund).

In May 2024, the EC also announced the intention to close the Article 7(1) TEU procedure against Poland. The Commission has concluded that Poland no longer poses a clear risk to the rule of law under Article 7(1) TEU since the new Polish government has implemented measures to address judicial independence concerns, recognized EU law primacy, and committed to respect EU and ECtHR court rulings. Due to Poland's recent reforms and the action plan's progress, the Commission has praised Poland's efforts although it will continue monitoring Poland's rule of law status.

In this respect, it should be noted that in the present judgment of the ECtHR, the Court, using the pilot judgment procedure, has also provided a guide for addressing systemic deficiencies in the Polish judiciary, indicating the most critical aspects where intervention by the new government is certainly needed. This may indeed represent an important roadmap in the process of restoring the independence of the judiciary in the country.

Despite the results of the recent elections, however, it appears that this attempt is not going to be an easy one. There is still considerable opposition in the country to a reformist course that would restore an effective separation of powers and judicial independence. In addition, eight years of court-packing and politically influenced appointments have left their mark on the current composition of Polish courts, including the Supreme Court. The same reactions to the ECtHR ruling and the alleged (yet groundless) violations in the composition of the Court, reported by members of the former Polish government, seem to bear witness to this resistance in the country. After all, one might argue that every commendable judgment has faced its share of criticism.

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