

Mandate of the Special Rapporteur on the independence of judges and lawyers

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 44/8.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning **the alleged judicial harassment against two Polish judges, allegedly as a result of actions taken and/or opinions expressed in the exercise of their judicial functions.**

I would also like to express my concerns about the **alleged disregard by Polish authorities of the measures adopted by EU institutions in relation to the new disciplinary regime for judges**, and in particular the order of the Grand Chamber of the Court of Justice of the European Union to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges and the various reasoned opinions of the European Commission regarding the continued functioning of the Disciplinary Chamber.

Igor Tuleya is a judge of the Criminal Division of the Warsaw Regional Court. He has been publicly critical of the Government's ongoing reform of the judiciary and has made numerous public statements calling for adherence to the rule of law and preservation of judicial independence. Judge Tuleya has been stripped of his judicial immunity in relation to a decision taken in good faith in the exercise of his judicial functions, and is now exposed to the risk of criminal prosecution.

Beata Morawiec is a judge (and a former president) of the Kraków Regional Court. She is also one of the leaders of THEMIS Association of Judges, the second largest association of judges in Poland. The ongoing disciplinary procedure against judge Morawiec seems to be in direct correlation with the civil proceedings she successfully undertook against the Minister of Justice for his allegedly slandering remarks about her professional conduct.

According to the information received:

The case of judge Igor Tuleya

On 18 December 2017, in a public hearing, judge Tuleya adjudicated a complaint concerning discontinuation of an investigation by the prosecutor's office in a high-profile, politically sensitive case involving the lawfulness of a

vote convened by the Speaker of the lower house of Parliament.¹

Judge Tuleya allowed journalists to be present and broadcast from the courtroom while the court's decision and its oral justification were pronounced.

The matter of transparency of court sessions is regulated by article 95b of the Code of Criminal Procedure.² Usually, rulings on investigations are issued behind closed doors, i.e. without the participation of the public, including the media, but the criminal procedure code allows judges to make the hearing public when the interest of justice so requires.

In delivering the justifications for his ruling, the judge referred to evidence from the preparatory proceedings, including witness testimony, and pointed out numerous discrepancies in the testimonies given by members of the ruling party.

The prosecutor present at the hearing allegedly did not object to the media presence or to Judge Tuleya's reference to the evidence presented in his public decision.

However, in 2018, the deputy disciplinary officer for common court judges launched an investigation into Judge Tuleya's decision to allow journalists access to the proceedings. Judge Tuleya was accused of abuse of power and unauthorised disclosure of information related to an active criminal investigation.

Under the Polish Criminal Code, the unauthorised public disclosure of information about preparatory (pre-trial) criminal proceedings constitutes a criminal offence.³ The prosecutor's office considered that the judge had exceeded his authority and committed this offence by allowing the media to broadcast the hearing. The prosecutor's office alleged that judge Tuleya disseminated information on the ongoing investigation while reading the

¹ On 16 December 2016, the speaker of the Sejm excluded an opposition MP from the session of the lower house of the Polish Parliament. The decision was taken following the critical remarks the opposition MP made on a bill seeking to limit the access of the media to the two houses of Parliament. This decision, perceived as unlawful and disproportionate, triggered a parliamentary crisis, during which opposition MPs occupied the Sejm's tribune and plenary hall. The interrupted session was resumed in another hall (the Column Hall), and several important laws, including the budget act for 2017, were passed.

A group of citizens and MPs notified a prosecutor's office about the suspected commission of a criminal offence, namely the holding of the vote outside the plenary chamber. In their opinion, the vote was held in violation of the Rules of the Sejm, including those related to the requirement of the quorum and the obligation to enable members of the opposition to participate in parliamentary sessions. The prosecutor's office did not find grounds to press charges and discontinued the investigation. Following the decision of the prosecutor's office, the applicants filed a complaint to the Regional Court in Warsaw. The case was assigned to judge Tuleya.

² Article 95b, § 1, provides that "A session shall be held in camera, unless the Act stipulates otherwise or the president of the court or the court orders otherwise."

³ Article 241, para. 1, of the Criminal Code provides that "whoever publicly disseminates, without permission, information from preparatory proceedings before they have been disclosed in court proceedings shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years."

motivation of his decision.

On 10 April 2019, judge Tuleya lodged an application with the European Court of Human Rights (application no. 21181/19), alleging that the disciplinary proceedings started against him cast doubt on his reputation as a judge, in violation of article 8 (right to respect for private and family life) of the European Convention of Human Rights. Judge Tuleya also alleged that there was no legal avenue for him to contest the breach of his privacy rights, as required by article 13 (right to an effective remedy). The case of judge Tuleya will also be examined under article 10 (freedom of expression).

On 26 February 2020, the National Prosecutor's Office sought permission to lift judge Tuleya's immunity from criminal prosecution in relation to the December 2017 proceedings. The Prosecutor's office alleged that Judge Tuleya failed to fulfill his duties and overstepped his authority by allowing the media to record the December 2017 session. On 9 June 2020, the Disciplinary Chamber, in a single-judge formation, denied the motion of the prosecutor's office. In a closed hearing, the Chamber found that Judge Tuleya's decision to permit media recordings "in no way" constituted overstepping the judge's authority as judicial discretion to admit media to such proceedings is explicitly authorized under statutory law.

The prosecutor's office appealed against the first-instance decision of the Disciplinary Chamber. On 18 November 2020, a three-judge panel of the Disciplinary Chamber overturned the first-instance decision and granted the prosecutor's motion to waive judge Tuleya's immunity. In its resolution, the Disciplinary Chamber resolved that the judge could be prosecuted in relation to the alleged violation of the prohibition of disclosing materials from an ongoing criminal investigation. At the same time, the Disciplinary Chamber dismissed the prosecution's submission regarding the abuse of power allegedly perpetrated by the judge.

With regard to the decision to allow the media to be present in the courtroom during the reading of the decision, the Disciplinary Chamber held that although a judge has the authority to decide whether a case is heard in camera or not, "it is not true that a judge can do anything in the courtroom". In this particular case, the Disciplinary Chamber considered that judge Tuleya should have considered the kind of information he would disclose to the media prior to allow their presence in the courtroom.

The Disciplinary Chamber also suspended judge Tuleya from the exercise of his professional duties for an indefinite period and reduced his pay by 25 percent for the duration of the suspension.

The appeal decision of the Disciplinary Chamber was adopted with a 2-1 majority, with one of the judges presenting a dissenting opinion. There appears to be no further appeal within the Polish court system against the decision of the Disciplinary Chamber, and Judge Tuleya may now face criminal charges for exercising his judicial discretion during a proceeding in his courtroom.

The Disciplinary Chamber's decision to lift judge Tuleya's immunity was widely criticised in Poland and abroad. Many organisations, including OSCE/ODIHR and the American Bar Association, raised concerns about the severe threat to the independence of the judiciary in Poland arising from the Disciplinary Chamber ruling.⁴

The case of judge Beata Morawiec

In 2017, the Minister of Justice dismissed judge Morawiec – allegedly on discretionary basis – from the position of the Regional Court's president. It is alleged that the judge's dismissal as president of the Regional Court in Krakow was part of a wider national purge of court presidents that took place after the adoption of the Act on Common Courts Organisation.⁵

Judge Morawiec's dismissal was widely covered by the state-controlled media and the Ministry of Justice. The Ministry issued a press release stating that judge Morawiec had failed to perform her supervisory duties concerning the work of the court's economic director and suggesting that her dismissal was linked to the corruption scandal revealed in courts in Kraków.

Judge Morawiec was the only former court president in Poland who sued the Minister of Justice for his allegedly slandering remarks about her professional conduct. Following her dismissal as court president, she brought a civil action against the Ministry of Justice and won in the first instance. The court allegedly ordered the Minister of Justice to apologise to the judge. The Ministry appealed against the first-instance decision and, in January 2021, the Appellate Court in Warsaw upheld the decision of the first-instance court.

In September 2020, the National Prosecutor's Office submitted a motion to the Disciplinary Chamber of the Supreme Court for waiver of judge Morawiec's immunity from criminal prosecution. There are currently speculations among the judicial community that the criminal charges against judge Morawiec may constitute a reprisal for the fact that that the judge publicly "humiliated" the Minister of Justice by bringing a civil action against him.

The motion to strip the judge of her judicial immunity was related to a pending criminal investigation concerning a corruption scandal in Kraków courts. Reportedly, the prosecution informed the media that there were sufficient

⁴ See OSCE/ODIHR, OSCE/ODIHR concerned about decision undermining judicial independence in Poland, 20 November 2020, available at: <https://www.osce.org/odihr/471225>; American Bar Association, The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland, available at: https://www.americanbar.org/groups/human_rights/reports/the-case-of-judge-igor-tuleya--continued-threats-to-judicial-ind/

⁵ In my mission report on Poland, I raised concerns on the amendments to the Act on Common Courts Organisation, which introduced new rules for the appointment and dismissal of court presidents. According to article 17, the Minister of Justice acquired wide and discretionary powers to appoint and dismiss court presidents; during the six months after the entry into force of the amendments, the Minister of Justice was empowered to dismiss presidents and vice-presidents of the common courts and to appoint their replacements at his own discretion, and without any form of judicial review. The amendments also introduce a new ground for dismissal which could easily be abused to remove judges at the Minister's discretion and provide to the Minister unfettered power to appoint new court presidents without any obligation to obtain the approval of the general assembly of the court concerned or the National Council of the Judiciary, as was the case under the previous Act (A/HRC/38/38/add.1, para. 48).

grounds to press charges against judge Morawiec for bribery and the abuse of power. According to the prosecution, judge Morawiec would have obtained remuneration from the Appellate Court in Kraków for the preparation of a fictitious expert opinion, and would have accepted a telephone for issuing a favourable judgment. The judge denied these allegations. Reportedly, she even posted the expert opinion that she had written for the court on the internet.

On 18 September 2020, around 6:30 a.m., a public prosecutor, assisted by two agents of the Central Anti-Corruption Bureau (CBA), allegedly presented a decision of the National Prosecutor's Office on the 'voluntary handover of items' to judge Morawiec.

The prosecutor and CAB agents requested the judge to give them an expert opinion, which she wrote in 2013 at the request of the Court of Appeal in Krakow, as well as the electronic media on which she had prepared it. They warned her that if she did not hand them over, the prosecutor would search her house. The Judge voluntarily gave them a pen drive with the opinion and her official computer, which contains notes related to cases in which she had adjudicated and draft judgments.

The visit lasted about an hour. The same group appeared in court at 10.30 a.m., to obtain from judge Morawiec a copy of the expert opinion that she said she had there. The prosecutor and CAB agents took the copy and the printer on which the judge had printed it.

On 12 October 2020, the Disciplinary Chamber of the Supreme Court lifted the judicial immunity of judge Morawiec. The Disciplinary Chamber also suspended the judge from the exercise of her professional duties and reduced her pay by 50 percent. According to the Disciplinary Chamber, the evidence gathered in the criminal investigation demonstrated that judge Morawiec had committed a criminal offence.

The Disciplinary Chamber allegedly rejected the defence's motion to remove the judges appointed by the current National Council of the Judiciary from the case, as requested by the interim measures adopted by the European Court of Justice in case C-791/19 R. In this order, the European Court requested the Disciplinary Chamber to suspend its activities concerning Polish judges and to cease hearing disciplinary procedures against judges, while the proceedings as to whether it is an independent body complying with the requirements of EU law are pending.

Judge Morawiec has appealed against the Disciplinary Chamber's resolution.

Alleged disregard of the measures adopted by EU institutions in relation to the new disciplinary regime for judges

On 3 April 2019, the European Commission launched an infringement procedure against Poland in relation to the new disciplinary regime for judges, considered to undermine the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control, as required by the Court of Justice of the European Union (CJEU).

On 25 October 2019, the European Commission brought an action before the CJEU, claiming, inter alia, that the new disciplinary regime did not guarantee the independence and impartiality of the Disciplinary Chamber, composed exclusively of judges selected by the National Council of the Judiciary along political lines.

On 19 November 2019, the CJEU issued a judgment in response to a request for preliminary ruling presented by the Chamber of Labour Law and Social Insurance of the Supreme Court of Poland (“the Labour Chamber”). The CJEU found, inter alia, that article 47 of the Charter of Fundamental Rights of the European Union precluded cases concerning the application of EU law from falling within the exclusive jurisdiction of a court that is not independent and impartial (in the present case, the Disciplinary Chamber of the Supreme Court of Justice).⁶

Following the CJEU judgment, the Labour Chamber of the Supreme Court of Poland held, in its judgments of 5 December 2019 and 15 January 2020, that the National Council of the Judiciary could not be regarded as an impartial body independent of the legislative and the executive branches of power, and that the Disciplinary Chamber of the Supreme Court was not a “court” within the meaning of European Union law and national law.

Notwithstanding this judgment, the Disciplinary Chamber continues to operate.

On 20 December 2019, the plenary of the Sejm adopted a bill on amending the Act on the Common Courts Organisation, the Act on the Supreme Court and certain other acts (hereinafter, “the Amendments”). The bill was developed, at least in part, as a response to the judgment of CJEU of 19 November 2019 and the subsequent ruling of the Labour Chamber of the Supreme Court.

On 23 January 2020, the European Commission requested the CJEU to order Poland to adopt the following interim measures: (1) to suspend, pending the judgment of the Court of Justice on the action for failure to fulfil obligations (‘the final judgment’), the application of the provisions constituting the basis of the jurisdiction of the Disciplinary Chamber to rule, both at first instance and on appeal, in disciplinary cases concerning judges; (2) to refrain from referring the cases pending before the Disciplinary Chamber before a panel whose composition does not meet the requirements of independence defined, in particular, in *A.K and Others*, and (3) to communicate to the Commission, at the latest one month after notification of the order of the CJEU imposing the requested interim measures, all the measures that it has adopted in order to comply in full with that order.

On 8 April 2020, the Grand Chamber of the CJEU issued an order granting the Commission’s application for interim measures. The order requested Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges.⁷

⁶ Court of Justice of the European Union, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, 19 November 2019.

⁷ Court of Justice of the European Union, *European Commission v. Poland*, order of 8 April 2020.

On 29 April 2020, the European Commission sent a letter of formal notice to Poland regarding the amendments of 20 December 2019, entered into force on 14 February 2020.

On 30 October 2020, the European Commission moved forward with the infringement procedure initiated in April 2020 by sending a reasoned opinion to Poland.

On 3 December 2020, the European Commission sent an additional letter of formal notice to Poland, adding a new grievance to the infringement procedure started on 29 April 2020. In that letter, the Commission considered that Poland had violated EU law by allowing the Disciplinary Chamber – the independence and impartiality of which is not guaranteed – to decide on matters which have a direct impact on judges and the way they exercise their function. These matters include cases of the lifting of immunity of judges with a view to bringing criminal proceedings against them, and the consequent temporary suspension from office and the reduction of their salary. The Disciplinary Chamber is also deciding on matters related to labour law, social security and the retirement of Supreme Court judges.⁸

On 27 January 2021, the European Commission decided to send an additional reasoned opinion to Poland regarding the continued functioning of the Disciplinary Chamber of the Supreme Court. The additional reasoned opinion follows on the additional letter of formal notice adopted on 3 December 2020, which added a new grievance to the infringement procedure started on 29 April 2020.

Without prejudging the accuracy of the information received, concern is expressed at the above allegations.

International and regional standards provide that judges enjoy a certain degree of immunity from civil or criminal jurisdiction. Judicial immunity is not general, but is limited to decisions taken or activities carried out in good faith in the exercise of judicial functions (functional immunity). Judicial immunity stems from the principle of judicial independence, and aims at shielding judges from any form of intimidation, hindrance, harassment or improper interference in the performance of their professional functions. Without a certain degree of immunity, prosecution or civil claims could be used as a retaliatory or coercive measure to erode independent and impartial decision-making.

In relation to the body in charge of hearing disciplinary cases against judges, international standards provide that the power to discipline judges should be vested either in an independent body or a court. A number of human rights mechanisms and bodies, including the Special Rapporteur on the independence of judges and lawyers (A/HRC/38/38/Add.1, para. 60), have raised serious concerns in relation to the independence of the Disciplinary Chamber, whose members are selected by a National Council of the Judiciary that is largely dominated by the political appointees of the current ruling majority.

Similar concerns have been raised by European institutions, and in particular the European Commission and the CJEU. In this regard, I am gravely concerned that Poland did not take any action in compliance with the order of the Grand Chamber of the CJEU. Reportedly, Poland also failed to adopt appropriate measures to address the concerns that led the European Commission to initiate a new infringement procedure in April 2020 and to remedy to the violations of EU law arising from the continued functioning of the Disciplinary Chamber of the Supreme Court.

The disciplinary proceedings referred to in this communication and the threat of criminal prosecution against the two judges seem to be directly correlated to the activities they have undertaken in the exercise of their judicial functions, and may also constitute an act of reprisal for the legitimate exercise of their right to freedom of expression. Considered in their entirety, the various measures adopted by national authorities against the two judges may constitute “judicial harassment”, intended as the malicious and often simultaneous use of disciplinary proceedings, civil suits and/or prosecution as a retaliatory or coercive tactic to punish the two judges for the decisions they rendered in the exercise of their professional functions and/or for critical views they expressed with regard to the judicial hierarchy or the reform of the judiciary.

The disciplinary and criminal proceedings against the two judges may have a far-reaching adverse impact on the independence of the judiciary in Poland, since other judges may be deterred from exercise their judicial independence and their freedom of expression out of fear of being subject to disciplinary, criminal or civil proceedings.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law**, attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and comments which you may have on the above mentioned allegations.
2. Please provide detailed information on the factual and legal grounds for lifting judge Tuleya’s immunity, and explain how the resolution of the Disciplinary Chamber of the Supreme Court can be regarded as compatible with international and regional standards concerning the immunity of judges from jurisdiction in relation to decisions taken in good faith in the exercise of their professional duties.
3. Please provide updated information on the ongoing criminal prosecution of judge Tuleya.
4. Please provide detailed information on the ongoing disciplinary procedure against judge Morawiec. Please indicate the factual and legal grounds for lifting judge Tuleya’s immunity, and explain how the resolution of the Disciplinary Chamber of the Supreme Court can be

regarded as compatible with international and regional standards concerning the immunity of judges from jurisdiction in relation to activities she had undertaken in good faith in the exercise of her professional duties.

5. Please explain why the Disciplinary Chamber of the Supreme Court decided to adjudicate the cases of judge Tuleya and Morawiec despite the interim measure adopted by the Grand Chamber of the Court of Justice of the European Union on 8 April 2020. What measures has Poland adopted, or intends to adopt, to implement the Grand Chamber decision?
6. Please provide detailed information on the legislation concerning accountability of judges, and explain how it is compatible with international human rights norms and standards relating to the independence of the judiciary.
7. Please indicate the measures Poland intends to take to address the serious concerns raised by several international and regional mechanisms in relation to the threats to the independence of the judiciary, and provide detailed information on the guarantees in place to protect and promote the independence of the judiciary as a whole as well as the independence of individual judges.

I would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

The independence of the judiciary is enshrined in a number of international and regional human rights treaties to which Poland is a party, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

Both instruments provide that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. The country's adherence to these treaties means that it must, *inter alia*, adopt all appropriate measures to guarantee the independence of the judiciary and protect judges from any form of political influence in their decision-making.

As a member State of the European Union, Poland is also bound to respect and implement European Union treaties and the values they enshrine, including respect for the rule of law and human rights (art. 2 of the Treaty on the European Union). Article 47 of the European Union Charter of Fundamental Rights, which is binding on Poland, reflects fair trial requirements relating to an independent and impartial tribunal previously established by law.

In its General Comment No. 32 (2007), the Human Rights Committee noted that the requirement of independence refers, in particular, to the procedure for the appointment of judges; the guarantees relating to their security of tenure; the conditions governing promotion, transfer, suspension and cessation of their functions; and the actual independence of the judiciary from political interference by the executive branch and the legislature. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal (para. 19).

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. The Principles provide, *inter alia*, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

The Basic Principles expressly recognise that like other citizens, members of the judiciary are entitled to freedom of expression, provided that in exercising this rights, they always conduct themselves "in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary" (principle 8).

With regard to the accountability of judges, the Basic Principles provide that judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions (principle 18). Any

decision to discipline, suspend or remove a judge from office should be taken in accordance with a fair procedure (principle 17), and be taken in accordance with established standards of judicial conduct (principle 19). Accountability mechanisms and proceedings should respect the fundamental guarantees of fair trial and due process and should be implemented by an independent and impartial body. Accountability procedures should be limited to instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute (A/HRC/26/32, para. 123).

The Special Rapporteur stressed on a number of occasions that the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence. Outside these cases, the only remedy for “wrong decisions” adopted by judges is the overruling or modification of their decisions through the appeal process. In particular, judges cannot be removed or punished for *bona fide* errors or for disagreeing with a particular interpretation of the law.

In a report on national judicial councils (A/HRC/38/38), the Special Rapporteur on the independence of judges and lawyers highlighted the essential role that judicial councils play in guaranteeing the independence and the autonomy of the judiciary, and included a number of recommendations relating to the establishment, composition and functions of judicial councils aimed at ensuring the independence of such bodies and their effectiveness in the discharge of their functions as guarantors of judicial independence.

Finally, the Special Rapporteur considers that the responsibility for disciplinary proceedings against judges should be vested in an independent authority composed primarily of judges, such as a judicial council or a court (para. 101). In his report on Poland (A/HRC/38/38/Add.1), the Special Rapporteur noted with concern that the Disciplinary Chamber, established pursuant to the new Act on the Supreme Court of April 2018, is composed of judges by the President of the Republic upon recommendation of the National Council of the Judiciary, which is now allegedly dominated by political appointees of the current ruling majority. He noted that the President of the Republic would be able to determine almost completely the composition of the new Disciplinary Chamber, so as to ensure that it is wholly or mainly composed of newly appointed judges, with the risk that the whole judicial system “will be dominated by these new judges, elected with the decisive influence of the ruling majority” (para. 60).