# THE SELECTION AND APPOINTMENT OF JUDGES -

## Reflections on the impartiality and the independence

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## 1. Foreword

The alarming news of the breach of fundamental values concerning the principle of rule of law and in particular judicial independence in Poland and Hungary during the past few years has called for measures at the European Union level[1]. We are seeing authoritarian and populist tendencies in many parts of Europe. In Poland and Hungary, parties that express such movements have entered into the government. In both of these EU Member States, the parties seek to consolidate their position by taking power over the courts. They primarily target the highest courts and the central court administration.

Of old, the Western nations and the Nordic countries have taken for granted that the independency and impartiality of the judiciary and individual judges cannot be violated. Even though we in Finland have been lulled into believing that the said independency cannot be shaken or at least threatened, it would be foolery to continue believing that such a scenario would be completely impossible in our own national system.

The Nordic countries have a long history of cooperation. In relation to judiciary and jurisdiction, among other things, the development in Finland has largely followed the same course as that of Sweden. Sweden has already started to review its system by setting up a committee to assess how the constitution can be changed and whether there is need to enforce the safeguards that ensure the impartiality and independency of courts[2]. Discussion of a similar review in Finland has been initiated this spring 2021 by the President of the Supreme Administrative Court and continued by the Permanent Secretary at the Ministry of Justice[3], but since then the discussion has remained inactive.

Independent courts are a defense against the exercise of authoritarian power, and they protect the fundamental rights and freedoms of individuals. As stated by the European Court of Human Rights (hereafter referred to as the ECtHR), the right to tribunal established by law is a "reflection of the very principle of the rule of law and, as such, it plays an important role in upholding the separation of powers and the independence and legitimacy of the judiciary as required in a democratic society"[4]. Considering the political climate in some parts of Europe and how fast it can change, the

[1] European Parliament, press release 16.1.2020, Rule of law in Poland and Hungary has worsened.
[2] Kommittédirektiv dir 2020:11
[3] Two articles in the national newspaper with the widest circulation in Finland, Helsingin Sanomat, 6.4.2021 and 27.4.2021.
[4] Case GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND of 12 March 2019, Application no. 26374/18, paragraph 237

discussion also in Finland should take place now when the stability and agreement on fundamental values prevail.

For these reasons we decided to take under review the question of what problems are possibly related to the selection and appointment of judges from the point of view of impartiality and independence of judges. Our setting for the subject is national, but we approach the Finnish judicial appointment system from a general and international perspective. First, we present what norms or principles may be derived from ECtHR and the Court of Justice of the European Union (hereafter referred to as the CJEU) case-law that sets out the framework on ensuring the independence of judiciary in accordance with the principle of the separation of powers. Then we evaluate our national appointment procedure and explore what potential risks it might hold. Even though the political or other external threats to the independence of the courts are currently more acute in the European level, we also put forth the question of impartiality or "internal independence" of the Finnish appointment procedure concerning fixed term judges.

## 2. The independence and impartiality of judiciary in the light of ECtHR and CJEU case law

*Appointment of permanent judges and chief judges in Finland*

In general, a candidate applying for a position as a judge must meet certain formal qualifications such as Finnish citizenship, a Master's degree in law, and a certain level of proficiency of both official languages of Finland. Judges are appointed to a judicial office permanently unless there are special grounds for making the appointment for fixed term. According to the Finnish Constitution, a judge can only be relieved from his or her office by a court's judgment. It is a judge's lawful duty to resign from his or her office at a certain age or due to loss of ability to work. The principle of irremovability of judges is thus guaranteed in the Constitution. Unlike for example prosecutors, the judges cannot be relieved on productional or financial grounds. The fact that judges can only be dismissed due to retirement or work disability enhances the impartiality and independence of judges.[5]

The Finnish Constitution states that all the permanent judges are appointed by the President of the Republic. The appointment procedure and appointment of other judges is established by law.

[5] If a judge refuses to resign in such circumstances, the competent court is obliged to consider and decide on the matter. In general, the competent court to decide on removal from office is a court which ranks higher in the stages of appeal than the court in which the judge is serving. Naturally a judge can also be suspended from office under specific grounds described in the Public Officials Act, *e.g.* criminal investigation, or refusal to take part in such necessary health controls or tests that are ordered to evaluate if a judge is capable of performing his or her duties. According to the Courts Act, the decision of suspension is in general made by the court in which the judge is serving.

According to the Courts Act, permanent judges and chief judges are appointed by the President of the Republic based on the Government's proposal. According to the Act on Public Officials in Central Government, there is no right to appeal of the appointment made by the President.

In brief, the procedure goes as follows: An announcement is made of vacant position(s) in a court. The National Courts Administration, the central administration of courts, draws up a summary of each applicant's official merits[6]. The Judicial Appointments Board, an independent body that consist mainly of judges, prepares a reasoned proposal of who should be appointed to the office(s) based on the summary and statements it has gathered from relevant court(s).

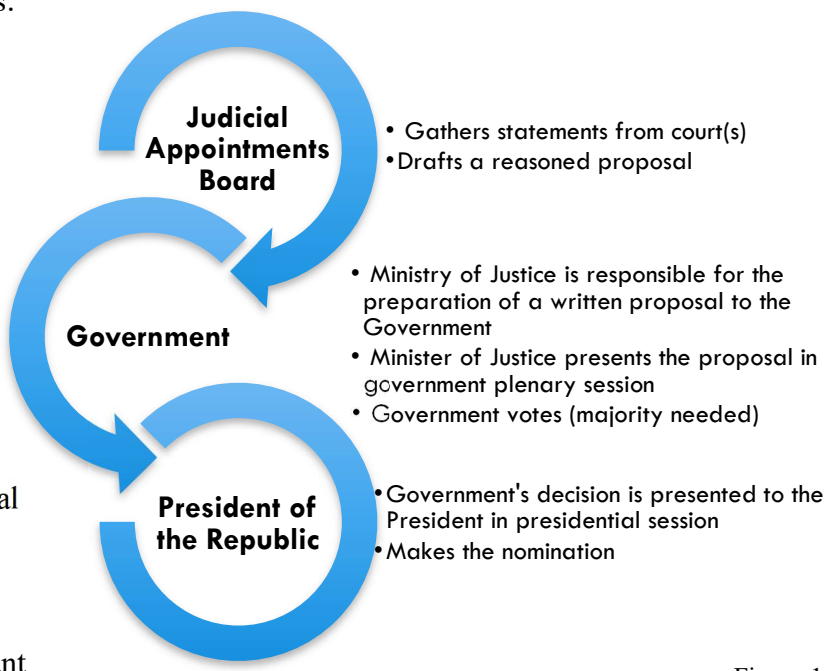


Figure 1

The Board submits its proposal to the Ministry of Justice, that is the ministry responsible for the preparation of matters concerning the appointment of judges. At the ministry an officer prepares a written proposal based on the Judicial Appointment Board's consultative, reasoned proposal. The Minister of Justice and the presenting officer then present the written proposal to the Government in its plenary session. The proposal supported by the majority of the Government is the final decision. The decision made at the Government's session shall then be presented to the President of the Republic in a presidential session by the Minister of Justice.

Before making its proposal, the Board requests a statement on the applicants from the court that announced the vacancy. When the position in question is that of a district court judge, the Board requests a statement both from the district court and the court of appeal of the same jurisdiction. The statement contains the court's reasoned opinion on the merits and qualifications of the applicants and the ranking of applicants in order of preference. Afterwards the Board reserves an opportunity for the applicants to comment on the statements obtained during the process. Before the

[6] This is done in cooperation with the secretary of the Judicial Appointments Board, who advises the staff of the National Courts Administration of what information is needed.

appointment, the applicant must declare his or her private interests, in other words his or her industrial and commercial activity, business or property ownership, secondary occupations and any other duties or liabilities that may have significance when evaluating the applicant's qualifications to perform the duties of the position applied.

*The Finnish system in the light of the Guðmundur Andri Ástráðsson v. Iceland judgment – with a little Polish twist*

In its fairly recent judgment[7], the ECtHR stated, after assessing the case in the light of fundamental principles behind the "tribunal established by law" rule and the European Convention on Human Rights (hereafter referred to as the ECHR or the Convention), that there had been a violation of the right to a fair trial and the said rule in Iceland. In this judgment, the ECtHR also provided a new threshold test to navigate through the assessment process: whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, and whether the balance between the competing principles has been struck fairly and proportionately in the particular circumstances of a case.[8] The said threshold test was again used in another recent ECtHR judgment to test whether the nomination process of three judges to the Constitutional Court in Poland violated the article 6 and the tribunal established "by law" rule[9]. Maybe this goes to show that such a test might be needed in the future in other cases as well, no matter how much a "rule of law" state one is considered to be.

Could there be a case in Finland similar to what happened in Iceland or Poland? In Iceland the Evaluation Committee had made its proposal for the candidates to be appointed as judges. In the national applicable legislation, the Minister of Justice was granted a possibility to defer from this proposal and give her own proposal of the candidates for the Parliament for the final vote. The Minister had changed four names on the list provided by the Committee, and presented in the Parliament, which, instead of separate vote on each candidate, voted *en bloc* for the Minister's list and accepted it as it was.[10] In Poland, the nominating body, *sejm*, had in the end of its term legally appointed three judges to the Constitutional Court, but the President refused to take the oath to the office of these judges, and eventually the following *sejm* appointed other three judges as replacement, and tried to enforce its actions by legislative means. By the later *sejm's* opinion, the

[7] Case GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND of 12 March 2019, Application no. 26374/18
[8] Case GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND of 12 March 2019, Application no. 26374/18
[9] Case XERO FLOR w POLSCE sp. z o.o. v. POLAND of 7 May 2021, Application no. 4907/18
[10] Case GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND of 12 March 2019, Application no. 26374/18

judges appointed by the previous *sejm* were not legally appointed, as they were not sworn in by the president.[11]

*The first step* of the Court's threshold test is to ask whether there has been a manifest breach of domestic law, objectively and genuinely identifiable as such, when appointing the judge to his or her position. In Iceland, the conditions of the first step were clearly satisfied. Firstly, the Icelandic Minister had failed to give independent evaluation of the facts and adequate reasons to disagree with the Evaluation Committee's proposal of the applicants that should be appointed as judges. Secondly, the voting procedure was not compliant with the applicable legislation.[12] In Poland, the major focus on the first step was on the relevant and fairly recent case law of the Constitutional Court, and based on that, the ECtHR found in its judgment that there had been a breach of the domestic law. The first breach was caused by the later *sejm,* as the judge positions had been already filled according to the national law and as their resolutions calling for the president not to take the judges' oath and to rule that the appointments made by the previous *sejm* lacked legal effect, were legally non-binding. Secondly, the president did not have a role in the appointment process that would allow him to refuse to take oath from the judges, as the election was final by the decision of the *sejm*.[13]

In principle, a situation similar to Iceland could happen in Finland, if the proposal of the Judicial Appointments Board would be contested in the Ministry of Justice. On the other hand, the difference seems to be that in Finland the proposal is not written by the Minister as a person of a political status, but by the public officials at the ministry. However, the proposal could also be contested in the Government, which is an organ formed – usually – by those political parties currently in power. Yet again, the President of the Republic holds the power of decision and could refuse to appoint an applicant proposed by the Government contrary to the proposal of the Judicial Appointments Board. Compared to what happened in Poland, it feels somewhat unimaginable that the final decision of the appointment in the Finnish process could be re-evaluated for any, let alone political, reasons. Even in a situation, where the president or the government had changed during the appointment process, it seems unthinkable that it would have any effect on the appointment process. But maybe this goes to show, how we might also be a bit credulous to our own system.

*The second step* that follows, is to assess the breach in the light of the object and purpose of the requirement of a tribunal established by law. The question is whether the ability of the judiciary to

[11] Case XERO FLOR w POLSCE sp. z o.o. v. POLAND of 7 May 2021, Application no. 4907/18
[12] Case GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND of 12 March 2019, Application no. 26374/18
[13] Case XERO FLOR w POLSCE sp. z o.o. v. POLAND of 7 May 2021, Application no. 4907/18

perform its duties free of undue interference, and thereby to preserve the rule of law and the separation of powers, is ensured despite of a breach in the appointment process. One particular question is whether the breach of the applicable national rules creates a real risk that the other organs of the government could exercise undue discretion undermining the integrity of the appointment process to an extent not envisaged by the national rules. In the Icelandic case the Court noticed that the main aim behind the mechanism set by the national legislation for the procedure in which the judges are appointed, was to limit the influence of the executive in the appointment of judges and to strengthen the independence of the judiciary. Some legislative changes had been made to answer the concerns that the rules governing the selection and appointment of judges did not sufficiently guarantee their independence, due to the possible political influence and the role of the ministers in the process.[14] In Finland such interference has not been a major topic of a public debate. But is it naïve to expect that process carried out mainly by judges themselves or government officials, would be free of doubts from this point of view? The suspected undue interference might not be as political by nature, but there is easily some room for questions in terms of objectivity.

The Icelandic Minister of Justice had failed to explain the reasons to pick a candidate over another, against the Committee's properly reasoned proposition. Also, the reasons the Minister gave for the change of the candidates were of such nature, that they called into question the objectivity of the selection process. The Court concluded that Minister's actions raised objectively justified concerns to that effect, and this was sufficient also to detract from the transparency of the selection process. The Parliament could have taken an informed position on the Minister's proposal and performed a meaningful supervision of the appointment process only if the Minister had given due reasons for her proposal to depart from the Evaluation Committee's opinion, which she failed to do. The deficiencies in the procedure before the Minister of Justice in turn resulted in a flawed procedure before Parliament, as those deficiencies were not rectified when the matter came to a vote in Parliament. Just the fact that the vote had not been conducted in right order, would not by itself been considered a manifest breach.[15]

One might say it would probably be considered a manifest breach if the Committee had failed to explain its proposal or the reasons given were to raise doubts. In Finland probably the best knowledge of the candidates rests at the Judicial Appointments Board, and its assessment of the candidates is the most important part of the process to fulfill the required standard of reasoning. Yet it still gives the Ministry of Justice – or the Government or the President of the Republic – the

[14] Case GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND of 12 March 2019, Application no. 26374/18
[15] Case GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND of 12 March 2019, Application no. 26374/18

opportunity to act as a safeguard mechanism, if it seems that the reasoning given is not sufficient or raises questions in terms of impartiality. The proposal of the Judicial Appointments Board has only once been disapproved, and in that case both the proposal and the final nomination were very well justified. Consequently, the discretion in Finland has so far been rightly exercised.

In the Polish case, the ECtHR put emphasis on two elements in the second step evaluation. Firstly, the later term *sejm* and the President of the Republic persisted in defying the finding that the three judges elected by the previous *sejm* had been duly elected. Secondly, the later term *sejm* adopted new legislation to support the election of three other judges, even though the constitutional court declared two statutory provisions aimed at forcing the three judges' admission to the bench unconstitutional and held that the implementation of the impugned legislative acts would be contrary to its earlier, final judgments. The ECtHR stated that the legislative and executive organs' failure to abide by the relevant constitutional court judgments regarding the validity of the election of the court's judges undermined the purpose of the established by law requirement to protect the judiciary against unlawful external influence. The legislative and executive authorities failed to respect their duty to comply with the relevant judgments of the constitutional court, which determined the controversy relating to the election of judges of the constitutional court, and thus their actions were incompatible with the rule of law. Their failure in this respect further demonstrated their disregard for the principle of legality. Also, the ECtHR pointed out the importance of the role of any constitutional court: their decisions should be respected by other political organs, as it is fundamental to the separation of powers, judicial independence and the proper functioning of the rule of law. Inevitably, the breaches were considered fundamental by the standards of the second step.[16]

The emphasis put in the role of the constitutional court and its rulings raises a question should there always be a separate constitutional court, or some other constitutional body, to act as a safeguard to the right to a tribunal established by law – especially for the attempts to structurally undermine the appointment process by legislative means for political purposes? In Finland there is the Constitutional Law Committee, which does not play a role of any kind in the appointment process itself, but the legislative changes that are being prepared can be evaluated by it. Also, the Chancellor of Justice supervises the legality of the Ministry's decisions by reviewing beforehand the proposals intended for the Government's discussion. However, this review does not assess the appropriateness of the proposal, only its legality. Hence, if in the political turbulence the legislative

[16] Case XERO FLOR w POLSCE sp. z o.o. v. POLAND of 7 May 2021, Application no. 4907/18

authorities would try to affect the appointment process or the already made final appointments by implementing new acts, there would be a safeguard of some sort. Nevertheless, posterior evaluation of the process of an individual appointment procedure is not in its power.

*The third and final step* is to assess whether the allegations regarding the right to a tribunal established by law were effectively reviewed and remedied by the domestic courts. Such review must be carried out on the basis of the relevant Convention standards, adequately weighing in the balance the competing interests. The assessment must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom: assessing the facts and the complaints in the light of the Convention standards, weighing in the balance the competing interests at stake and drawing the necessary conclusions. Also, 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. The ECtHR considered that the Icelandic Supreme Court appeared to have failed to draw the necessary conclusions from its own findings and to assess the matter in a Convention-compliant manner, even though it had the power to address and remedy the effects of the breach. The Supreme Court seemed to have placed a great deal of emphasis on the mere fact that the appointments had become official upon signature by the President and thus there was no reason to doubt that the judges, all legally qualified for the post, would perform their tasks independently and in accordance with the law. None of the Supreme Court's findings addressed as such the question whether the irregularities in the process interfered with the applicant's right to a tribunal established by law as a distinct Article 6 safeguard. The conclusion was that procedural breaches of the type encountered in the case would, in practice, only result in an award of damages to the unsuccessful candidates. The ECtHR held that the judiciary plays a significant role in maintaining the checks and balances inherent in the separation of powers, and its role is fundamentally important in a democratic State governed by the rule of law. This said, the effects of such breaches may not justifiably be limited to the individual candidates who have been wronged by non-appointment, as the effects concern the general public. The judiciary plays a special role as the guarantor of justice, and therefore it must enjoy public confidence if it is to be successful in carrying out its duties. The ECtHR, as the ultimate authority on the application and interpretation of the Convention, could not accept the review undertaken by the Supreme Court, as it had no regard to the question whether the object of the safeguard enshrined in the concept of "established by law" had been achieved.[17] In the Polish case, the ECtHR simply stated that like the Polish Government had argued, there was no procedure under Polish law whereby the applicant

[17] Case GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND of 12 March 2019, Application no. 26374/18

company could challenge the alleged defects in the election process for judges of the constitutional court. Consequently, the ECtHR stated, no remedies were provided.[18]

In Finland it is unclear how a similar situation would be handled. If a party would think that the judge in his or her case would have been appointed in a flawed process, what would be the options to proceed? A party could make a claim regarding the judge's impartiality in his or her case, and have a ruling for that, but this would not lead to a dismissal of the said judge, and most likely another judge would just be appointed for that specific case. If the flaw is discovered by an outsider, who has no personal interest or a case pending, it is left unclear, whether there would be real remedies in use. One option would be to make a complaint to the Chancellor of Justice, but the answer to that complaint would not result in re-evaluation of the appointment process. This all puts in question, if in Finland we are a bit blind to our own system, even though it might not give real remedies for possible flaws in the appointment process, at least from the point of view of the step three. We seem to have a big emphasis on the pure trust that misuse would not happen, because in practice we have judges – reliable and impartial by nature and by their profession – as members in the Judicial Appointments Board selecting their peers. But maybe there should be some kind of safeguard mechanism in terms of remedy, just in case the unexpected happens.

On the other hand, there is of course a need for the judge's position to earn a special stability and the judges should not be easily dismissed. Whatever claim on the appointment process cannot be considered as a breach, so it all goes back to the ECtHR threshold test. The main principle that can be derived from the Icelandic case was that the procedure should not be breached in a way that is against the fundamental purpose of the "by law" rule, which is, of course, to endorse and secure the impartiality of judges and the legitimacy of the tribunal. In that case the breached procedural rules were the safeguards that were introduced to the system to prevent the appointing body from acting out of political or other undue motives, so that the legitimacy and independence of the tribunal should not be undermined. In Poland the breaches were flagrantly political and struck in a structural level the very essence of the separation of powers and rule of law, as the authority of the Constitutional Court – a kind of a safeguard as itself – was overruled. All these elements should be taken into consideration when evaluating the appointment process of the judges in Finland.

[18] Case XERO FLOR w POLSCE sp. z o.o. v. POLAND of 7 May 2021, Application no. 4907/18

*The independence and impartiality of judiciary in the light of CJEU case law*

The Maltese Constitutional Court requested a preliminary ruling from the CJEU concerning the power of the Prime Minister in the process of appointment of members of the judiciary in Malta in the light of the Charter of Fundamental Rights of the European Union (hereafter referred to as CFR) article 47 and the Treaty on European Union (hereafter referred to as TEU) article 19. The CJEU delivered its judgment in the spring 2021.[19]

Article 2 of the TEU describes the values upon which the Union is founded on. Among them is the principle of rule of law. According to the second subparagraph of Article 19(1) of TEU, Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

In its recent preliminary ruling, the CJEU reminded that in its settled case-law the guarantees of independence and impartiality required under EU law presuppose rules, in particular regarding the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as 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. The independence of the judiciary must be ensured in relation to the legislature and the executive to be in accordance with the principle of the separation of powers, which characterizes the operation of the rule of law. Therefore, it is necessary that judges should be protected from external intervention or pressure that might jeopardize their independence. Merely the fact that judges are appointed by the President of a Member State does not give rise to a relationship of subordination of those judges to the latter or to doubts as to the judges' impartiality, if the judges are free from influence or pressure when carrying out their role after being appointed. However, the CJEU also stated that it is still necessary to ensure that the substantive conditions and procedural rules governing the adoption of appointment decisions cannot give rise to reasonable doubts to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them.[20]

In its judgment the CJEU declared that in order to comply with the value of rule of law enshrined in Article 2 and the concrete expression of the said value in Article 19, Member States are required to ensure that any regression of their laws on the organization of justice is prevented, by refraining

[19] Judgment of 20 April 2021, Repubblika v Il-Prim Ministru, case C-896/19, EU:C:2021:311.
[20] Judgment of 20 April 2021, Repubblika v Il-Prim Ministru, case C-896/19, EU:C:2021:311. Paragraphs 53-56 and the case-law cited.

from adopting rules or imposing national provisions related to the organization of justice, which would undermine or reduce the guarantees of judicial independence.[21]

In principle, an involvement of an advisory board [such as the Maltese Judicial Appointments Committee *in casu*] in the appointment process may as such contribute in rendering that process more objective, because it limited the Prime Minister's power in the appointment of members of judiciary. It is also necessary that such a body should itself be sufficiently independent of the legislature, the executive and the authority to which it is required to submit an opinion on the assessment of candidates for a judicial post.[22] In addition the Prime Minister's power was also limited by the requirements of professional experience laid down in the [Maltese] Constitution, and these requirements had to be satisfied by candidates applying for judicial positions. Further, if the Prime Minister were to present another candidate to be appointed than the one suggested by the advisory board, the Prime Minister would be obliged to state his or her reasons for this to the House of Representatives and by publishing the said reasons in the state's official journal. Taking all these circumstances under consideration, the CJEU declared that the national provisions relating to judicial appointments did not give rise to legitimate doubts as to the imperviousness of appointed judges to external factors and as to their neutrality.[23]

## 3. The impartiality of judiciary from the aspect of the selection and appointment of judges in Finland

*The Finnish system and a threat of external pressure so far*

The Judicial Appointments Board has an advisory role to the Government, that makes a proposal to the President of the Republic, who in turn appoints permanent judges and chief judges to their offices. The only, but significant, duty of the Judicial Appointments Board is to prepare judicial appointments[24]. The Board was set up in 2000 as an independent body. A clear majority of the members of the Board consists of judges. The Board has contributed to the largely autonomous administration of judges. The Board also acts independently in relation to the courts. Even though the President of the Republic of Finland makes his or her decision based on the Government's

[21] Judgment of 20 April 2021, Repubblika v Il-Prim Ministru, case C-896/19, EU:C:2021:311. Paragraphs 62-66 and the case-law cited.
[22] Judgment of 20 April 2021, Repubblika v Il-Prim Ministru, case C-896/19, EU:C:2021:311. Paragraph 66 and the case-law cited.
[23] Judgment of 20 April 2021, Repubblika v Il-Prim Ministru, case C-896/19, EU:C:2021:311. Paragraphs 67-73.
[24] The Judicial Appointments Board is appointed by the Government for a five-year-term.

proposal, the President and the Government have in practice respected the proposals of the Board almost without exceptions over the past two decades.

When assessing the impartiality of the judiciary, according to the CJEU the fact that judges are appointed by the President of a Member State does not give rise to doubts the judges' impartiality. Likewise, ECtHR has in its case-law stated that in the light of Article 6 of ECHR, the fact that the executive power appoints the members of judiciary is found acceptable and in practice very common[25]. Appointment by parliamentary representation is also acceptable[26]. Hence there is nothing problematic in the Finnish appointment process itself.

As said before, only once in two decades have the Government and the President deviated from the Board's proposal. The deviation was well justified, and in this case, noteworthy was that the Board had also voted for the appointment by votes 6 to 5.[27] From this perspective it is easy to say that there has been no external or political threats concerning the Finnish appointment system so far.

One of the main purposes establishing the Judicial Appointments Board was to harmonize the prevailing practice concerning the appointment of judges in different courts, to increase the transparency and reasoning of appointment decisions and to facilitate the recruitment of lawyers with more diverse professional skills and experience. Overall, the Board has been seen to function well. The objectives, such as more diverse assessment of applicants' skills, abilities, and personal qualities, seem to have been achieved. The proposals of the Board are quite transparent, and in addition, the procedure also pays attention to non-judicial matters and to the professional and personal qualities of the candidates.[28]

Even though the Judicial Appointments Board has served its purpose, it has also raised some questions. In terms of population, Finland is a small country. Thus, the number of lawyers is also relatively small and the number of lawyers working in the judiciary is even smaller. Therefore, it is obvious that there are members of the Board who may know some of the applicants. No matter how independent, objective or transparent the activities of the Board are, this leaves a small window open for discussion, insinuations and suspicions. However, these issues are more related only to the internal neutrality of the Board and have nothing to do with the external or political threats coming from the outside. The external or political interference seems to be considered less of a threat.

[25] See *Campbell and Fell v. the United Kingdom*, nos. 7819/77+, 28.6.1984; *Belilos v. Switzerland*, no. 10328/83, 29.4.1988; and *Asadov and Others v. Azerbaijan* (dec.), no. 138/03, 12.1.2006.
[26] See *Filippini v. San Marino* (dec.), no. 10526/02, 26.8.2003; and *Ninn-Hansen v. Denmark* (dec.), no. 28972/95, 18.5.1999.
[27] Minutes of the presentation by the President of the Republic 112/2000, 21.12.2000.
[28] Jokela, The opening of a career of a judge – true or false?, page 56.

Maybe it has something to do with the fact that the actors in the appointment process – who in practice draft the proposals in different stages of the process – are government organs consisting of government officials, not individuals selected in a political election. Excluding the Parliament could be seen as a way to keep the everyday politics distant from the process. However, it should not be forgotten that the composition and duties of these organs, and the appointment process as a whole, are set in our national legislation, which in the end is always implemented through a political process.

*Appointment of judges for fixed term and its prevalence in Finland*

In Finland judges may also be appointed for fixed term on several grounds stated in the Courts Act. The holder of the permanent office may be on leave of absence – such as a sick leave, parental leave or job alternation leave – or a longer annual holiday. It may also be necessary for the court to appoint judges for fixed term due to the number or nature of cases. For example, in the earlier phase of the COVID-19 pandemic in 2020, especially the Finnish district courts widely canceled court sessions for safety reasons if there was no legally pressing reason to hear and solve the case urgently, which caused the number of pending cases to increase significantly.[29] To clear that backlog, the courts have received additional grants from the Government and appointed new judges for fixed term.

An announcement for the vacant position shall be made if the vacancy is for at least six months. The chief judge of the respective court may appoint a judge for fixed term for at most one year. Before the appointment is made, the chief judge shall hear the management board of the court, or if there is none, the permanent judges of the court. If the term is longer than one year, the appointment is made by the Supreme Court or the Supreme Administrative court.

To our knowledge, the number of fixed term judges in Finland is quite large. Despite our inquiries, no one has been able to show us statistics or unambiguous number that would verify this "common knowledge".[30] The periods for the fixed term assignments are usually short but can be extended.

[29] Press release 3.3.2021 by the National Courts Administration. Statistics showing the number of suspended cases, verdicts and decisions due to the coronavirus epidemic are published on the frontpage of the National Courts Administration's webpage in English, latest update per 13 June 2021 (https://tuomioistuinvirasto.fi/en/index.html).
[30] The National Courts Administration only has statistics showing the numbers of permanent or fixed term judges in person-years in each court. However, all the fixed term judges are not in the same position, as some of them might be working fixed term for a better pay category in the same or different court where he/she has been appointed as a lower pay category judge, and is on leave of absence from the other position. Also, some fixed term judges may have some other position and are taking a leave of absence to work as a fixed term judge. Yet some of the fixed term judges have no "back up" post to go back to. This obviously also makes it difficult to put in these figures.

Most of the fixed term positions of judges are in the district courts[31]. Therefore, the district courts also have the most fixed term judges. As said before, in the district courts the chief judge of the district court appoints judges for a shorter period than a year. The appointment can take place without an application process if the period is shorter than six months. This means that fixed term judges are usually appointed in a totally different process than permanent judges. Fixed term judges may be selected, for example, through the grapevine or through acquaintances. So, the appointment process for fixed term judges can be problematic from the point of view of internal impartiality. The length of a candidate's court service can usually have a great effect for obtaining a permanent post. In practice, this means that the local chief judge may play a major role in a person's judicial career and obtaining a permanent position even though this for surely has not been the intention of the legislative body for appointing judges. One could easily argue that such an opportunity for arbitrary power cannot be acceptable.

The fixed term assignments are also problematic from the point of view of impartiality because the strong security and permanency of appointments also helps to ensure the independence of the judges. However, in order for the system to work and be effective, it must be possible to appoint judges for a limited period in certain situations. According to the ECtHR case law, the appointment of members of judiciary for a reasonably long term is usually a guarantee of impartiality. There is no rule set for minimum length. Even short terms may be acceptable, but for example the renewal of a term of four years was considered questionable.[32] Yet in some areas in Finland, serving as a fixed term judge for several years is more likely to be considered common than unheard of.

By saying all this, the current risks of the appointment process itself are mainly internal and do not, for the time being, relate to the political threats coming from the outside or structures undermining the separation of powers or rule of law. However, it does not mean, that there is no work to be done to ensure our judiciary's impartiality and independence at all levels in the future.

[31] What is said about district courts applies mostly to administrative courts as well, even though their number is not as large as district courts'.
[32] See *Le Compte, Van Leuven and De Meyere v. Belgium*, nos. 6878/75+, 23.6.1981, *Campbell and Fell v. the United Kingdom*, nos. 7819/77+, 28.6.1984, *Incal v. Turkey*, no. 22678/93, 9.6.1998.

## 4. Conclusions

One of our key findings is that even though the appointment process as such would seem to ensure that the values of independence and impartiality of judiciary are upheld, it is crucial to create a safeguard mechanism that can be depended on in case the reasoning given for an appointment is not sufficient or raises reasonable doubts in terms of impartiality. One option could be to set an obligation for the body exercising the power of appointment to announce the reasons behind the proposal to another independent body – such as the Parliament or a Finnish equivalent to a Constitutional Court – in accordance with the principle of separation of powers. The appointment system needs to have such a remedy, if something unexpected and threatening would happen in the political sphere.

Also, the irremovability of judges is secured by the Constitution, but it is not absolute: if the judiciary would face a major impartiality crisis through politicization, would it be a sufficient safeguard, that the dismissal of a judge is possible only by a court's ruling? As said in the introduction, many of us are lulled into believing that no such threats even exist despite the indubitable fact that during the past decade the far right (or left) parties have grown more popular in European countries as a result of, among other things, the refugee crisis and economic crises that have given rise to radical and nationalistic feelings. The current COVID-19 crisis might also provide its own twist to the political atmosphere in European countries.

From the Finnish point of view, besides having no exact safeguard mechanism, Finland does not have a constitutional court. In addition, the candidates applying for positions of judges themselves do not have a right to appeal of the appointment decision. These facts make our system even more vulnerable because they reduce the possible paths to ensure that the appointment proposals are reasoned and that they can be openly evaluated, if for some reason doubts of impartiality would rise. In terms of impartiality within the judiciary itself, our finding is that the large number of fixed term judges and the total length of these appointments is at the moment problematic, because the power of appointment lies within the chief judges alone.

As already mentioned in the beginning, the conversation in Finland about the external and political threats concerning the rule of law and the impartiality of judges has been quite inactive, probably because there have not been any concrete or immediate threats. In this written paper we have focused on the principles set by the European case law and what they could mean from the Finnish perspective. As an example, we have also put forth the question of the impartiality regarding the appointment of fixed term judges.

In our video presentation we will focus on the external and political threats asking the question whether the independence of the Finnish courts should be strengthened and how this could be done. We have been privileged to discuss the topic with top legal professionals in Finland, and to enrich the conversation we have wanted to share their opinions on the matter with you. Stay tuned!

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