

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**BUREAU
OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES
(CCJE-BU)**

Comments by the CCJE Bureau

following the request of the Polish Judges' Association "IUSTITIA" on behalf of the Polish associations of judges to provide an opinion with respect to the decision of 22 June 2016 of the President of the Republic of Poland not to appoint as judges ten candidates presented by the National Council of the Judiciary

The request

1. By letter of 29 July 2016, the President of the National Board of IUSTITIA, one of the Polish associations of judges, addressed the CCJE on behalf of all associations of judges in Poland, requesting the opinion of the CCJE with respect to the decision of 22 June 2016 of the President of the Republic of Poland whereby the President refused to appoint as judges ten candidates presented by the National Council of the Judiciary. The courts in question were regional administrative courts, regional courts, appellate courts and district courts.

2. The Polish associations of judges referred to Article 179 of the Polish Constitution, whereby judges are appointed by the President of the Republic on the motion of the National Council of the Judiciary. The associations emphasised that the decision made by the President of the Republic of Poland was without any reasoning, and that the decision would make the process of judicial appointment less transparent and more susceptible to political influence. Furthermore, according to the Polish associations of judges, the decision violates the principle of tripartite division of powers and the right to access to court.

The procedure of assessment

3. According to the CCJE Terms of Reference for 2016-2017 (document CM(2015)131 addfinal of 2 December 2015), one of the tasks of the CCJE is to “provide targeted cooperation at the request of member States, CCJE members, judicial bodies or relevant associations of judges, to enable States to comply with Council of Europe standards concerning judges”. The above-mentioned request of the Polish associations of judges falls within the Terms of Reference of the CCJE, and the CCJE is entitled to respond to the request presented by the associations. Following its general policy, the Bureau of the CCJE communicated the letter of the associations to the CCJE member in respect of Poland and invited her to provide the Bureau with her views on the subject matter.

The response of the CCJE member in respect of Poland

4. The CCJE received, on 24 September 2016, a response of the CCJE member in respect of Poland. According to the information presented by her, there are three different views declared by constitutional law specialists in Poland:

- The President of the Republic has the right, as his prerogative, to refuse to nominate judges without providing any kind of motivation for the decision.
- The President of the Republic can refuse to nominate judges, but is obliged to provide reasoning for the decision. This position is shared by the National Council of the Judiciary.
- The President of the Republic has only a ceremonial role in the process of appointing judges, and he cannot refuse to nominate candidates presented to him by the National Council of the Judiciary.

5. The CCJE member in respect of Poland informed the CCJE Bureau that meetings would be held between the Board of the National Council for the Judiciary and the President of the Republic, and she believed that a proper solution would be found. The CCJE Bureau was informed, on 11 October 2016, by the CCJE member in respect of Poland, that no solution had been arrived at so far.

Assessment

6. The events initiating the request of the Polish associations of judges took place on 22 June 2016, when the President of the Republic of Poland refused to appoint as judges ten candidates presented by the National Council of the Judiciary. The President did not provide reasons for the decision.

7. The CCJE Bureau is informed that, according to Article 179 of the Polish Constitution, judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary. The competence of the Council in this respect is reflected in Article 3 of the Act of 12 May 2011 on the National Council of the Judiciary. Furthermore, according to Articles 186 and 187 of the Polish Constitution, the National Council of the Judiciary is composed of a majority of judges, and it is entrusted with the task of safeguarding the independence of courts and judges.

8. According to the CCJE member in respect of Poland, as mentioned above, there are three different positions taken by specialists on constitutional law in Poland with regard to the competence of the President of the Republic concerning the issue raised by the Polish associations of judges. The CCJE Bureau emphasises that it is not in a position to assess the constitutionality of the decision taken by the President of the Republic of Poland. However, the CCJE Bureau is competent, according to its Terms of Reference, to assess whether the decision is in compliance with the Council of Europe standards concerning judges.

9. The CCJE Bureau recalls the declaration adopted by the CCJE Plenary at its 9th meeting in Strasbourg on 13 November 2008 concerning the practice of judicial appointments in Poland, following a decision whereby the President of the Republic of Poland had refused to appoint as judges a certain number of persons presented by the National Council of the Judiciary. After due consideration, the CCJE recalled that by its Recommendation No. R(94)12 (hereafter Rec No. R(94)12), the Committee of Ministers of the Council of Europe took the view that, in principle, "the authority taking the decision on the selection (...) of judges should be independent of the government and administration" and "its members should be selected "by the judiciary", even "where the constitutional or legal provisions and traditions allow judges to be appointed by the government". Furthermore, the CCJE recalled that Rec No. R(94)12 called for guarantees "to ensure that the procedures to appoint judges are transparent and independent in practice", e.g. that the government "follows in practice" advice provided by an independent body, and that a guarantee for the concerned candidate for the "right of appeal against a decision" to the independent body should be provided.

10. By its Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities (hereafter CM/Rec(2010)12), the Committee of Ministers of the Council of Europe took the position that Rec No. R(94)12 needed to be substantially updated in order to reinforce all measures necessary to promote judges' independence and efficiency, guarantee and make more effective their responsibility and strengthen the role of individual judges and the judiciary generally. CM/Rec(2010)12 replaced the above-mentioned Rec No. R(94)12, and the Committee of Ministers recommended that the governments of member states take measures to ensure that the provisions contained in the new recommendation are applied in their legislation, policies and practices.

11. By CM/Rec(2010)12, the Committee of Ministers took the position that the authority taking decisions on the selection and career of judges should be independent of the

executive and legislative powers, and, with a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers (paragraph 46 of CM/Rec(2010)12).

12. According to CM/Rec(2010)12, where the constitutional or other legal provisions prescribe for the head of state to take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary should be authorised to make recommendations or express opinions which the head of state follows in practice (paragraph 47). The CCJE Bureau notes that the Polish Council for the Judiciary is the relevant independent and competent body referred to in this respect, and its recommendation with regard to appointment of judges should be followed in practice by the head of state.

13. The CCJE Bureau also recalls the CCJE Opinion No. 10(2007) on the Council for the Judiciary at the service of society, paragraph 49, where the CCJE stated that while it is widely accepted that appointment or promotion can be made by an official act of the head of state, heads of states must be bound by the proposal of the Council for the Judiciary.

14. This position is supported by the report CDL-AD(2007)028-e on Judicial Appointments adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007). According to the conclusions of this report (paragraphs 44-51), Councils for the Judiciary should have "a decisive influence on the appointment and promotion of judges and disciplinary measures against them".

15. The CCJE Bureau considers the above-mentioned recommendations applicable to the matter under consideration, and accordingly the President of the Republic of Poland should have followed the advice of the Polish National Council of the Judiciary and consequently appointed as judges the candidates presented by the Council.

16. Furthermore, CM/Rec(2010)12 calls for transparency in the procedures for appointing judges with reasons for decisions being made available to applicants on request (paragraph 48). The President of the Republic of Poland did not provide reasons for the decision not to appoint the judges presented by the National Council of the Judiciary. Such a lack of transparency in the procedure is not in line with the Council of Europe standards for judicial independence.

17. A similar position is taken by the European Network of Councils for the Judiciary (ENCJ) in its Dublin Declaration of May 2012 on standards for the recruitment and appointment of members of judiciary, where it is stated, inter alia, that "where whoever is responsible for making the ultimate appointment (the Government or Head of State) has the right to refuse to implement the appointment or recommendation made in the context of an independent selection process and is not prepared to implement the appointment or recommendation it should make known such a decision and state clearly the reason for the decision" (underlined by the CCJE Bureau).

Conclusions

18. The CCJE Bureau considers that the decision of 22 June 2016 of the President of the Republic of Poland not to appoint as judges ten candidates presented by the National Council of the Judiciary is not in accordance with the above-mentioned Council of Europe standards for judicial independence. The President of the Republic should have followed the Council's advice and appointed the nominated candidates as judges. The President of the

Republic did not provide reasons for the decision, and such lack of transparency in the procedure is not in line with the Council of Europe standards for judicial independence.

19. The CCJE Bureau has noted that the CCJE member in respect of Poland, in her response to the request from the Polish associations of judges, expressed the hope that a proper solution could be elaborated through a dialogue between the judiciary and the President of the Republic of Poland. The CCJE Bureau finds this approach to be consistent with CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy. Underlining that the rule of law is best protected when the three powers of state act in mutual respect for each other's functions in a democracy based on the rule of law, the CCJE Bureau recalls CCJE Opinion No. 18 (2015), emphasising that each of the three powers of state depends on the other two to work effectively (paragraph 31). In this respect, and with reference to paragraph 43 of the same Opinion, the CCJE Bureau reiterates that, when an unwarranted interference does occur, the powers of the state should loyally cooperate to restore the balance and so the confidence of society in a smooth functioning of public institutions. This should be done with the best interest of the rule of law in mind, and in accordance with the principles for judicial independence as outlined by the Council of Europe.