

Strasbourg, 7 April 2017

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**CONSULTATIVE COUNCIL OF EUROPEAN JUDGES  
(CCJE)**

**Opinion of the CCJE Bureau**

**following the request of the Polish National Council of the Judiciary to  
provide an opinion with respect to the**

**Draft Act of 23 January 2017, latest amended on 3 March 2017,  
amending the Act of 12 May 2011 on the Polish National Council of the  
Judiciary and certain other acts**

## **A. The request and the procedure of the assessment**

1. By letter of 3 April 2017 the Chairman of the National Council of the Judiciary of Poland addressed the CCJE, requesting an opinion with respect to the Draft Act amending the Act of 12 May 2011 on the Polish National Council of the Judiciary and certain other acts.
2. The Polish National Council of the Judiciary referred to the Draft Act and requested the CCJE to assess the compliance of the proposed changes with international standards on the independence of judges. The CCJE was provided with the Draft Act amended on 3 March 2017 as well as the Act of 12 May 2011 on the Polish National Council of the Judiciary, both in English translation.
3. The CCJE Bureau emphasises that it is not in a position to assess the constitutionality of the Draft Act. On the other hand, the CCJE Bureau is competent, according to its Terms of Reference, to assess whether the Draft Act is in compliance with Council of Europe standards concerning judges.

## **B. The current legislation on the National Council of the Judiciary**

4. According to Article 186 of the Polish Constitution, the National Council of the Judiciary "*shall safeguard the independence of courts and judges*". Pursuant to Article 187 of the Constitution, the National Council of the Judiciary is composed of 25 members as follows:
  - the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic
  - 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts
  - 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its members
5. According to Article 187 of the Constitution, the term of office of the members of the Judicial Council shall be four years. Furthermore, the organisational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.
6. The Act of 12 May 2011 on the National Council of the Judiciary regulates the competencies, method of selecting the members, the structure and proceedings before the Polish National Council of the Judiciary<sup>1</sup>. According to Article 3 of the Act the competencies of the Judicial Council include among others:
  - review and assessment of candidates for the post of judges of the Supreme Court and common courts, administrative and military courts and the appointment of trainee judges
  - presenting to the President of the Republic motions for appointment of judges to the same courts
  - resolving on a set of principles of professional ethics of judges and trainee judges and ensuring their observance
  - passing opinions on the condition of the judiciary and trainee judges

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<sup>1</sup> Act of 12 May 2011 on the National Council of the Judiciary, Article 1

- expressing opinions on matters concerning the judiciary, judges and trainee judges
  - giving opinions on draft legislation concerning the judiciary, judges and trainee judges, and presenting proposals in this regard
7. The most significant changes introduced by the Draft Act of 23 January 2017 to the 2011 Act concerns:
- the selection methods for judicial members of the Judicial Council
  - the structure of the Judicial Council and the procedure for selecting judges
  - the pre-term removal of the judges currently sitting as members of the Judicial Council

The Bureau of the CCJE will assess these proposed amendments in the following.

### **C. Selection methods for judge members of the Judicial Council**

8. The current selection methods for the fifteen judges appointed to sit on the Judicial Council entails that they are elected by different assemblies of judges<sup>2</sup>. According to the Draft Act, the current selection method shall be replaced with a procedure whereby all judges sitting on the Judicial Council will be chosen by the *Sejm*.
9. According to the Draft Act Articles 10-12, the Marshal of the *Sejm* shall publish vacancy notifications for judges to be appointed to the Judicial Council. The Presidium of the *Sejm* or at least 50 members of the *Sejm* shall present their candidates for membership of the Council to the Marshal of the *Sejm*. Judges' associations may also present their recommendations concerning the proposed candidates. The Marshal shall then present to the *Sejm* a pool of candidates based on the nominations received from the Presidium and deputies.
10. The Bureau of the CCJE is deeply concerned at the implications of Draft Act for constitutional principle of separation of powers as well as that of the independence of the judiciary, as it effectively means transferring the power to appoint members of the Council from the judiciary to the legislature<sup>3</sup>. This proposed new method for selecting judicial members of the Council is not in accordance with European standards for judicial independence. It will increase the influence of the legislative power over the judiciary and infringe the well-established principle that judicial members of a Council for the Judiciary should be chosen by their peers.
11. By its *Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities*, the Committee of Ministers of the Council of Europe took the position that not less than half the members of Councils for the Judiciary should be judges *chosen by their peers from all levels of the judiciary* and with respect for pluralism inside the judiciary<sup>4</sup>. This is also reflected in the opinions of the CCJE and other relevant bodies at a European level set up in order to safeguard the Rule of Law and principles for judicial independence and impartiality.
12. In its Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, paragraphs 25-27, the CCJE stated: In order to guarantee its independence, there should be rules ensuring that the judge members of Councils for the Judiciary *should be elected by their peers* following methods guaranteeing the widest representation of the judiciary at all levels. This position was reiterated by the CCJE in its Magna Carta of Judges, adopted on the

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<sup>2</sup> Act of 12 May 2011 on the National Council of the Judiciary, Articles 11-13

<sup>3</sup> The Commissioner for Human Rights share the same concerns by his letter of 31 March 2017 to the speaker of the *Sejm*

<sup>4</sup> Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities, paragraph 27

occasion of its 10<sup>th</sup> anniversary in 2010<sup>5</sup>. Also the Venice Commission has advocated the view that judicial members of a Council for the Judiciary should be elected or appointed by their peers<sup>6</sup>.

13. In relation to the need for pluralism, the Bureau of the CCJE notes that the Draft Act does not specify the modalities for ensuring that judges who are members of the Judicial Council are representative of the whole judiciary at all levels and of all its branches.
14. Furthermore, the proposed new method for selecting judicial members of the Council goes against the principles set out in the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality. The Plan of Action was adopted by the Committee of Ministers on 13 April 2016 and states *inter alia*: *In order to ensure the independent and effective working of judicial councils, measures should be taken to de-politicise the process of electing or appointing members to judicial councils.*
15. The Bureau of the CCJE stresses the necessity of regulating the procedure for the appointment of members to Councils in a way that ensure that they are free from political or corporate influence<sup>7</sup>.
16. The Bureau of the CCJE concludes that in order to fulfil European standards on judicial independence, the judge members of the National Council of the Judiciary of Poland should continue to be chosen by the judiciary.

#### **D. The structure of the Judicial Council and the procedure for selecting judges**

17. The Draft Act provides for a division of the Judicial Council into two Assemblies. According to the Draft Act the First Assembly shall be composed of ten members; the Minister of Justice, the First President of the Supreme Court, the President of the Supreme Administrative Court, a person appointed by the President of the Republic of Poland, four members of the *Sejm* and two members of the Senate. The Second Assembly shall be composed of fifteen judges.
18. The Assemblies shall in turn and separately consider and evaluate the candidates for the posts of Supreme Court judges, the posts of common court judges, administrative court judges and military court judges as well as the posts of trainee judges. If the Assemblies of the Council have adopted divergent assessment of the candidate, the Assembly of the Council, which issued a positive assessment, may adopt a resolution to refer the application for the examination and evaluation by the full composition of the Council. In this case, issuing a positive evaluation of a candidate requires votes of 17 members of the Council: First President of the Supreme Court, President of the Supreme Administrative Court and the Council members elected from among the judges<sup>8</sup>.
19. The proposed division of the Judicial Council into two Assemblies, combined with the rules to be applied in case of diverging opinions between the two of them, will provide the First Assembly with the power to veto a favourable decision taken by a majority of the Second Assembly as the proposed rules requires all 17 judges of the Judicial Council to reach a unanimous favourable decision. Thus, the legislative and executive powers forming the majority of the First Assembly, will have a decisive role in the procedure for appointing judges and trainee judges, and thereby the proposed new procedures may infringe the independence of the judiciary.

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<sup>5</sup> The CCJE Magna Carta of Judges (Fundamental Principles), paragraph 13

<sup>6</sup> European Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System, Part I: The Independence of Judges, Adopted by the Venice Commission at its 82<sup>nd</sup> Plenary Session (Venice, 12-13 March 2010), paragraph 32

<sup>7</sup> Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities, paragraph 36

<sup>8</sup> Draft Act Articles 31A and 31 B

20. The proposed division of the Judicial Council will furthermore give rise to the risk of politicising the Council. It is essential for the maintenance of the independence of the judiciary that the procedures for appointment and promotion of judges ensures that decisions concerning the selection of judges are based on merits, and free from excessive political interference<sup>9</sup>.
21. The Bureau of the CCJE concludes that the proposed new procedure for selecting judges will give the legislative and executive powers a decisive role in the procedure for appointing judges and assistant judges, and thereby the proposed new procedures may infringe the independence of the judiciary. Furthermore, the proposed division of the Judicial Council into two Assemblies may hamper the work of the Council and thereby weaken its role as a constitutional body and as a guardian of judicial independence.

## **E. The pre-term removal of the judges currently sitting as members of the Judicial Council**

22. The transitional provisions of the Draft Act provide for the termination of the mandate of the 15 judges who are currently members of the Judicial Council thirty days after the entry into force of the Draft Act i.e., 14 days after its publication: The appointment of their successors should occur within 30 days from the termination of their mandate, and be carried out in accordance with the new procedure and modalities laid out in the Draft Act.
23. The CCJE has taken the position that decisions which remove basic safeguards of judicial independence are unacceptable. A new parliamentary majority and government must not question the appointment or tenure of judges who have already been appointed in a proper manner<sup>10</sup>. The Judicial Council is a constitutional body entrusted with a mission of fundamental importance for the independence of the judiciary. The same security of tenure must therefore apply *mutatis mutandis* to members of a Council for the Judiciary. Consequently, a member of a Judicial Council should only be removed from office following the application - as a minimum - of those safeguards and procedures that would apply when consideration is being given to a removal from office of an ordinary judge. The procedure in the case of pre-term removal should be transparent and any risk of political influence should be firmly excluded<sup>11</sup>.
24. Furthermore, this proposed provision may interfere with the guarantees of Article 6 of the European Convention on Human Rights in so far as the current members of the Judicial Council would seemingly not be able to challenge the termination of their mandates before a judicial body. In this respect the Bureau of the CCJE refers to the ECtHR Grand Chamber judgment of 23 June 2016 in the case *Baka v. Hungary*.
25. The Bureau of the CCJE concludes that the pre-term removal of the judges currently sitting as members of the National Council of the Judiciary is not in accordance with European standards on judicial independence.

## **F. Conclusions**

26. The Bureau of the CCJE, which represents the CCJE members (who are serving judges from all over Europe), is concerned that the Draft Act would be a major step backward from real judicial independence in Poland, and about the message this sends about the value of judges to society, their place in the constitutional order and their ability to provide a key public function in a meaningful way.

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<sup>9</sup> Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality, Explanatory note, Action 1.2

<sup>10</sup> CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, paragraph 44

<sup>11</sup> CCJE Opinion No. 19 on the Role of Court Presidents, paragraphs 46-47

27. The Bureau of the CCJE is deeply concerned, in particular, by the implications of the Draft Act for the constitutional principle of separation of powers as well as that of the independence of the judiciary, as it effectively means transferring the power to appoint members of the Polish National Council of the Judiciary from the judiciary to the legislature. In order to fulfil European standards on judicial independence, the judge members of the National Council of the Judiciary of Poland should continue to be chosen by the judiciary.
28. In addition, the proposed division of the Judicial Council into two Assemblies and the proposed new procedure for appointment of judges may infringe judicial independence insofar as the legislative and executive powers will have a decisive role in the procedure for appointing judges and trainee judges.
29. The proposed division of the Judicial Council and the proposed procedures for appointment of judges will hamper the work of the Council and weaken its role as a constitutional body and as a guardian of judicial independence.
30. The pre-term removal of the judges currently sitting as members of the National Council of the Judiciary of Poland is not in accordance with European standards on judicial independence.