Questionnaire for the preparation of CCJE Opinion No. 18 (2015)
– reply POLAND:

Question 1

Constitution of the Republic of Poland (dated 2 April 1997) introduces the classic tripartite division of powers. According to the Preamble to the Constitution, the Constitution is a basic law for the state based on the respect for freedom and justice, cooperation between the authorities and the social dialogue.

The idea of cooperation between authorities is further developed by detailed constitutional regulations, for instance:

Art. 2. The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

Art. 10. 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Art. 173. The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.

Art. 178. 1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

2. (...)

3. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

Since 1997 (that is for 18 years), there were no changes of the Constitution relating to the basic principles of the state system of government, including the

position (status) of the judiciary. It may be concluded that at the level of the Constitution relationships between all the branches of power are regulated properly and that the situation is stable.

Question 2

There is no significant discussion regarding the model of the system adopted in the Constitution. It is widely accepted. Nobody questions the idea of separation and balance between the branches of powers *(check and balance*) as declared in the Constitution.

However, there are discussions regarding *ad hoc* solutions adopted in ordinary legislation. Judicial system in Poland is regulated by four acts: 1) Law on the system of courts of general jurisdiction (which applies to district, regional and appeal courts), 2) Act on the Supreme Court, 3) Act on administrative courts and 4) Act on the system of military courts (administrative and military courts are situated outside the structure of the courts of general jurisdiction). The most important of these acts – Law on the system of courts of general jurisdiction – regulates functioning of the 11 courts of appeals, 44 regional courts and approximately 300 district courts, as well as the performance of service by nearly 10,000 judges. According to that law (Art. 9), administrative supervision over activities of the court of general jurisdiction is exercised by the Minister of Justice. Discussions focus primarily on what should be meant by the Minister of Justice's "administrative supervision" over courts of general jurisdiction, how far it can go and to what kind of court activities it may apply. It should be emphasized that the Constitution does not regulate administrative supervision over activities of the courts in any way. The adopted model of supervision over the courts is therefore exclusively a political decision expressed in the form of ordinary legislation (government projects adopted as law by the parliament). In Poland, there is no category of so called organic laws (like, for instance, in Spain). System of the courts of general jurisdiction is regulated by an ordinary law that can be at any time changed by the parliament using a simple majority of votes. Since its enactment in 2001, the current Law on courts of general jurisdiction was amended more than 50 times, of which 7 amendments took place in 2014 alone. Permanent changes are criticised by judges (the National Council of the

Judiciary, general assemblies of regional and appeal court judges). Also representatives of the world of science (certain professors of the constitutional law) take a critical view about them. The problem lies not only in the frequency of changes, but also in their direction – usually strengthening position of the Minister of Justice in relation to the judges and courts, and reducing the separate nature of the judiciary and weakening position of the judges.

Majority of these proposed changes to the structure of the courts of general jurisdiction is negatively assessed (by the National Council of the Judiciary, the First President of the Supreme Court, judges' associations), however negative opinions are not taken into account during the legislative process.

Over the past 10 years, some of the solutions proposed by the Minister of Justice and subsequently adopted by the parliament were challenged by the National Council of the Judiciary in the Constitutional Court (for instance principles of supervision over the courts by the Minister of Justice, introduction of dual power in the courts – creating, next to the president of the court, position of the court director appointed by the Minister of Justice and directly reporting to the Minister, the ability to freely establish and abolish courts by the Minister of Justice, and transferring judges without their consent to other courts in connection with changes in the organization of the judiciary). Some solutions were challenged in the Constitutional Court by the First President of the Supreme Court. In constitutional issues the Constitutional Court adjudicates in the plenary session. The Court did not agree with majority of the objections raised by the National Council of the Judiciary, but judgements declaring constitutionality of the solutions proposed by the government were not passed unanimously (there were many dissenting opinions - *vota separata).*

Discussions on the relationships between the courts (judiciary), the parliament, and the government (authorities having their roots in political elections) take place in the legal and academic communities (especially among scholar lawyers), but also in political circles (e.g. during the meetings of the parliamentary committees in the course of the legislative process) and media (in professional legal journals and newspapers).

Question 3

Polish courts recognise and respect separation of powers between the legislative, executive and judicial authorities. They are quite circumspect. Therefore,

there are no major public debates on "judicial restraint" or "judicial moderation". Judges in Poland must not belong to political parties nor carry out political activities. According to art. 178 (3) of the Constitution, the judge must not belong to a political party, trade union, or perform public activities incompatible with the principles of independence of the courts and judges. As a rule, judges do not run for parliament (in which case they would have to relinquish the office of a judge), and do not get involved politically. Judges' associations have primarily educational nature – they ensure appropriate attitudes, especially ethical ones.

In the process of adjudication, the courts take into account the fact that some issues require an administrative decision to be issued by the executive and do not interfere with these powers. Administrative courts control administrative decisions only from the formal point of view (regarding their legality), and do not substitute for government or local government The courts take into account in matters falling within their competence (the administrative court may only overrule decision if it is unlawful, but it cannot resolve an administrative case in place of a public administration body). Civil and administrative courts do not assess administrative decisions from the point of view of their reasonableness and fairness.

There is possibility of judicial proceedings before a civil court regarding compensation for a damage caused by wrongful act of public authorities. According to Art. 77 (1) of the Constitution, everyone has the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. The rules governing seeking damages in such a situation are regulated by the Civil Code. According to Art. 417 § 1 of the Civil Code, the State Treasury, a unit of local government or any other legal person exercising public authority under the law is responsible for damage caused by an unlawful act or omission in the exercise of that authority. However, there are some limitations. According to Art. 417 (1) of the Civil Code:

If the damage was caused by the issuance of a normative act, the remedy may be sought **after the act was found, in the course of appropriate proceedings, non-compliant with the Constitution, a ratified international agreement or a statute** (§ 1).

If the damage was caused by the issuance of a final judgement or a final decision, the remedy may be sought **after such a judgement or decision were found, in the course of appropriate proceedings, non-compliant with the law,**

unless otherwise provided by the law. This also applies to cases where a final decision or a final decision has been issued on the basis of a normative act non-compliant with the Constitution, a ratified international agreement or a statute (§ 2).

If the damage was caused by failure to pass a judgement or issue a decision, when the obligation to pass such a judgement or to issue such a decision results from the law, the remedy may be sought **after the failure to pass a judgement or to issue a decision was found, in the course of appropriate proceedings, non-compliant with the law,** unless otherwise provided by the law (§ 3).

If the damage was caused by failure to issue a normative act whose obligation to issue is provided by the law, the unlawfulness of the failure to issue that act is found by the court examining the case for damages (§ 4).

As it can be seen from the above-mentioned regulations, before the civil court passes a judgement awarding damages as a result of legislative lawlessness (occurring in the process of issuing normative acts or in connection with the failure to issue such acts), judicial unlawfulness (occurring in the process of judgements being passed by the courts), or administrative unlawfulness (resulting from the issuance of non-issuance of an administrative decision), injustice must be previously identified in the course of a separate procedure. It also imposes restraints on courts in ruling on compensation for damages caused by the actions of the legislative or executive authorities. For example, a compensation for damages caused by a wrongful act of the executive power must be preceded by a statement, made in due manner, that the decision (or failure to issue the decision) was illegal.

The division of powers is treated in a strict way. The judicial power shall not interfere in the activities of the legislature or the executive power. A special court, the State Tribunal, whose members are appointed by the Sejm [lower house of the parliament], adjudicates on matters relating to the constitutional responsibility. The highest representatives of the state (including the Polish President, Chairman of the Council of Ministers, members of the Council of Ministers, that is ministers, members of the parliament, senators, President of the National Bank of Poland, Supreme Commander of the Armed Forces) bear constitutional responsibility before the State Tribunal for violation of the Constitution or law in connection with their offices or in the field of their duties. Furthermore, the Supreme Court determines validity of the presidential and parliamentary elections (including elections to the European Parliament).

There are incidental cases of criticism of the judges for unacceptable interference with the freedom of action of the executive power, but they are recognized by majority of the political scene to be unfounded. For example, in one of the judgements in a criminal case of an alleged corruption (against a famous cardiac surgeon practising cardiac transplantation), a judge sharply criticized actions of the Central Anti-Corruption Bureau regarding the manner in which patients of the accused were interrogated as witnesses (the patients were questioned also late in the evening and at night, and the judge considered this to be a violation of their rights, and compared the situation to the interrogations taking place under Stalinist regime). As it has happened at the time when the current opposition party held power (and also supervised the Central Anti-Corruption Bureau), the part of journalists affiliated with opposition party raised a voice of criticism of the judge.

Question 4

a) In the past 10 years, there were no amendments of the Constitution relating to the judiciary. There were, however, numerous changes in the ordinary legislation concerning organization of the courts and status of the judges, which had an impact on the relationships between the judiciary and other authorities.

Some examples.

1. At the end of 2012, the Minister of Justice issued a regulation abolishing, as from 1 January 2013, 79 small district courts (accounting for 25% of all the district courts in Poland). The judges of these courts (over 500 persons) were transferred by the Minister of Justice to other courts. These changes in the structure of the courts were criticized by many communities (not only judges and the National Council of the Judiciary or associations of judges, but also by local governments - mayors and heads of counties protested against the liquidation of the courts in their cities because existence of a district court elevates the prestige of the place; MPs of the coalition party also protested). Over 320 transferred judges appealed to the Supreme Court from the decision of the Minister of Justice to transfer them without their consent to other courts. The Supreme Court asked the Constitutional Court whether a provision of the Law on the system of courts of general jurisdiction allowing the Minister of Justice to transfer a judge without his/her consent to other court is compliant with the Constitution. To date, the Constitutional Court has not ruled on this issue. Meanwhile, the Minister of Justice has changed and the new minister re-

established, effective 1 January 2015, 45 out of 79 abolished courts. Soon subsequent are to be re-established. The Minister of Justice once again transferred judges to the re-established courts despite the fact that the rule allowing him to do so has been challenged as to its compatibility with the Constitution. The President of Poland came up with an initiative to amend the Law on the system of courts of general jurisdiction which introduces statutory criteria for establishing and abolishing the courts (the criteria in question being the number of inhabitants and the number of cases filed with the court).

2. A few years ago, court directors were introduced as managers who had to relieve the presidents of courts (which are always judges) of the most vexing responsibilities (such as, for example, office equipment purchases, repairs, investments, cleaning of buildings, supervision over supporting staff such as drivers, maintenance workers etc.). Then, the court directors were entrusted with an increasingly broad range of competences (powers and duties) until they became – apart from the court presidents – the second court body. Directors report directly to the Minister of Justice who appoints and dismisses them, determines remuneration for their work, bonuses etc. From the formal point of view, the court president acts as a superior of the court director, but in fact the director retains certain autonomy in relation to the president (e.g. the president may not give orders to the director in some cases).

Director of the court: 1) manages the administrative operation of the court, 2) performs tasks of the unit manager in the field of financial and economic matters, financial control, management of the State Treasury property, and internal audit in these areas; 3) acts as the official superior and takes actions in the field of the labour law, as well as represents the court in this regard to the employees of the court, with the exception of judges, court clerks and judge assistants; 4) determines, in consultation with the president of the court, distribution and the number of individual positions in which the court workers are employed, with the exception of judges, court clerks and judge assistants, in the court departments; 5) represents the State Treasury in terms of the entrusted property and the court tasks.

The biggest problem for the court presidents who are fully responsible for the operation of the courts and the results of their operations is that the director acts as a superior for all employees except judges, court clerks and judge assistants. Therefore, he takes decisions regarding employing and laying off court officers

serving judges (secretaries, clerks, as well as heads of secretariats). This gives rise to conflicts of jurisdiction and conflicts between the court presidents and the court directors.

3. Large waves of emotions are being aroused by the Minister of Justice attempts to get access to all court records (including cases pending). The Ministry of Justice wants to have access to files of the pending cases ostensibly to have an opportunity to recognize citizen complaints about activities of the courts (e.g. in order to consider initiation of disciplinary proceedings against a judge). Critics of the idea to provide the Minister of Justice with access to the court records argue that this is an attempt to limit independence of the judiciary.

b) Changes in the Law on the system of courts of general jurisdiction are unending. Currently (January 2015), the parliament works on further drafts of amendments to this act (several projects at a time). These are generally government drafts (rarely presidential projects), and the source of further amendments to the laws regulating the judiciary is primarily the Minister of Justice. The National Council of the Judiciary has no legislative initiative and it can only challenge changes in the system and organization of courts and status of the judges which it considers to be inconsistent with the constitution in the Constitutional Court.

The official reason for the introducing further changes is to improve efficiency and effectiveness of the operation of the courts and reduction in spending on the judiciary from the public funds (budgetary savings). For the latter reason, judges are to be denied reimbursement of commuting from home to the court. Previously, the retirement age of judges was raised (age when a judge becomes a judge emeritus), and their sick leave remuneration were lowered. The changes are supposedly designed to improve citizens' satisfaction with the functioning of the courts. Actually, they strengthen supervision of the Minister of Justice over activities of the courts of general jurisdiction.

c) There is no national debate on amendments to the legislation on judiciary. From the point of view of the general public, administration of justice is not as engaging as operation of the health system, the pension system, state aid for the unemployed or other issues related to the social sphere. Lack of national debate may also result from low legal culture and lack of the citizens' awareness that there is no freedom and rule of law without strong (independent and impartial) courts. Only liquidation of small courts sparked the social debate – also in the popular press

magazines. Systemic issues are primarily a domain of experts (National Council of the Judiciary, judges themselves, judges' associations and other non-governmental organizations monitoring operation of the state at different levels, lawyers, members of the parliament, academics communities, especially experts in the field of the constitutional law, that is professors of constitutional law, specialized press, e.g. legal periodicals).

Question 5

Officially, nobody questions the role of courts in a democratic state of law nor importance of the judiciary as a guarantor of the protection of individual rights. Individual court judgments are criticized – also by politicians, members of the parliament or prominent journalists associated with different political parties, however this criticism often stems from ignorance of the facts of a particular case and the rules of conducting court proceedings and adjudication (e.g. *in dubio pro reo* principle*).*

Courts are criticised for their slowness (excessive length of judicial proceedings) and a certain alienation of judges (lack of empathy for the parties to the litigation, adjudicating literally by letter of the law and not according to the *ratio legis* of an act).

Recently (autumn 2014), the judges were ruthlessly criticized by one of the opposition parties in connection with delaying announcement of the official results of local elections (the National Electoral Commission and regional electoral commissions are made up of judges). There were even accusations thrown against judges that they took part in the falsification of the election results. Therefore, the presidents of the three main courts: the Supreme Court, the Constitutional Court and the Supreme Administrative Court (whose president is also the Chairman of the National Council of the Judiciary) issued a statement defending independence and reputation of judges.

Officially, nobody questions judgements of the Constitutional Court (they are universally binding), however the legislative authorities (parliament) delays their implementation (i.e. bringing legal regulations to accordance with the Constitution).

Question 6

The mere administration of justice (sentencing, adjudication) is in principle free of any influence of external factors (e.g. political ones). However, functioning of the

courts in areas other than sentencing (adjudication) is subject to the influence of the legislative and executive authorities.

Influence of the Minister of Justice on the functioning of the courts has already been mentioned above.

Budgets of the courts are determined on the basis of indicators resulting from the guidelines of the Minister of Finance – e.g. wages of the public sector employees, including court employees/officials have been frozen since 2009 (no increases) (this does not apply to judges who enjoy legally guaranteed annual salary adjustments).

The Supreme Chamber of Control (the Polish *Cour de compte*) controls public spending, including in the courts which are budgetary units.

Presidents of the highest courts (the Supreme Court, the Supreme Administrative Court, and the Constitutional Court), as well as Chairman of the National Council of the Judiciary, report annually on the activities of these bodies before the parliamentary committees, however, it does not affect in any way independence of the courts and independence of the judiciary.

Question 7

Supervision over the courts should be removed from the jurisdiction of the Ministry of Justice and submitted to an authority independent of the executive power – e.g. the National Council of the Judiciary or institutions formed according to the model of the Nordic court administration.

Changes in the Law on the system of courts of general jurisdiction should be kept to a minimum. Constant changes in the organization and structure of the judiciary do not provide stabilization necessary for the proper performance of the court tasks.

Politicians, members of both the parties currently holding power and the opposition parties, should speak out on matters relating to the judiciary, courts and judges, guiding themselves by the interests of the state and the general public rather than *ad hoc* political objectives. One may not undermine public confidence in the courts and judges as the courts and judges are the mainstay of the power and durability of a democratic state (this is the inscription on the building of the regional court in Warsaw, dating back to the pre-war years).