



Strasbourg, 18 June 2018

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

**STATEMENT**

**AS REGARDS THE SITUATION**

**ON THE INDEPENDENCE OF THE JUDICIARY IN POLAND**

The CCJE has received a letter of the Polish Judges Association "IUSTITIA" dated 24 May 2018 referring to an extremely worrying situation with the independence of the judiciary in Poland affecting the rule of law and requesting the CCJE to pronounce its position on this situation.

In particular, the Polish Judges Association "IUSTITIA" has requested the CCJE to respond to the following questions:

- a) Is the process regarding the replacement of 149 Polish court presidents and vice-presidents in accordance with Council of Europe standards for judicial independence?
- b) Is the formation of the new Polish National Council of the Judiciary in accordance with Council of Europe standards for judicial independence?
- c) Is the termination of the tenure for the First President of the Supreme Court and the termination of the tenure for Supreme Court judges in accordance with Council of Europe standards for judicial independence?
- d) Is the new model of disciplinary proceedings for judges in Poland in accordance with Council of Europe standards for judicial independence?

In analysing these questions, the Bureau of the CCJE takes note of its following documents adopted in the course of 2017 on these and other related matters:

- the Opinion of the CCJE Bureau of 7 April 2017 on the draft legislation on the Polish National Council of the Judiciary (CCJE-BU(2017)5Rev);

- the Statement of the Bureau of the CCJE of 17 July 2017 on the Polish Parliament's recent adoption of two Acts on the Polish judiciary and on the draft Act on the Polish Supreme Court (CCJE-BU (2017)6);
- the Opinion of the CCJE Bureau of 12 October 2017 on the draft legislation on the Polish National Council of the Judiciary presented by the President of Poland (CCJE-BU(2017)9Rev).

The Bureau of the CCJE also takes note of its Report on judicial independence and impartiality in the Council of Europe member States in 2017 (CCJE-BU(2017)11).

**As regards the first question,** as the CCJE Bureau indicated in its Opinion of 12 October 2017, the President of Poland did not veto the Act adopted by Parliament by which the Minister of Justice would be empowered with the competence to dismiss court presidents and substitute them within the next six months after the entering into force of this new law.

As it is also indicated in the CCJE Bureau's Report on judicial independence and impartiality in the Council of Europe member States in 2017, the Bureau shared the strong concern expressed in the letter of the Polish Judges Association "IUSTITIA" dated 28 July 2017, about that the President of Poland did sign into law the Act on the organisation of common courts giving the Minister of Justice – who is at the same time the Prosecutor General - the power to dismiss court presidents and to substitute them as well as other powers in the court administration and management. This would be a major setback for the rule of law and for judicial independence in Poland<sup>1</sup>.

The CCJE Bureau understands that this Act allows the Minister of Justice (MoJ) to dismiss all the presidents of regional, district and appeal courts within six months of its entry into force. Moreover, the Act introduces changes to the procedure of the appointment of the presidents of courts on all levels. It foresees that MoJ will be able to appoint the presidents of regional, district and appeal courts without obtaining a prior positive opinion on the candidate from the general assemblies of judges in these courts.

Previously, the presidents of district and appeal courts were appointed by MoJ upon receiving an opinion on the candidate from the general assembly of the court. In case of the negative opinion of the assembly, the MoJ had to obtain a positive opinion from the National Council of the Judiciary (NCJ). In the Act, the NCJ has been eliminated completely from the procedures concerning the appointment of presidents of the courts.

Therefore, the CCJE Bureau fully shares the concern expressed by the Polish Judges Association "IUSTITIA" in its most recent letter of 24 May 2018 and considers that the process regarding the replacement of 149 Polish court presidents and vice-presidents clearly and certainly contradicts the Council of Europe's standards for judicial independence and is not in conformity with the conclusions<sup>2</sup>.

**As regards the second question,** the CCJE Bureau expressed itself very extensively on both the first draft Act on the NCJ vetoed by the President of Poland, and on the second draft prepared by the President of Poland. In its Opinion of 12 October 2017, the CCJE Bureau emphasised that the most significant concerns caused by the adopted and later vetoed Act on the NCJ were related to:

- the selection methods for judge members of the NCJ;

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<sup>1</sup> See the CCJE Bureau's Report on judicial independence and impartiality in the Council of Europe member States in 2017, para 140.

<sup>2</sup> See CCJE Opinion No. 19(2016) on the "Role of court presidents", paras 8 and 10.

- the pre-term removal of the judges currently sitting as members of the NCJ;
- the structure of the NCJ.

The only significant change in the second draft presented by the President of Poland was the requirement for a majority of 3/5 in the Sejm for electing 15 judge members of the Council. However, this did not change in any way the fundamental concern of transferring the power to appoint members of the Council from the judiciary to the legislature, resulting in a severe risk of politicised judge members as a consequence of a politicised election procedure<sup>3</sup>. This risk could be said to be even greater with the new draft, since it provided that if a 3/5 majority cannot be reached, those judges having received the largest number of votes would be elected.

Therefore, since this Act has already been adopted, as the Polish Judges Association “IUSTITIA” reports, it represents a major setback for the independence of the judiciary and the rule of law in Poland. The formation of the new Polish NCJ under the new Act therefore seems to clearly contradict the Council of Europe standards.

**As regards the third question**, the CCJE Bureau also expressed itself very extensively. In its Statement of 17 July 2017, it noted that according to the draft Act on the Polish Supreme Court, the latter would be subordinated to the MoJ – who is at the same time the Prosecutor General - regarding the Court's organisation and its human resources. The MoJ would also be empowered with the exclusive competences of nominating candidates for judicial office holders in the Supreme Court. The CCJE Bureau noted that, if adopted, the Act would further undermine the separation of state powers, the rule of law and the independence of the judiciary in Poland.

The CCJE Bureau particularly stressed that it is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office<sup>4</sup>. In order to uphold the rule of law and for the protection of human rights, judges must be protected against arbitrary dismissal. The term of office of judges and their age of retirement must be respected and adequately secured by law.

The Bureau of the CCJE reiterated that 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>5</sup>. Any change to the judicial obligatory retirement age must not have retroactive effect<sup>6</sup>.

Furthermore, this proposed provision may interfere with the guarantees of Article 6 of the European Convention on Human Rights (ECHR) in so far as the current judges of the Supreme Court would seemingly not be able to challenge the termination of their mandates before a judicial body<sup>7</sup>.

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

<sup>4</sup> See CCJE Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges, para 57.

<sup>5</sup> See CCJE Opinion No. 18(2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, para 44.

<sup>6</sup> The Universal Charter of the Judge, Article 8, approved by the International Association of Judges on 17 November 1999.

<sup>7</sup> In this respect, the Bureau of the CCJE referred to the Grand Chamber judgment of the European Court of Human Rights (ECtHR) of 23 June 2016 in the case *Baka v. Hungary*.

Therefore, since this Act has already been adopted without significant changes, as the Polish Judges Association “IUSTITIA” reports, the termination of the tenure for the First President of the Supreme Court and the termination of the tenure for Supreme Court judges clearly contradicts Council of Europe standards for judicial independence.

**As regards the fourth question**, it could be understood, from the request, that the disciplinary framework for judges has been changed, and a new model of disciplinary proceedings for judges has been introduced, with a significant role of the Minister of Justice who has the power to appoint the members of the disciplinary courts as well as the disciplinary officers (accusers). In addition, a new chamber has been created within the Supreme Court, called the Disciplinary Chamber, with an autonomy from the rest of the Supreme Court. The judges sitting in this Chamber will earn 40% more than the other Supreme Court judges.

In Recommendation Rec(2010)12 of the Council of Europe’s Committee of Ministers on judges: independence, efficiency and responsibilities, as well as in numerous judgments of the ECtHR<sup>8</sup>, it is clearly stated that judges in disciplinary proceedings have to enjoy the same guarantees of Article 6 of the ECHR which includes a hearing before an impartial tribunal.

In the light of the generally very critical situation in Poland, the CCJE Bureau, not having addressed this issue before, finds that the allegations by the Polish Judges Association “IUSTITIA” call for further examination.

## CONCLUSION

The Bureau of the CCJE, which represents the CCJE members who are serving judges from all Council of Europe member States, reiterates once again that the adopted Acts on the NCJ, Supreme Court and organisation of the judicial system entails a major step back as regards judicial independence, separation of powers and the rule of law in Poland. These Acts are also extremely worrying in terms of the message they send about the value of judges in the society, their place in the constitutional order and their ability to provide a key public function in a meaningful way.

The CCJE Bureau wishes to confirm in particular and once again that all its above-mentioned documents reflect the position of the CCJE; it strongly regrets that reportedly so far the recommendations in these documents have not been followed; and it hopes and expects that the European standards will be restored and ensured in the legislation regarding the judiciary as soon as possible.

Therefore, the CCJE Bureau recommends to the authorities in Poland to immediately restore a meaningful dialogue with the judicial community and to start the process of the replacement of the adopted Acts on the NCJ, the Supreme Court and the organisation of the judicial system, replacing them with a legislation which is to be expected in any Council of Europe member State respecting human rights, the rule of law and a pluralist democracy.

Based on the above, the Bureau of the CCJE also wishes to call on the Committee of Ministers of the Council of Europe to be vigilant and to follow closely the situation in order to make sure that Poland fulfils its commitments as a Council of Europe member State.

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<sup>8</sup> See i.e. ECtHR *Oluic v. Croatia* (application no. 61260/08), 20 May 2010; and *Harabin v. Slovakia* (application no. 58688/11), 20 November 2012.