

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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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 September
2017 presented by the President of Poland amending the Act 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 October 2017, the Chairman of the National Council of the Judiciary of Poland addressed the CCJE, requesting its opinion on the Draft Act on the National Council of the Judiciary of Poland (hereafter the Draft Act) presented by the President of Poland. The CCJE was requested, in particular, to assess the compatibility of the Draft Act with European standards on the independence of the judiciary and the status of councils for the judiciary. The CCJE was provided with the Draft Act as well as the Act of 12 May 2011 on the Polish National Council of the Judiciary, both in English translation.
2. According to its Terms of Reference, one of the tasks of the CCJE is to provide targeted cooperation, *inter alia*, at the request of the CCJE members, judicial bodies or relevant associations of judges, to enable States to comply with the Council of Europe standards concerning judges. The aforementioned request of the Polish National Council of the Judiciary (hereafter the Council) falls within the Terms of Reference of the CCJE.
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 the Council of Europe standards concerning judges.

B. The CCJE Bureau Opinion of 7 April 2017 on the Draft Act of 23 January 2017 on the Polish National Council of the Judiciary and certain other acts

4. The CCJE Bureau recalls its opinion of 7 April 2017 on the Draft Act of 23 January 2017, amending the Act of 12 May 2011 on the Polish National Council of the Judiciary and certain other acts, whereby the CCJE Bureau:
 - Expressed its deep concerns at the consequences of the Draft Act with regard to the principle of the 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.
 - Stated 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.
 - Emphasised that the proposed division of the Judicial Council into two Assemblies and the proposed new procedure for appointment of judges would infringe judicial independence insofar as the legislative and executive powers will have a decisive role in the procedure for appointing judges and trainee judges. Furthermore, 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.
 - Concluded that 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.

C. The CCJE Bureau statement of 17 July 2017 on the Draft Act of 23 January 2017 on the Polish National Council of the Judiciary and certain other acts

5. By its statement of 17 July 2017, the Bureau of the CCJE deeply regretted the adoption by the Polish Parliament of the Act on the Polish National Council of the Judiciary. The CCJE Bureau pointed out that, according to the Act, the power to appoint members of the Judicial Council will be transferred from the judiciary to the legislature, and that the political powers consequently will have a decisive role in the procedure for appointing judges.
6. Furthermore, the Bureau of the CCJE expressed its deepest concerns about the draft Act on the Polish Supreme Court submitted to Parliament by a group of members of the Law and Justice Party. According to the draft Act, all judges of the Supreme Court being in active service, except a group of judges indicated arbitrarily by the Minister of Justice, would be transferred into retirement on the day following the entry into force of the draft Act. The CCJE Bureau concluded 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 assessed the adoption of these acts as a major set-back for the rule of law and for judicial independence in Poland.
7. The President of Poland later vetoed both these acts. However, the President 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.
8. By the end of September 2017, the President of Poland presented new draft acts on the Polish National Council of the Judiciary and on the Supreme Court. The current request addressed to the CCJE by the Council concerns the Draft Act on the Judicial Council.

D. The current legislation on the National Council of the Judiciary

9. As regards the current legislation on the National Council of the Judiciary, the CCJE Bureau refers to its opinion of 7 April 2017. In brief, 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 (lower house of the Parliament) from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.
10. According to Article 187 of the Constitution, the term of office of the members of the Council shall be four years. The Act of 12 May 2011 on the Council regulates the competencies, the method of selecting the members, and the structure and

proceedings before the Council. According to Article 3 of the Act, the competencies of the Council include presenting motions for the appointment of judges to the President of Poland.

E. The most significant changes introduced by the Draft Act presented by the President of Poland

11. Thus, the most significant concerns caused by the adopted and later vetoed act on the Council related to:
 - the selection methods for judge members of the Council;
 - the pre-term removal of the judges currently sitting as members of the Council;
 - the structure of the Council.
12. Out of these concerns, the only significant change in the present draft presented by the President of Poland is the requirement for a majority of 3/5 in the Sejm for electing 15 judge members of the Council. However, this does 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 procedure¹. This risk may be said to be even greater with the new draft, since it provides that if a 3/5 majority cannot be reached, those judges having received the largest number of votes will be elected.
13. Furthermore, since the President of Poland proposes, as in the previous draft, that the Sejm also elects 15 judge members of the Council, in addition to 4 *ex officio* members of the Council and 6 members presently elected by Parliament from among MPs, this effectively means that almost all members of the Council would be elected by the Parliament. Such a proposal contradicts the Council of Europe's standards for judicial self-governing bodies such as councils for the judiciary.
14. The CCJE Bureau reiterates that 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 judiciary². This is also reflected in the Opinions of the CCJE and other relevant bodies at the European level set up in order to safeguard the rule of law and the basic principles for judicial independence and impartiality. The Venice Commission has particularly advocated that judicial members of a Council for the Judiciary should be elected or appointed by their peers³. Furthermore, the proposed new method for selecting judge members contradicts the principles set out in

¹ The Commissioner for Human Rights shared the same concerns by his letter of 31 March 2017 to the speaker of the *Sejm*.

² Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities, paragraph 27.

³ 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 82nd Plenary Session (Venice, 12-13 March 2010), paragraph 32.

the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality⁴.

15. In addition, the CCJE Bureau recalls that the OSCE/ODIHR adopted its Final Opinion on 5 May 2017 on the previous draft, underlining that “the proposed amendments would mean, in brief, that the legislature, rather than the judiciary would appoint the fifteen judge representatives to the Judicial Council and that legislative and executive powers would be allowed to exercise decisive influence over the process of selecting judges. This would jeopardize the independence of a body whose main purpose is to guarantee judicial independence in Poland”⁵. The new draft does not in any way change this.
16. As regards the term of office of members of the Council, the new draft foresees, similarly to the previous draft, the pre-term termination of the mandate of the 15 judges who are currently members of the Council. They will serve in the Council only until the election of the new 15 members by Sejm.
17. The CCJE has underlined in general that a member of any Council for the Judiciary, which is a constitutional body entrusted with a mission of fundamental importance for the independence of the judiciary, 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, which is not the case either in the previous or in the new draft.
18. Furthermore, this provision interferes with the guarantees of the Article 6 of the European Convention on Human Rights insofar as the current members of the Council would seemingly not be able to challenge the termination of their mandates before a judicial body other than the Polish Constitutional Tribunal, the independence of which from the legislative and executive powers has been questioned⁶. In this respect, the Bureau of the CCJE refers to the Grand Chamber judgment of the European Court of Human Rights⁷.
19. The previous draft contained provisions regarding the division of the Council into two Assemblies, a step that would infringe judicial independence insofar as the legislative and executive powers would have a decisive role in the procedure for appointing judges and trainee judges. These provisions have not been kept in the new draft.

⁴ 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.*

⁵ See Final Opinion on 5 May 2017 of the OSCE/ODIHR on draft amendments to the Act on the National Council of the Judiciary and certain other Acts of Poland, para 12.

⁶ See *inter alia* the report adopted by the Venice Commission at its 108th Plenary Session, 14-15 October 2016 on the Act on the Polish Constitutional Tribunal (especially paragraph 123): [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)026-e)
See also information note by the co-rapporteurs of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe from their fact-finding visit to Warsaw 3 to 5 April 2017 (especially paragraph 27):

<http://website-pace.net/documents/19887/3136217/AS-MON-2017-14-EN.pdf/a1215706-4f9a-40dd-af40-e1e03209d0a4>

⁷ See *Baka v. Hungary*, 23 June 2016.

However, the fundamental concern of politicised judge members as a consequence of a politicised election procedure remains.

F. Conclusions

20. 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 Draft Act would be a major step back as regards judicial independence in Poland. It is also worrying in terms of the message it 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.
21. 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. Moreover, the pre-term removal of the judges currently sitting as members of the Council is not in accordance with European standards and it endangers basic safeguards for judicial independence.
22. The Bureau of the CCJE is deeply concerned by the implications of the Draft Act for the principle of the 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. The CCJE Bureau recommends that the Draft Act be withdrawn and that the existing law remain in force. Alternatively, any new draft proposals should be fully in line with the standards of the Council of Europe regarding the independence of the judiciary.
23. The CCJE Bureau remains at the disposal of the Polish authorities for any assistance in this matter.