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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# POLAND

# OPINION

# ON THE DRAFT ACT AMENDING THE ACT ON THE NATIONAL COUNCIL OF THE JUDICIARY,

# ON THE DRAFT ACT AMENDING THE ACT ON THE SUPREME COURT,

# PROPOSED BY THE PRESIDENT OF POLAND,

# AND ON THE ACT ON THE ORGANISATION OF ORDINARY COURTS

**Adopted by the Venice Commission at its 113th Plenary Session (8-9 December 2017)**

**On the basis of comments by**

**Mr Richard BARRETT (Member, Ireland)**
**Ms Claire BAZY MALAURIE (Member, France)**
**Mr Richard CLAYTON (Member, United Kingdom)**
**Mr Philip DIMITROV (Member, Bulgaria)**
**Mr Christoph GRABENWARTER (Member, Austria)**

## Contents

## I. Introduction

1. By letter of 26 October 2017, the President of the Parliamentary Assembly of the Council of Europe (the PACE), following Resolution 2188 (2017),[1] requested the Venice Commission to prepare an opinion on the compatibility with the Council of Europe's standards on the rule of law of the two Draft Acts recently submitted to the Sejm by the President of the Republic, and amending the Act on the National Council of the Judiciary and the Act on the Supreme Court (CDL-REF(2017)053 and CDL-REF(2017)052 accordingly), as well as of the Act of 12 July 2017 on the Organisation of Ordinary Courts (hereinafter – the Act on Ordinary Courts, CDL-REF(2017)046). The President of the PACE requested the Venice Commission to prepare this opinion "at its earliest opportunity".

2. Mr Barrett, Ms Bazy Malaurie, Mr Clayton, Mr Dimitrov and Mr Grabenwarter were invited to act as rapporteurs for this opinion.

3. In a letter of 16 October 2017 the Venice Commission proposed to the Polish authorities a date for a visit of the rapporteurs to Warsaw (16-17 November 2017). In reply, the Polish authorities confirmed their willingness to cooperate with the Venice Commission, but suggested to postpone the visit and the adoption of the opinion until after the December Plenary session. In the light of the urgency of the request, and of the possible imminent examination by Parliament of the two Draft Acts, such postponement was not possible. The Venice Commission regrets that it did not have the benefit of direct discussions with the Polish authorities, politicians, judges, NGOs and other stakeholders.

4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of the translation of the Act on Ordinary Courts (provided by the Polish authorities) and of the two Draft Acts (unofficial translations). In addition, the Venice Commission had at its disposal an unofficial translation of two explanatory Memorandums prepared by the administration of the President of Poland in support of the two Draft Acts (CDL-REF(2017)053add1 and CDL-REF(2017)052add1). Inaccuracies may occur in this opinion as a result of incorrect translations. Finally, on 5 and 7 December 2017 the Polish authorities submitted written comments on the draft opinion.

5. The present opinion was discussed at the Sub-Commission on the Judiciary on 7 December 2017 and adopted by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017).

## II. Background

### A. The 2017 judicial reform - a general overview

6. In January 2017 the Polish Government announced plans for a large-scale judicial reform. In a public statement the Minister of Justice explained that a comprehensive reform was needed in order to increase the efficiency of the court system, reduce delays in the proceedings, enhance the accountability of judges, strengthen their professionalism, combat corporatism and re-establish the public trust in the judiciary.[2] In the search for solutions, the ruling majority and the President of the Republic came forward with a series of draft acts.

[1] See http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en

[2] See the public statement of 20 January 2017 by Z. Ziobro, the Minister of Justice and Prosecutor General of Poland.

7. Thus, in May – July 2017 the Polish Parliament adopted the Draft Act on Ordinary Courts, the Draft Act on the National Council of the Judiciary, and the Draft Act on the Supreme Court. These Draft Acts have been severely criticised at the national and international levels.[3]

8. The Draft Act on Ordinary Courts was signed by the President of the Republic on 25 July and entered into force. Two other Draft Acts (on the Supreme Court and on the National Council of the Judiciary) were vetoed by the President on 24 July 2017.

9. In September 2017 the President proposed two alternative Draft Acts: on the Supreme Court and on the National Council of the Judiciary. The two Draft Acts, proposed by the President, have taken into account some of the criticisms of the national and European institutions and NGOs. However, the general direction of the reform remained unchanged, and the Draft Acts submitted by the President were subjected to severe criticism from the inside and the outside of the country. In particular, the UN Special Rapporteur concluded that "taken together, these legislative acts pose a serious threat to the independence of the Polish judiciary and the separation of powers".[4] The OSCE/ODIHR concluded that the Draft Act on the Supreme Court "would seriously undermine the separation of powers and the rule of law in Poland".[5] The CCJE found that the proposed reform of the National Council of the Judiciary represented a "major step back as regards judicial independence in Poland".[6] The European Parliament concluded that the reform may "structurally undermine judicial independence and weaken the rule of law in Poland"; the European Parliament also called for "postponement of the adoption of any laws until a proper assessment has been made by the Commission and the Venice Commission".[7]

10. These two Draft Acts, submitted by the President, together with the Act on Ordinary Courts already in force, are the subject of the present opinion. This opinion is not supposed to cover all aspects of the 2017 judicial reform. Other international and national bodies provided a very detailed analysis thereof. The Venice Commission will focus on the essential proposals/amendments, which determine the position of the judiciary within the system of checks and balances, in the light of the Council of Europe's standards on the rule of law and democracy, and of the European best practices.

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[3] See, in particular, an opinion of the CCJE Bureau of 7 April 2017; a statement of the Bureau of the CCJE of 17 July 2017; a Preliminary Opinion by the OSCE/ODIHR of 22 March 2017 "On draft amendments to the Act on the National Council of the Judiciary and certain other acts of Poland"; a Final Opinion of the same name of 5 May 2017; an Opinion by the OSCE/ODIHR of 30 August 2017 "On certain provisions of the Draft Act on the Supreme Court of Poland"; an information note by the co-rapporteurs of the Monitoring Committee of the PACE (§ 27); a Recommendation by the European Commission of 26 July 2017 regarding the rule of law in Poland, complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146; an Opinion of the ENCJ Executive Board of 30 January 2017; a letter by the CoE Human Rights Commissioner to the Speaker of Sejm of 31 March 2017; a joint letter of several major international NGOs to the European Commission (Amnesty International, FIDH, Human Rights Watch, Open Society European Policy Institute, Reporters without Borders etc.) of 16 February 2017; a statement by the Helsinki Foundation for Human Rights of 13 July 2017; a statement by MEDEL (*Magistrats Européens pour la Démocratie et les Libertés*) of 18 July 2017; a letter by the President of the Council of Bars and Law Societies of Europe to the President of the Sejm (of 3 April 2017) and to the President of the Republic (of 18 July 2017); a statement by the National Council of the Judiciary of 7 March 2017 "regarding the government's draft act on the National Council of the Judiciary"; a resolution of the General Assembly of the judges of the Supreme Court on the proposed changes to the judiciary in Poland of 16 May 2017; a report by the Board of the Law Faculty of the Jagiellonian University of 8 May 2017. Some of the above-mentioned documents were issued in English, some documents were available to the Venice Commission in an unofficial translation.

[4] Statement of 27 October 2017 by the UN Special Rapporteur Mr Diego García-Sayán, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22313&LangID=E.

[5] OSCE/ODIHR "Opinion on certain provisions of the draft act on the Supreme Court of Poland (as of 26 September 2017)", of 13 November 2017

[6] See Opinion of the CCJE Bureau of 12 October 2017, § 20

[7] Resolution on the situation of the rule of law and democracy in Poland, 15 November 2017, Strasbourg, pp. 4 and 7; http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0442&format=XML&language=EN

11. Critical remarks contained in the present opinion should not be interpreted as the endorsement of the *status quo*. It is clear that the Polish judicial system is not flawless, and some reforms are needed. Renewal of the judiciary should also be possible, but it needs to be done step by step, and safeguards against excessive political interference in the judicial governance are to be put in place.

### B. The context of the 2017 reform

12. Before starting the examination of the reform of 2017, the Venice Commission needs to recall that the Polish legal landscape has been reshaped by two major events which occurred in 2015 and 2016: the constitutional crisis over the Constitutional Tribunal, and the adoption of the new Act on the Public Prosecutor's Office.

13. The situation with the Constitutional Tribunal was examined by the Venice Commission in Opinion CDL-AD(2016)026.[8] The Venice Commission concluded that the new Act on the Tribunal "would considerably delay and obstruct the work of the Tribunal and make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning" (§ 123). The Venice Commission also questioned the legitimacy of the new composition of the Tribunal (§ 125). This situation should be taken into account when examining the stance taken by the Constitutional Tribunal in respect of the current judicial reform (see below).

14. The amendments to the Act on the Public Prosecutor's Office (of 2016) are examined by the Commission at the same Plenary Session as the present opinion. The central element of those amendments was the merger of the office of the Minister of Justice and that of the Prosecutor General, and an important increase in the powers of the Prosecutor General in the management of the prosecutorial system (see CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's Office, as amended, § 20). These new competencies the Minster of Justice should be born in mind when analysing the 2017 judicial reform and the role of the Minister in the proposed model of judicial governance.

## III. Analysis

### A. The Draft Act on the National Council of the Judiciary

15. Article 187 of the Polish Constitution defines the composition of the National Council of the Judiciary (the NCJ). This body has 25 members; 15 of them should be "chosen from amongst the judges". The other 10 are lay members: 6 are elected by Parliament, one is appointed by the President and three are sitting in the NCJ *ex officio*.

16. The Constitution does not specify how the "judicial members" are to be chosen. In a judgment of 20 June 2017 the Constitutional Tribunal of Poland[9] explained that the method of election of the 15 judicial members of the NCJ should be regulated by a law. Currently, the law defines that the 15 judicial members of the NCJ are to be chosen by the judiciary.

17. In the past decades many new European democracies created judicial councils – compound bodies with functions regarding the appointment, training, promotion and discipline of judges. The main function of such a body is to ensure the accountability of the judiciary, while

[8] CDL-AD(2016)026, Poland - Opinion on the Act on the Constitutional Tribunal

[9] The Venice Commission recalls that there is a lasting controversy in Poland about the legitimacy of the election of some of the judges of the Constitutional Tribunal – in particular, those, who took part in the judgment of 20 June 2017.

preserving its independence.[10] The exact composition of the judicial councils varies, but it is widely accepted that at least half of the council members should be judges elected by their peers.[11] The Venice Commission recalls its position expressed in the Rule of Law Checklist, in the Report of the Judicial Appointments and in the Report on the Independence of the Judicial System (Part I: The Independence of Judges) to the effect that "a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself".[12]

18. The "democratic element" of such councils is usually represented by lay members, elected by Parliament or appointed otherwise. Judicial members, by contrast, are elected by other judges and hence have no strong political affiliation.[13] Thus, the current composition of the Polish NCJ is in this regard in harmony with this prevailing European standard.

### 1. New method of election of the 15 judicial members of the NCJ

19. The Draft Act on the NCJ changes the method of election of the judicial members. Under the Draft Act the 15 judicial members will be elected, in the first round, by a majority of 3/5$^{th}$ in the Sejm (the lower chamber of Parliament).

20. The present Draft Act on the NCJ contains improvements compared to a draft adopted in July by Parliament. Thus, the division of the Council into two chambers (which practically meant a veto power of the *ex officio* members) was given up, and a higher majority of 3/5$^{th}$ is now required for the election of the judicial members (Article 1, adding Article 9a). This is a positive development. The Venice Commission has consistently recommended that the members of a judicial council elected by Parliament should be elected by a qualified majority.[14]

21. Article 11d of the Draft Act describes what happens if a 3/5$^{th}$ majority cannot be reached. In this case a second round of election is held, in which candidates are elected "by a roll call" (§ 1). Under Article § 2, each MP has one vote, and may vote only for one candidate. Under § 3, "candidates who have received the highest number of votes shall be deemed to have been elected", and each MP may vote "for" or "against" a candidate, or abstain. In the case of a tie, a candidate who received fewer votes "against" will be elected.

22. The system of voting in the second round is not entirely clear.[15] The requirement of a qualified majority in the first round of elections encourages the ruling majority and the opposition to find a compromise and select more neutral figures to serve on the NCJ. This mechanism, however, would not be effective if in the second round candidates supported only by the ruling party may be elected by a simple majority of votes.

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[10] The Memorandum of the Polish authorities (p. 3), in fact, recognises that "the inalienable role of the National Council of the Judiciary" is "to safeguard the independence and autonomy of the courts."

[11] See Recommendation 2010/12 of the Committee of Ministers of the Council of Europe, CM/Rec (2010)12 on Judges, Independence, Efficiency and Responsibilities, § 27; OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, p. 7; Opinion number 10 of the CCJE (Consultative Council of European Judges of the Council of Europe), § 27; European Charter on the Statute for Judges of 8-10 July 1998, p. 1.3.

[12] CDL-AD(2016)007, footnote 68; CDL-AD(2007)028, § 29; *see also* CDL-AD(2010)004, § 31.

[13] Among the 22 European judicial councils in 2016, in 18 of them half of judge members or more are elected by their peers or appointed or proposed by their peers (see page 38 of the 2016 EU Justice Scoreboard, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf).

[14] See CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, § 67, with further references.

[15] Thus, if every MP has only one vote, is this vote spent by abstention or by voting "against"?

23. It appears that under the Draft Act proposed by the President minority candidates (i.e. those supported by the opposition) might have a chance to be elected in the second round.[16] However, this should be clarified.

24. In any event, the proposal by the President is still at odds with the European standards (as far as those countries which have a judicial council are concerned), since the 15 judicial members are not elected by their peers, but receive their mandates from Parliament. Given that six other members of the NCJ are parliamentarians, and four others are *ex officio* members or appointed by the President of the Republic (see Article 187 § 1 of the Constitution), the proposed reform will lead to a NCJ dominated by political nominees. Even if several "minority candidates" are elected, their election by Parliament will inevitably lead to more political influence on the composition of the NCJ and this will also have immediate influence on the work of this body, which will become more political in its approach.

25. In support of the new method of elections the Memorandum refers to the judgment of the Constitutional Tribunal of 20 June 2017, quoted above. According to the Tribunal, the method of election of the judicial members of the NCJ is to be regulated by a statute. The Venice Commission acknowledges that the current Constitution leaves this question open for the regulation by the statute. However, the European standards are clearly in favour of the currently existing model, which is also constitutionally acceptable.

26. In addition, the procedure of *nomination* of candidates does not protect the NCJ from politicisation. Where judges nominate candidates to the council, it is not uncommon for Parliament to make the final choice. However, in the current proposal a judge-candidate may be nominated either by a group of 2000 citizens or by 25 fellow judges (Article 11a § 2).[17] Parliament is not obliged to select candidates supported by other judges, and may choose candidates who have only minimal support amongst their colleagues. Thus, the opinion of the judicial community has insufficient weight in the process of election of members of the NCJ, which is regrettable.[18]

27. The Memorandum explains that one of the reasons for changing the method of election of the judicial members is the current underrepresentation of the district court judges in the NCJ.[19] This is a valid concern, but this may be addressed by changing the system of nomination of candidates within the judiciary, or of their election by the judiciary, which would give a better representation to judges of the district courts level (and would help to progressively "rejuvenate" the NCJ).

### 2. Early termination of the mandate of the current members of the NCJ

28. Article 6 of the Draft Act provides for early termination of mandates of all judicial members of the NCJ at the moment of the election of new members. According to the Memorandum,[20] this measure is called for by the judgment of the Constitutional Tribunal of 20 June 2017.[21] In that judgment the Tribunal held, in particular, that all judicial members of the NCJ should have the same term of office. The Draft Act, proposed by the President, in Article 1 (new Article 9a § 1) speaks of the "joint term of office" of the judicial members of the NCJ. That implies that all

[16] See a more detailed explanation of the system in CDL-AD(2010)042, Interim Opinion on the Draft Act on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §§ 36-38.
[17] In the latter case, personal information of judges supporting their colleague as a candidate is communicated to the Minister of Justice (Article 11b § 8). It may make more difficult to nominate "dissident candidates".
[18] On this point see the OSCE/ODIHR Final opinion on draft amendments to the Act on the National Council of the Judiciary and certain other acts of Poland, §§ 44 et seq.
[19] P. 5
[20] P. 8
[21] The Venice Commission does not have the full text of the judgment in English, but an official press-release gives an outline of this judgement: http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/9752-ustawa-o-krajowej-radzie-sadownictwa/

mandates will start and end simultaneously, and that the composition of the NCJ should be fully renewed every 4 years.

29. The very idea of a "joint term of office" is open to criticism. Desynchronised terms of office are a common feature in collegiate bodies in Europe. They help to preserve institutional memory and continuity of such bodies. Moreover, they contribute the internal pluralism and hence to the independence of these bodies: where members elected by different terms of Parliament work alongside each other, there are better chances that they would be of different political orientation. By contrast, simultaneous replacement of all members may lead to a politically uniform NCJ.[22]

30. But even assuming that a "joint term of office" is politically legitimate, this aim may be achieved otherwise, in a way which does not interfere with the term of office of the current members. The judgment of the Constitutional Tribunal does not call for the simultaneous removal of *all currently serving* judicial members. The currently serving judicial members may remain in their positions until the original term of their mandate expires, while new members (i.e. those elected under the new rules) could be elected for a *shorter* period, ensuring that at some point in future the whole composition of the NCJ will be renewed simultaneously.[23] This solution will not only respect the security of tenure but also better ensure the institutional continuity of the body.[24]

31. In sum, the proposed change in the manner of appointment of the 15 judicial members of the NCJ, in conjunction with their immediate replacement, is going to weaken the independence of the Council with regard to the majority in Parliament. Against the background of other reforms in the field of the judiciary (see below), this measure contributes to a weakening of the independence of justice as a whole. Therefore, the Venice Commission urges the Polish authorities to abandon this proposal and keep the current system, which combines election of lay members by Parliament and election of the judicial members of the NCJ by the judges themselves.

### B. The Draft Act on the Supreme Court

32. The key proposals of the Draft Act on the Supreme Court (the SC) introduced by the President in September, are as follows: two new chambers will be created within the SC, one for hearing disciplinary cases of the SC judges and another for examining "extraordinary appeals", and hearing electoral and other public law disputes. Lay members, elected by Parliament, will participate in the "extraordinary appeal" proceedings and in the disciplinary proceedings before those two new chambers along with professional judges. The retirement age of judges of the SC will be lowered, as a result of which a considerable number of currently sitting judges will leave the court prematurely, with the President of the Republic having the discretionary power to maintain some of them in office. Finally, the President of the Republic will receive further additional powers vis-à-vis the SC, its First President and the Presidents of the five Chambers.

33. The explanatory Memorandum prepared in support of this Draft Act explained the need for the reform of the Supreme Court as follows: the Polish courts have never been truly "decommunized"; collaborators of the previous regime infiltrated the judiciary and resisted all

[22] See the position of the Venice Commission on Georgia (CDL-AD(2013)007, § 69), where it held that "important function of judicial councils is to shield judges from political influence. For this reason, it would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections." See also Opinion no.10 (2007) of the CCJE "On the Council for the Judiciary at the service of society", p. 35.

[23] It appears that this is precisely the method proposed by the Presidential Draft Act for the elections to the positions became vacant in mid-term.

[24] CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§ 20, 21

changes.[25] As a result, the society lost trust in the courts.[26] To re-establish this trust it was necessary to increase the democratic control over the judges and strengthen their accountability. Whether the above assessment is correct is a subject of the political debate going on in Poland at the moment.

34. At the outset, the Venice Commission observes that the Draft Act on the SC, introduced by the President, contains some improvements compared to an earlier draft, adopted in July by Parliament. For example, the Draft Act does not provide for a simultaneous dismissal of all SC judges with their subsequent re-appointment by the Minister of Justice. However, the Draft Act on the SC still contains proposals which raise concerns as to their compliance with the European standards.

### 1. Creation of new chambers

35. The Draft Act proposes to divide the SC into five chambers (Civil Chamber, Criminal Chamber, Labour and Social Security Chamber, the Extraordinary Control and Public Affairs Chamber, and the Disciplinary Chamber). The SC will continue to be headed by the First President, appointed by the President of the Republic from the list of five candidates proposed by the assembly of judges of the SC. Moreover, there will be five "Presidents of the Supreme Court", one for each Chamber, appointed by the President of the Republic from the list of three candidates proposed by the judges of the respective chambers.

36. In principle, the Venice Commission sees no difficulty with the division of chambers with specialised jurisdiction within a supreme court. However, in the case of Poland, the newly created Extraordinary Control and Public Affairs Chamber (hereinafter – the "Extraordinary Chamber") and Disciplinary Chamber are worth particular mention. These two chambers will have special powers which put them over and above the other chambers. They will also include *lay members* who will be selected by the Senate and appointed on the benches on a case-by-case basis by the First President of the SC.

37. The Extraordinary Chamber will be *de facto above* other chambers because it will have the power to review any final and legally binding judgement issued by the "ordinary" chambers (Articles 25 and 86).[27] In addition, this chamber will be entrusted with the examination of politically sensitive cases (electoral disputes, validation of elections and referendums, etc.),[28] and will examine other disputes between citizens and the State.

38. The Disciplinary Chamber will also be given special status in the sense that it will have jurisdiction over disciplinary cases of judges of "ordinary" chambers (Article 26), and will deal with the cases of excessive length of proceedings in other chambers of the SC. It will also be competent to deal with other disciplinary cases which may fall within the jurisdiction of the SC. That being said, the Venice Commission sees a greater justification for the creation of a special disciplinary chamber entrusted with the competency to deal with disciplinary cases of the SC judges, by comparison with the creation of the Extraordinary Chamber.

39. The Polish Constitution does not say how many chambers the SC should have. However, it is clear that the Constitution is based on a certain vision of the SC as a supreme instance on

[25] Memorandum on the Draft Act on the SC, p. 2
[26] Memorandum on the Draft Act on the NCJ, p. 1
[27] The experts of the OSCE/ODHIR are of the same opinion: see OSCE/ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), § 24.
[28] This chamber will also be competent to examine disputes over the duration of proceedings in common and military courts, and other cases of public law.

the top of a hierarchical pyramid, and of the First President, elected under a special procedure.[29]

40. The Draft Act proposes to create new chambers, which will be headed by largely autonomous office-holders. The heads of those two new chambers will be appointed directly by the President of the Republic under special rules, and will have a comparable legitimacy with the First President. In respect of the Disciplinary Chamber the First President will have very few powers,[30] which weakens his role within the SC, foreseen by the Constitution. Furthermore, by virtue of their special competencies, the two chambers will be *de facto* superior to other, "ordinary" chambers of the SC. Establishing such hierarchy within the SC is problematic. It creates "courts within the court" which would need a clear legal basis in the Constitution, since the Constitution only provides for one SC, its decision being final.

41. It belongs to the Constitutional Tribunal of Poland to decide whether the creation of those two chambers is constitutional. However, even assuming that it is constitutional, the proposed model is still problematic from the practical and theoretical points of view.

42. First of all, involvement of lay members in the adjudication in those two new chambers is particularly problematic (see below). Second, as regards the Extraordinary Chamber, the very idea of "extraordinary control" jeopardises the stability of the Polish legal order (also see below). Third, as to the Disciplinary Chamber, it is doubtful whether it would have enough cases (disciplinary and others) to justify its independent existence. The Venice Commission accepts that measures against excessive length of proceedings may be organised in different ways, also by internal measures within a court. However, there must be a clear procedure which is followed in this type of proceedings. The Draft Law does not specify whether the parties to the proceedings may introduce a complaint before the Disciplinary Chamber.

43. Finally, it is of particular concern that the Draft Act seems to enable the President of the Republic to determine almost completely the composition of these two chambers and to ensure that they are wholly or mainly composed of newly appointed judges.[31] This would mean that judges appointed by a NCJ dominated by the current political majority[32] would decide on issues of particular importance, including the regularity of elections, which is to be decided by the Extraordinary Chamber. Electoral issues are by their very nature of the highest importance for politicians and it is therefore crucial to insulate judges deciding on electoral issues from political influence. By making electoral judges particularly vulnerable to political influence, the Draft Act creates a serious risk for the functioning of Polish democracy.

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[29] Article 183 § 3 of the Polish Constitution provides that "the First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court".

[30] The Presidents of Chambers will be appointed by the President of the Republic "for a three-year term of office from among three candidates presented by the assembly of judges of a specific chamber" (Article 14 § 2 of the Draft). The appointment of the President of the Disciplinary Chamber would not require asking an opinion of the First President (Article 14 § 3). Thus, Disciplinary Chamber President will have nearly the same legitimacy as the First President. Furthermore, the general hierarchy of judicial structure is not applicable to the Disciplinary Chamber - it is the President of the Disciplinary Chamber who performs most of the functions normally performed by the First President (Article 19). Disciplinary chamber will have its own separate secretariat (Article 95 § 3 and Article 97 § 2), etc.

[31] The powers of the President of the Republic under Article 4 include setting of the "internal organisation of the Supreme Court" and fixing the number of judges in individual chambers. This power may be exercised, during the transitional period, even without consultations with the NCJ. Article 30 gives the President the right (after consultations with the First President of the SC), to "announce the number of vacancies for judges in the specific chambers" of the SC. It may imply that, following the adoption of the Draft Act, the President of the Republic would have the right to determine, single-handedly, the number of judges in the two new chambers and the procedure for their recruitment.

[32] This would be the result of the proposed changes to the Act on the NCJ, examined above.

### 2. Early retirement of a large number of senior judges

44. Article 180 § 4 of the Constitution provides that the retirement age of a judge should be established by a statute. Under Article 36 of the Draft Act, a SC judge shall retire upon reaching 65 years of age (under the current Act the upper age-limit for the SC justices is 70).

45. It is up to the democratic legislator to define the retirement age of judges. However, the general European trend consists of introducing a *higher* age of retirement.[33]

46. The application of this new retirement age to the *currently sitting judges* (Article 108) is even more problematic than the new retirement age as such.[34] This will oblige a significant number of judges to retire in the near future – apparently, almost 40% of the judges of the SC may be affected. Reasons for such a radical proposal, which may negatively affect the functioning of the SC, are not evident.[35]

47. From a practical perspective, is hard to see why a person who was deemed fit to perform official duties for several more years to come would suddenly be considered unfit. The Memorandum may be understood as implying that, as a result of the reform, most senior judges, many of whom have served under the previous regime, would retire.[36] If this reading is correct, such approach is unacceptable: if the authorities doubt the loyalty of some judges, they should apply the existing disciplinary or lustration procedures, and not change the retirement age.[37]

48. From a theoretical perspective, early retirement of the currently sitting judges undermines both their security of tenure and the independence of the SC in general. On the first point – related to the individual rights of judges concerned - the Venice Commission has previously found that a very similar reform in Hungary affected "the independence, the status and immovability of judges".[38] The Venice Commission notes with approval that by Judgment of 16 July 2012 of the Hungarian Constitutional Court declared the sudden reduction of the upper age-limit for judges unconstitutional.[39] Furthermore, on 6 November 2012 the Court of Justice of the European Union ruled that the sudden lowering of the retirement age for judges in Hungary violated European equal treatment rules.[40]

49. Early retirement does not only affect individual rights of judges; it may also "undermine the operational capacity of the courts and affect continuity and legal security and might also open the way for undue influence on the composition of the judiciary".[41]

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[33] See CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §§ 104-105

[34] The Venice Commission is less concerned with the possibility for women judges to retire at an early age. Some may present it as a positive discrimination, while others may see this measure as perpetuating old stereotypes detrimental to women and unfair to men. The Venice Commission will not take a definite stand on this question.

[35] It is unclear how the changed retirement age would affect sitting judges who move to another function.

[36] P. 2

[37] In an opinion on Armenia the Venice Commission observed that instantaneous removal of all chairpersons due to the introduction of the new time-limit for their mandates is problematic and "could give the impression that the only reason of the transitional rule is to create the opportunity of a radical change of court chairpersons" (CDL-AD(2014)021, Opinion on the draft Act on introducing amendments and addenda to the Judicial Code of Armenia (term of office of court presidents), § 50).

[38] CDL-AD(2011)016, Opinion on the new Constitution of Hungary, § 108

[39] The Universal Charter of the Judge, approved by the International Association of Judges on 17 November 1999, in its Article 8 proclaims directly: "any change to the judicial obligatory retirement age must not have retroactive effect."

[40] Case C-286/12, European Commission v. Hungary

[41] Ibid. (Hungary); the Commission also recalls its comments in Joint Opinion on the draft Amendments to the Organic Law on General Courts of Georgia, where it held that "the provisions providing for the automatic termination of the mandates of court chairperson upon the enactment of the draft amendment law is problematic and should be removed" (CDL-AD(2014)031, § 101).

50. Additionally, the Venice Commission draws the attention of the Polish authorities to the case-law of the European Court of Human Rights (the ECtHR) on the right of access to court of civil servants, in particular to the Grand Chamber case of *Baka v. Hungary.*[42] This case concerned the premature dismissal of the President of the Hungarian Supreme Court, and the absence of any judicial remedy against it.[43] Under the Draft Act, Polish judges exposed to early retirement would not have any judicial remedy at their disposal. Given the recent developments in the case-law of the ECtHR, absence of judicial remedies in this situation appears problematic.

51. Finally, the Venice Commission is concerned by the provisions which allow judges, including those currently sitting, who reach retirement age to apply for the extension of their office (Article 36 § 1). In the first place, there is no apparent rationale determining the office of which judges might be extended; it appears to be at the discretion of the President of Poland. This will give the President excessive influence over those judges who are approaching the retirement age.[44]

52. In conclusion, the Commission strongly recommends that the proposal to apply the new retirement age with immediate effect on the currently sitting judges be abandoned, and that the extension of the term of service beyond the normal retirement age is not left to the discretion of the President of the Republic as an elected politician.

### 3. Extraordinary review of final judgments

53. The newly created Extraordinary Chamber will receive the power to revise legally binding judgments by way of "extraordinary control". Such extraordinary appeals may be lodged by a number of designated office holders (Prosecutor General, Ombudsman, a group of MPs, etc.) within *five* years after the contested judgement had been taken, or even within *twenty* years during the transitional period (Article 115).[45] Extraordinary appeals may be lodged on points of fact and law (Article 86 § 1). Extraordinary appeals may be introduced against decisions examined by the SC in cassation, but grounds for such an appeal should be different from the grounds for cassation (Article 87 § 2).

54. A system of extraordinary appeals against final judgements existed in many former communist countries. Such system was found by the ECtHR as violating the principle of *res judicata* and of the legal certainty.[46] The proposed Polish system is not entirely identical to the old Soviet system, but has a lot of similarities with it.[47]

55. Several elements of the new system are particularly problematic. First, the Draft Act stipulates that final judgments may be overturned for the sake of "social justice" (Article 86 § 1).[48] The Venice Commission notes that, under Article 2 of the Polish Constitution, the Republic of Poland is "a democratic state ruled by law and implementing the principles of social justice". However, this term is open to a large discretion in the interpretation in the legal

[42] ECtHR, *Baka v. Hungary* [GC], no. 20261/12, ECHR 2016.
[43] Ibid, §§ 120-122
[44] See, in the same vein, the comments of the OSCE/ODIHR, cited above, § 121.
[45] In essence, a declaratory judgment may be issued even beyond the 5-years' time-limit (Article 115 § 2) after the judgment becomes final.
[46] ECtHR, *Brumarescu v. Romania*, [GC], no. 28342/95, ECHR 1999-VII, 28 October 1999; *Ryabykh v. Russia*, no. 52854/99, ECHR 2003-IX, 24 July 2003.

[48]The Memorandum speaks in this context of creating "a remedy that enables the natural legal order to be restored in accordance with the principle of social justice". Apparently, the authors of the Memorandum consider that, besides the legal order of the Republic of Poland, there is a higher "natural legal order" which should prevail in legal disputes examined by the courts. This is a dangerous idea, especially given that lay judges are participating in disciplinary proceedings.

proceedings. When it comes to the conditions for overturning final and binding judgments, such unspecific criteria should not serve as a basis for decisions. The use of such criteria is against the principle of foreseeability, which is a cornerstone principle of the broader concept of the Rule of Law.[49] If a law has been interpreted by the courts in a manner which is not welcome politically or unpopular, the legislator might change that law for the future, in line with the legitimate expectations of the persons concerned, but this new law must not – as a rule – affect the validity of the past judgments.

56. Second, according to the Draft Act, it will be possible to revise a final judgement *on points of fact* (Article 86 § 1 p. 3). Thus, the new instrument will permit the reopening of old cases not because of some newly discovered circumstances (like perjury committed by a key witness, for example) but beyond this. Normally, the main function of the highest judicial instance in a country is to review cases on points of law; extraordinary review should not be an "appeal in disguise", and "the mere possibility of there being two views on the subject is not a ground for re-examination".[50] Interpretation of evidence and establishment of facts should normally be the tasks of the first-instance courts and of the courts of appeal.

57. The Draft Act provides for very few restrictions to the use of this instrument. Thus, extraordinary appeals should not be based on the same arguments as those examined in cassation (Article 87 § 2). This rule is reasonable, but may be difficult to implement, since lawyers could reformulate the grounds of appeal to present them as "new grounds". In addition, the Draft Act does not require explicitly that the contested judicial decision should be first challenged by way of an ordinary appeal/cassational appeal. It is also unclear how the new instrument correlates with other "extraordinary remedies" which may exist under the Polish law (see Article 86 §1 (3) part 2).

58. The Draft Act introduces time-limits for the extraordinary appeals: thus, *reformatio in peius* (reversal to the detriment of the accused) is possible only if the request is introduced six months from the date of the "final" judgment (see Article 86 § 3). This is positive; however, it is understood that this temporal limitation applies only in the context of criminal proceedings, and that in all other disputes (including public law disputes) the 5-years' time-limit, which is very long by itself, will apply. In addition, during the transitional three years' period, the Extraordinary Chamber will be able to reopen all cases decided after 17 October 1997. In effect, it will be possible to reopen *any case* decided in the country in the past 20 years, on virtually *any ground*. Moreover, in the proposed system the new judgements, adopted after the re-opening, will also be susceptible to the extraordinary review. It means that no judgment in the Polish system will ever be "final" anymore.[51]

59. It also appears that the request for the reopening may be introduced without the knowledge and even without consent of the parties. This is a further similarity to the former Soviet legal system. By itself, the practice of "appeals in the general interest" launched without reference to or participation by the parties,[52] is not acceptable, because there is a risk that such appeals

[49] See the Rule of Law Checklist, cited above, § 58.
[50] *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 62, ECHR 2017 (extracts)
[51] The Polish authorities explained that "in the course of work on the Act, the legislature added the following provision: 'If 5 years lapses from the date the appealed decision becomes legally binding and the judgement entails irreparable legal effects or if it is dictated by the principles or freedoms and rights of an individual and citizen laid down in the Constitution, the Supreme Court may merely declare that the appealed decision was issued in breach of law and identify the circumstances on the basis of which the decision was issued'. This means that judgements issued 5 years before the determination of an extraordinary appeal, entailing irreparable legal effects, will not be overruled but a breach of law will be declared providing grounds for a compensation obligation of the State Treasury." However, this amendment only gives the Supreme Court the power to choose between a judgment having only a declaratory effect (and having no substantive legal effect on the parties), or a binding judgment having such effect.
[52] From the Draft Act it is not entirely clear what are the powers of the parties to the original dispute in the "extraordinary control" proceedings before the SC.

may focus on wrong issues, and be contrary to the best interests of the party on whose behalf the appeal was introduced.

60. Besides the far reaching possibilities of removing final judgments, the involvement of MPs in such proceedings is particularly questionable. The Ombudsman or the Prosecutor General may (at least in theory) be regarded as independent and neutral authorities acting in the general interest,[53] but it is very unusual to entrust such procedural powers to politicians. The Polish authorities explained that "during the course of the legislative work it was decided that MPs and senators would be excluded from the group of entities entitled to submit extraordinary appeals." This Venice Commission welcomes this amendment.

61. Finally, in one respect the proposed system is even *worse* than its Soviet predecessor. The Draft Act introduces a system of extraordinary review for the future judgments, which is problematic by itself. In addition, the Draft Act provides for the reversal of *old* judgments, which, at the moment of their adoption, were final and were not subject to any further review. This is not quite a retroactive application of criminal law, but, in practical terms, it may have a similar effect.[54]

62. This does not mean that final judgments should never be called into question. Under the Rule of Law Checklist, the principle of *res judicata* implies that "final judgments must be respected, unless there are cogent reasons for revising them".[55] Some of the proposals made by the Draft Act are acceptable. For example, Article 86 § 1 provides for the reopening of the proceedings where there has been a violation of human rights and freedoms. In such circumstances, the reopening must be possible, but *only under certain conditions* – namely, where the Constitutional Tribunal of Poland or the ECtHR established the fact of such violations.

63. In sum, the mechanism of the "extraordinary control", as designed in the Draft Act, jeopardies the stability of the Polish legal order and should be given up.

### 4. Lay members

64. The two newly created chambers will hear cases with the participation of lay members, i.e. non-lawyers (Article 58). At the first instance, "extraordinary control" and disciplinary cases will be decided by 2 judges and 1 lay member, and at second instance by 3 judges and 2 lay members (Articles 72 and 91). Under Article 60, lay members will be elected by the Senate for a 4-years' term,[56] by a secret vote, following a relatively open nomination procedure (Article 61 § 2). These elements seem destined to further the stated goal of the reform, namely to make the judicial system more "democratic".

65. The Polish Constitution does not specify the forms of participation of members of the public in the administration of justice (see Article 182 of the Constitution), leaving this question to regulation by statute. In principle, mixed benches including professional judges and lay members/jurors exist in a number of modern European jurisdictions, but they are usually

[53] The Venice Commission recalls that, in the Polish system, Prosecutor General is the same person as the Minister of Justice; in the light of this it is questionable whether he/she has sufficient political detachment.
[54] The Venice Commission also notes that, under Article 94, if the SC discovers an "obvious breach of the law" it should issue a warning notice, which may result in "a request for a disciplinary case to be examined by a disciplinary court" (§ 3). The Venice Commission recalls its position to the effect that "disciplinary proceedings should deal with gross and inexcusable professional misconduct, but should never extend to differences in legal interpretation of the law or judicial mistakes" (CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, § 60).
[55] Cited above, p. 63
[56] The Venice Commission notes that the Draft Act does not prevent, at least explicitly, the possibility of re-election of a lay judge for a new 4-years' term.

present in *lower* instances.[57] In the jury trial the sole responsibility of jurors is to answer *questions of fact*. Lay members are usually absent from the apex courts and this is for an obvious reason: such courts are called to examine complex *questions of law*.[58]

66. Overall, when lay members are present in the higher instances in disciplinary bodies created within certain professional corporations (like practising lawyers, for example), they are usually taken from among the professional group concerned. In the case of judges it would mean that judges should be selected as lay members, as representatives of the professional community.[59] This is clearly not the purpose of the Draft Act – from Article 59 it is clear that legal professionals cannot become lay members.

67. Under the Draft Act, lay members will not even have to have a higher education (Article 58 § 2 (6)). At the same time, they will have to deal with the most complex legal matters, including those related to, for example, anti-trust regulations, judicial ethics, etc. (Article 25). In the opinion of the Venice Commission, the proposal to introduce lay members, in particular in the two special chambers of the SC, is dangerous for the efficiency and for the quality of justice. This proposal has evident similarities with the Soviet judicial system.[60]

68. The reference to the "social justice" in the provisions related to the extraordinary control is particularly telling: it may be seen as encouraging lay members to take their decisions on the basis of extra-legal considerations.[61]

69. In addition, the method of selection of lay members is problematic. Jurors, for example, are usually selected by lot, and not elected by the legislature. By contrast, under the Draft Act lay judges will be elected by a simple majority of the Senate, and their 4-years' mandate may be renewed. In addition, the First President will have the power to appoint them to the benches in disciplinary cases at his/her discretion (Article 72 § 2).

70. The Venice Commission accepts that lay judges may take part in the proceedings before the first instance courts.[62] However, their participation at the level of the SC is, as a rule, ill-

[57] Interestingly enough, Article 4 § 1 of the Act on Ordinary Courts seems to depart from the same assumption; it proclaims that "citizens participate in administering justice by acting as lay judges in hearing cases before courts of first instance, unless acts provide otherwise." The Draft Act under consideration proposes to "provide otherwise" and depart from this basic principle.

[58] Lay members are occasionally present in judicial instances with a very specific and narrow competency - such, as, for example, the Court of Impeachment in Iceland, competent to decide on ministerial responsibility. In Poland, the Tribunal of State (competent to hear accusations against top State officials) is also composed essentially of lay members (see Article 199 § 1 of the Constitution). However, these are "special-purpose political courts", dealing with the questions of facts and law at the same time. See, in particular, the case of *Haarde v. Iceland*, no. 66847/12, §§ 103 – 108, 23 November 2017 (not final), where the ECtHR examined the composition of the Court of Impeachment. The ECtHR stressed, in particular, that "there had been parliamentary elections in the meantime and the sitting lay judges had thus not been appointed by the same Parliament that had decided to prosecute the applicant" (§ 107).

[59] Very often disciplinary proceedings are conducted within the judicial councils, which include lay members. It is the case in France, for example, where judges (including the president) constitute half of the panel deciding on the disciplinary cases.

[60] Introduction of lay members was at the heart of the judicial reform decreed by the Bolshevik government immediately after Bolsheviks seized the power in Russia in October 2017 (Decree no. 1 "On the tribunal" of 22 November 1917). Those lay members were elected by the Soviets; they were supposed to counterweight professional judges.

[61] In the above-mentioned Decree no. 1, p. 5., the Bolshevik government declared that the newly created tribunals should be guided by the "revolutionary legal conscience", which was supposed to replace the laws of the *ancient regime*. The Memorandum prepared by the Presidential Administration starts from the same assumption; it states (on p. 7) that "the involvement of lay judges in benches ruling on extraordinary appeals will introduce a very important element of social control to cases in which basic elements of the principle of social justice may have been breached." Thus, instead of applying the laws, lay members will be applying "the principle of social justice" and this is the reason for their participation in the proceedings.

[62] According to Chapter 7 of the Act on Ordinary Courts, analysed below, lay members take part in the examination of cases in the *lower* courts.

advised. In any event, the procedure of their selection and appointment should be better regulated in order that to exclude even appearances of political interference.

### 5. Powers of the President of the Republic vis-à-vis the Supreme Court

71. Traditionally, the Venice Commission distinguished between external and internal independence of the judiciary.[63] External independence refers to freedom from undue outside pressure, while internal independence protects individual judges from undue pressure from within the system. "Undue internal pressure" sometimes comes from court presidents and may take different forms: even where individual judges are not formally subordinate to court presidents, other powers (attribution of workload, allocation of resources and benefits, disciplinary powers, powers of transfer and secondment, distribution of cases, etc.) may be easily misused.

72. The borderline between internal and external independence may become blurred when the appointment of court presidents is politicised. It is thus important to examine what powers court presidents have vis-à-vis ordinary judges, and how those presidents are appointed, dismissed, etc., i.e. whether they themselves enjoy sufficient independence from the executive and the legislature.

#### a. Appointment of the First President of the SC by the President of the Republic

73. First of all, the Venice Commission notes that the currently serving First President will soon retire, due to the lowering of the retirement age for judges with immediate effect after the entry into force of the Draft Act. This raises an issue by itself (see above). A further reason for concern is that the President of the Republic will be able to entrust the chairmanship, pending the election of the new First President and Presidents of the Chambers, to any other judge "of his choice" (Article 108 § 4).[64] The possibility for appointment of the First President *ad interim* should be limited to situations of real emergency; the Draft Act should provide for an automatic solution (like the appointment of a most senior amongst the Presidents of the Chambers, which does not involve the exercise of the discretion by the President of the Republic) and be limited in time. This "emergency" procedure should not be used to circumvent the general procedure.

74. The new First President will be selected by the President of Poland from amongst five candidates elected by the General Assembly of the SC (Article 11).[65] Such scheme of appointment is provided by the Constitution, although the Constitution does not stipulate how many candidates the General Assembly should present to the President of the Republic.

75. In principle, the appointment of the First President by the President of the Republic is within the range of acceptable solutions, as long as the judiciary is meaningfully involved in the process. However, the system of voting in the General Assembly of the SC is unclear. Article 12 states that the candidates shall be those who receive the highest number of votes. It is not specified whether each candidate is voted on, or a list of candidates is voted on in one election. Ideally, all candidates proposed to the President should have a *significant support* within the SC. The President should not be able to pick a candidate supported by only a small minority of the SC judges.

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[63] CDL-AD(2010)004, Report on the independence of the judicial system, Part I: the independence of judges, § 56.

[64] Under Article 108 § 4 the First President is elected only after at least 2/3rd of the number of judges of the SC are appointed to the chambers of the SC. After the retroactive lowering of the retirement age, many judicial positions will remain vacant; the procedure of appointment of new judges may take months. During all this period the SC will be headed by a judge appointed, single-handedly, by the President of the Republic.

[65] Currently, under Article 16 § 1 of the Law on the SC, the General Assembly proposes the President only two candidates.

76. In this respect the currently existing system (where the President chooses between only two candidates proposed by the General Assembly) is better: even if the President chooses the second candidate (not the one who obtained the majority of the votes), there are high chances that this judge would still enjoy a significant support within the SC.

77. The Venice Commission acknowledges that appointment of the SC judges by a popularly elected President may, in theory, provide the appointed judges with a certain degree of democratic legitimation which is not the case in entirely the same way when the appointment of judges follows a system of co-optation within the judiciary. That being said, the Venice Commission is rather in favour of the minimisation of the role of the Head of State in the judicial appointments. In Opinion CDL-AD(2013)034 on Ukraine the Venice Commission stressed that it "has no objection against appointment of judges by the Head of State when the latter is bound by a proposal of the judicial council and acts in a 'ceremonial' way, only formalising the decision taken by the judicial council in substance."[66] Even where the President has the real (not ceremonial) power to choose, his/her choice should be limited to candidates having significant support within the judiciary.

78. Article 11 § 1 provides that the First President may be re-appointed for the second term by the President of the Republic. It is unclear whether in this case the SC will have to propose a list of five candidates to the President, and whether the incumbent First President will be automatically on the list. If so, that will make this person particularly dependent on the goodwill of the President.

b. Direct powers of the President of the Republic vis-à-vis the SC

79. Under the Draft Act, the President of the Republic has the power to establish the rules of procedure of the SC (Article 4 § 1) and the rules of procedure of the Lay Council of the SC (Article 69 § 3). In those Rules the President may define the number of judges in the SC, define "internal organisation" of the Court, formulate job descriptions for the judges' assistants, etc. (Article 4).[67] Furthermore, the President of the Republic may decide on the number of vacancies in each Chamber, and is only obliged to *consult* with the First President (or the President of the Disciplinary Chamber) on this matter (Article 30 § 1).

80. This may be considered an improvement compared to the previous draft, in which this power was given to the Minister of Justice.[68] However, the current solution is still open to criticism, and may be contrary to the principle of the separation of powers. As regards the number of judges in the SC and its chambers, the Venice Commission observes that the independence of the SC may be threatened by "packing" the Court with new justices, by the reduction of the number of justices, or by their arbitrary redistribution amongst the chambers. The Venice Commission is of the opinion that such matters should not be left at the discretion of the President of the Republic.[69]

[66] CDL-AD(2013)034, Opinion on proposals amending the draft act on the amendments to the constitution to strengthen the independence of judges of Ukraine, §16

[67] Article 4 of the Draft Act is a major modification of its predecessor: According to Article 3 § 2 and 3 of the Act on the SC of 2002 the internal organisation of the SC, the allocation of particular cases to appropriate chambers and the rules of internal procedure shall be set out by the Rules of the SC, which shall be adopted by the General Assembly of judges of the SC.

[68] In the Polish system, the Minister of Justice, besides being a minister, also holds the office of the Prosecutor General. So, the Minister has an additional vested interest in the court proceedings as a party. By contrast, the President of the Republic has no ministerial status and no responsibilities within the prosecution service.

[69] See, *mutatis mutandis*, CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§ 13-14

81. The establishment of purely *procedural* rules for the SC by the President is also ill-advised. Under the Draft Act the NCJ plays only a *consultative* role in this process (Article 4), and for the "first Rules of Procedure" the Draft Act does not require even a *consultation* with the College of the SC (Article 110). There is no general European rule that a judicial body has the *exclusive* right to issue its own rules of procedure. However, it is totally unusual to entrust this function to a State official external to the judicial system (even if he is a lawyer by training and profession).

82. While the involvement of the Head of State in the appointment of the chief judge is a relatively widespread practice, rules of procedure are normally adopted within the SC itself, or at least with its significant involvement. If the legislator fears judicial corporatism (which appears to be the major concern of the current reform), it may provide for some general guidelines on the procedure before the SC in a law, and leave the details to the internally adopted Rules. It is ill-considered to give the President of the Republic discretionary powers in this field. This approach is at odds with the principle of separation of powers from the European perspective. It might be a suitable compromise that e.g. the SC sets out its rules of procedure which then have to be approved by a state organ from outside the judiciary.

c. Powers of the First President and of the Presidents of Chambers

83. The First President and the "Presidents" of the five Chambers have substantive powers, some of which *de facto* place them in a hierarchically superior position *vis-à-vis* ordinary judges of the SC. The Venice Commission will not examine all the competencies of the First President and the Presidents of Chambers; it will concentrate on those competencies which are particularly dangerous for the internal judicial independence.

84. First, the First President/President of the Disciplinary Chamber play a decisive role in the disciplinary proceedings. In particular, they may appeal the decision of the Disciplinary Officer not to proceed with a disciplinary case of a judge (Article 75 §§ 4 and 5), which means that, in essence, the First President/President of the Disciplinary Chamber will have an independent power of triggering disciplinary proceedings.

85. Second, the First President, together with the MoJ, may initiate the secondment of a lower court judge to the SC for up to two years (Article 39 §1). A secondment may be even made indefinite (§ 3). Since a secondment entails a raise in the pay and status (§ 2), and no substantive conditions (other than the requirement to have ten years of service) are attached to it, Article 39 effectively gives the First President and the MoJ a discretionary power to give a promotion.

86. Third, and most importantly, the First President/Presidents of Chambers have vast discretion in defining the composition of judicial panels (or "benches"). Thus, the First President may define the composition of a panel deciding on the most serious questions, where there is a conflicting jurisprudence of different chambers (Article 80 § 1). The First President may assign lay judges to benches "on the case-by-case basis" for the examination of disciplinary cases of the SC judges (Article 72 § 2). The First President may "designate a judge to take part in the examination of a specific case in another chamber" (Article 34 § 3). Presidents of Chambers set up the composition of the benches in their Chambers and assign cases to them (Article 77). A President of Chamber may pick up a case and order its examination, "in particularly justified circumstances", in non-chronological order (Article 77 § 2). All these powers are discretionary, and may therefore easily be abused in order to ensure that a specific case is heard by an "appropriate" composition.

87. This form of discretion places the SC in tension with the principle of the "lawful" or "natural" judge and/or panel, which exists in many legal orders belonging to the continental legal tradition, to which Poland also belongs. According to this principle, the composition of the panel examining a case should be defined in advance by a statute or at least by objective criteria

based on the law. This principle of "competent judge defined by law" (in the German tradition *"gesetzlicher Richter"*) may be seen as an extension of the requirement of an "independent and impartial tribunal established by law" in Article 6 § 1 of the European Convention.[70]

88. In sum, the powers of the First President of the SC and of the Presidents of Chambers should be circumscribed. In particular, the First President/Presidents of Chambers should not have an unlimited discretion in setting up panels, distributing cases amongst them and assigning judges (and lay judges)[71] to the benches.[72]

### 6. Cumulative effect of the proposed amendments

89. The proposed reform, if implemented, will not only threaten the independence of the judges of the SC, but also create a serious risk for the legal certainty and enable the President of the Republic to determine the composition of the chamber dealing with the politically particularly sensitive electoral cases. While the Memorandum speaks of the "de-communization" of the Polish judicial system, some elements of the reform have a striking resemblance with the institutions which existed in the Soviet Union and its satellites.

90. Thus, due to the lowering of the retirement age with immediate effect, about 40% of the judges may soon leave the SC. They will have to be replaced by new judges, appointed by the President of the Republic on the recommendation of the newly composed NCJ. As explained in Section III A above, the new composition of the NCJ will be largely dominated by the political appointees of the current ruling majority. Against the background of the experience with the appointment of the new judges at the Constitutional Tribunal it has to be expected that the newly appointed judges of the SC will be chosen along political lines.

91. It cannot be excluded that many of the newly appointed judges will end up in the two newly created chambers – the Disciplinary Chamber and the Extraordinary Chamber.[73] In addition to the newly appointed judges, those two chambers will have lay members, appointed directly by the Senate, and hence also chosen along the political lines. It is particularly worrying that the Extraordinary Chamber will be responsible for electoral disputes.[74]

92. These two chambers will have a special status: while notionally they are a part of the SC, in reality they are above all other chambers.[75] Hence, there is a risk that the whole judicial system will be dominated by these new judges, elected with the decisive influence of the ruling majority. Moreover, their powers will extend even back in time, since the "extraordinary control" powers will give the Extraordinary Chamber the possibility to revive any old case decided up to twenty years ago.

93. In addition, the President of the Republic will obtain vast powers vis-à-vis the SC and its judges: he will define the internal structure of the SC and will adopt its Rules of Procedure. The

[70] See ECtHR, *DMD GROUP, a.s., v. Slovakia*, no. 19334/03, 5 October 2010

[71] The Venice Commission reiterates that it strongly recommends *not involving* lay judges to the adjudication process at the level of the SC.

[72] The Venice Commission acknowledges that the principle of random distribution of cases may not be always applicable in the SC, and the system may allow for some flexibility. However, the basic principles governing the composition of the panels within each chamber, and the distribution of cases amongst them, should be set by law or, at least, by the Rules of Procedure; any departure from these rules should be justified and reasons should be given; a collective body of the SC should be able to control any such departure from the pre-existing rules.

[73] The Draft Act gives the President the power to define the number of judges in individual chambers and the internal organisation of the SC, and "announce" positions in the specific chambers – see Articles 4 and 30 § 1.

[74] Even though, as clarified by the Polish authorities, the lay members will not take part in the examination of the electoral disputes.

[75] Thus, the Extraordinary Chamber may review any decision taken by other "ordinary" chambers, while the Disciplinary Chamber has a competency to impose disciplinary liability on any judge of the "ordinary" chamber.

President will also play the key role in the appointment of the First President of the SC and the Presidents of its chambers.

94. The First President of the SC will be soon re-elected, under the new rules. The First President and the Presidents of Chambers will define the composition of the panels and distribute cases amongst them, at their discretion. The First President will be able to select lay members to sit on the benches examining disciplinary cases against the SC judges.

95. In sum, the two Draft Acts put the judiciary under direct control of the parliamentary majority and of the President of the Republic. This is contrary to the very idea of separation of powers, proclaimed by Article 10 of the Polish Constitution, and of the judicial independence, guaranteed by Article 173 thereof. Both principles form also an integral part of the constitutional heritage of all European states governed by the rule of law. The Venice Commission, therefore, urges the Polish authorities to subject the two Draft Acts to a deep and comprehensive revision.

### C. The Act on Ordinary Courts

96. The Act on Ordinary Courts (hereinafter - the Act) was signed by the President, and entered into force. Some of its provisions are now being implemented. The Act increases the powers of the Minister of Justice (the MoJ) related to the internal organisation of the courts, to the appointment and dismissal of the presidents and deputy presidents of the courts,[76] and extends competencies of the MoJ in the areas of promotion and discipline. Again, the Act is a very lengthy and complex document; the Venice Commission will only analyse the most problematic parts of it.

97. At the outset, the Venice Commission emphasises that the new powers of the MoJ should be analysed not alone, but in conjunction with the other powers the Minister has in the Polish system. In Poland the competencies of the MoJ vis-à-vis the judiciary were already very large, even before the reform. Thus, the Minister:

- assigns new posts of judges to individual courts (Article 20a § 1 of the Act),
- establishes and abolishes divisions, branch divisions and branch units of courts (Article 19),
- establishes and abolishes courts and determines their local competency areas (Article 20),
- determines the number of vice presidents of the regional court (Article 22b §4),
- acts as the administrative head of all court managers, appoints and dismisses them (Article 21a § 2, Article 32 § 1),
- participates in the appointment of the inspecting judges (Article 37d),
- controls administrative performance of the presidents of the courts of appeal and establishes guidelines for them (Article 37g § 1 (2) and (3)),
- imposes financial sanctions on court presidents (Article 37ga),[77]
- receives reports from the court presidents and rates, annually, their performance (Article 37h §§ 3 and 5, which may result in the increase or reduction of the post allowance – §§ 11 and 12),
- determines the rules of procedure for common courts (Article 41 § 1),
- establishes rules for handling internal complaints (Article 41e),
- establishes a detailed procedure and manner of evaluating the qualifications of a candidate for a vacant post of a judge (Article 57i § 4),
- authorises transferrals of judges to other courts or secondment to other Sate organs (Article 75b § 3 and 77),

[76] Courts of appeal, regional courts, and district courts; the organisation of the SC and the status of its judges is regulated by a separate law.

[77] See, in particular, § 5, which implies that the NCJ may only quash the decision of the MoJ for the future, but that the six-months reduction of the post allowance decided by the Minister is not compensated.

- grants paid health leave to the judges (Article 93 § 3),
- orders medical examination of a judge (Article 94d),
- appoints deputy judges and allocates them to courts (Article 106i §§ 1 and 2),
- may request the opening of disciplinary proceedings against a judge (Article 114 § 1),
- may lodge an appeal against decisions of a disciplinary court (Article 121 § 1), and, most importantly,
- administers the budget allocated to the common courts (Article 177 § 1), and
- sets rules in the financial sphere for the courts (Article 179).

98. This list may be continued. The exercise of some of those powers requires *consultations* with the judicial bodies: court presidents (who are to be appointed by the MoJ, under the new Act), assemblies of judges, or the NCJ.[78] However, the final word in the decision-making process always belongs to the Minister. Thus, the system of judicial governance in Poland is largely centralised and managed externally by the MoJ.

99. Most importantly, in Poland the MoJ and the Prosecutor General are one and the same person. These two offices were merged by the 2016 Act on Public Prosecutor's Office, and that merger is problematic in itself (see CDL-REF(2017)048, Poland – Act on Public Prosecutor's Office; see also CDL-AD(2017)028, Poland - Opinion on Act on the public prosecutor's office, as amended, § 20). This merger determines the position of the MoJ within the judicial system: the Minister has a vested interest in the court proceedings, and, at the same time, has important powers vis-à-vis the courts and individual judges.[79] These factors should be taken into account when analysing the amendments of July 2017, which strengthen even further the position of the MoJ within the judiciary.

### 1. Direct powers of the Minister of Justice vis-à-vis the courts

#### a. Appointment and dismissal of the presidents of the courts

100. Within the 6-month period after the adoption of the Act, the MoJ may dismiss and appoint courts' presidents at his/her discretion (Article 17). It appears that the Minister has already used this power by removing a number of court presidents. After this transitional period, the Act gives the MoJ the power to appoint and dismiss court presidents (Articles 23, 24, 25 and 27). Appointment of the presidents of the appeal courts, regional courts and district courts is made by the MoJ single-handedly, no substantive conditions being attached to this decision.[80]

101. According to the CCJE, the procedure for appointing court presidents should correspond to the election and appointment of judges, and should normally involve the councils for the judiciary.[81] The Venice Commission shares this opinion. In its Report on the Judicial Appointments it stated that "a judicial council should have a decisive influence on the appointment and promotion of judges".[82] "Promotion" here implies *inter alia* appointment as a court president. In another opinion the Venice Commission expressed a clear preference for a system where court presidents are elected by the judges of the same court.[83]

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[78] See, for example, Article 22b §4, Article 41 § 1, Article 41e, etc.

[79] In addition, in this capacity the MoJ is the chief of the "disciplinary prosecutors" who, according to Article 112 of the Act, are responsible for prosecuting disciplinary cases against judges (even though the disciplinary prosecutors are elected by the NCJ, they seem to maintain their service links with the MoJ as their hierarchical superior).

[80] In the previous version of the Act, the MoJ had to obtain an approval of the general assembly of judges of the relevant court, or, in case such approval was denied, of the NCJ (Article 23).

[81] Opinion No. 19 (2016) on "The Role of Court Presidents", § 38, with reference to Opinion no. 10(2007) on "The Council for the Judiciary at the service of society", § 51.

[82] CDL-AD(2007)028, Judicial Appointments - Report adopted by the Venice Commission, §§ 28 and 44 – 47

[83] CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft law on Amendments to the Organic Law on General Courts of Georgia, § 84

102. Other models are also possible. Thus, the involvement of the MoJ in the process of appointment of court presidents is not unknown in Europe. Involvement in the dismissal of court president is more problematic. In any case, the Minister should not take such decisions single-handedly. Judges – directly or through an appropriately composed judicial council – should be significantly involved in the process.

103. In the Polish context, it is striking that following the July amendments to the Act the judiciary has no participation whatsoever in the procedure of appointment of court presidents. In Austria, for example, a panel composed of judges (*Personalsenat*) issues a proposal for each vacancy which has to be considered by the appointing MoJ. Although the MoJ is not bound by these proposals, they ensure a certain influence of the judiciary with regard to the appointment of judges.[84] In addition, the presidents of the courts in the Polish system have vast powers vis-à-vis the ordinary judges and play important role in the case-management process (which will be discussed below), which makes the strong dependence of the presidents before the MoJ even more problematic. By contrast, in Germany, for example, where court presidents are appointed by the ministers of justice,[85] there are strict rules ensuring that the distribution of cases is not at the discretion of the court president but determined in advance according to the constitutional principle of the lawful judge.

104. Before the July 2017 amendments, the procedure of appointment of court presidents involved the NCJ, which had the right to refuse a candidate proposed by the MoJ. Now this important safeguard is gone. The Venice Commission recommends returning to the previous model and providing that the decision of the MoJ to appoint a court president should be subject to approval by the NCJ or by the general assembly of judges of the respective court. Even better, one of those bodies may be given a power to *select* the best candidate, for further *approval* by the MoJ.

105. The amended Act does not sufficiently protect court presidents against arbitrary dismissals. A dismissal can now be justified by the Minister by a "serious or persistent failure [of the court president] to comply with the official duties" or by "other reasons [which] render the remaining in office incompatible with the sound dispensation of justice", or by "particularly ineffective" management of the court/lower courts (Article 27 § 1 (1), (2), (3)). These formulas are quite broad and do not limit the discretion of the MoJ in a meaningful way.

106. From the procedural point of view, under the amended Act the dismissals of court presidents are to be checked by the NCJ. In principle, such involvement of the NCJ is welcome, but this can hardly be seen as an efficient safeguard, because the NCJ may veto a dismissal only with a majority of 2/3rd of votes (Article 27 § 4). Even in the current system this threshold is very high, which means that the NCJ would be hardly capable of opposing a dismissal of a court president by the MoJ. This will become virtually impossible if the President's Draft Act on the NCJ is adopted, and if the overwhelming majority of the members of the NCJ will represent the same political majority to which the MoJ himself belongs. Furthermore, the MoJ may suspend a president of a court in the performance of his/her duties while the case is still pending before the NCJ.

107. Finally, the Venice Commission again refers to the above-cited case of *Baka*, where the ECtHR found a breach of Article 6 of the Convention because of the absence of judicial remedies in the case of dismissal of a chief judge. This case-law is also applicable to the dismissals of court presidents by the MoJ under the amended Act.

[84] CDL-AD(2007)028, §§ 45 and 46.
[85] Most judges are appointed at the level of the 16 Länder. Thus, there is no similar concentration of powers in the hands of a single person as in Poland.

108. Thus, as regards the dismissals, the Venice Commission recommends providing for the significant involvement of the judiciary and/or of the NCJ in the process; the NCJ/general assembly of judges should be able to veto the dismissal of the court president by a simple majority of votes.

b. Extension of the mandate beyond the retirement age

109. The MoJ may at his/her discretion extend the judge's mandate beyond the retirement age (Article 69 § 1b). The Act does not say for how long the mandate may be prolonged; those prolongations may be allowed for short periods of time, so that the judge remains uncertain about the further prolongation of his/her contract and becomes more vulnerable to pressure. This possibility should be removed, since it places the career of (usually the most senior) judges in the hands of the MoJ.

c. "Disciplinary" powers of the MoJ in respect of court presidents; assessment of the reports by the courts

110. The MoJ has powers vis-à-vis court presidents and vice-presidents which may be described as disciplinary (although they are not labelled as such in the Act).

111. Thus, the president of a higher court may address to a president of a lower court "written remarks" concerning the alleged mismanagement by the latter of his/her court (Article 37e § 1). If the lower court president/vice-president disagrees with those remarks, she/he may lodge and appeal with the MoJ (§ 7), who has the final word in this matter. As a result of such "written remarks", the president of the lower court may suffer a reduction of the post allowance for up to 50% for up to six months (§ 9). If the MoJ does not uphold the critical remarks, the allowance is "aligned to the previous amount". The exact meaning of this provision is not entirely clear. The Polish authorities explained that the meaning of the Polish word "*wyrównanie*" used in the relevant provisions is closer to "compensation" than "alignment". If it is so, the text should clearly stipulate that the president of the lower court is fully compensated for the period when his/her post allowance was reduced if the MoJ does not confirm this sanction. In any event, the Venice Commission is in principle against giving such quasi-disciplinary powers to the court presidents or to the MoJ – on this see below, §§ 114-117.

112. Under Article 37ga, the Minister him/herself may issue a "written notice" addressed to the president or vice-president of the court of appeal, and reduce the post allowance accordingly. Such "written notice" is subject to appeal before the NCJ, but even if the NCJ disagrees with the MoJ, the reduced allowance is "aligned" to the previous level (Article 37ga § 5). Again, the Polish authorities explain that the Polish word used in this provision should be construed as giving to the president concerned the right to get compensated for the period when his/her post allowance was reduced. This is positive, but should be stipulated more clearly in the law.

113. Under Article 37h, presidents of the courts of appeal should submit to the MoJ an annual report of activities. Those reports are graded by the Minister, and, depending on the grading, the Minister may apply reduction of the post allowance or its increase (§ 11 and 12). This decision is not subject to any appeal.

114. In essence, in the current system all court presidents become a part of a pyramid, with the MoJ on the top of it. The Minister performs the function of a highest disciplinary authority in the "chain of command" composed of court presidents. This is dangerous for both internal and external independence of the judiciary. There is nothing wrong with entrusting the Minister with the inspection functions, or imposing on the court presidents an obligation to submit regular reports to the MoJ. However, the MoJ should not be able to interfere with the salary of court presidents (at least not without any participation of the judiciary). Furthermore, the internal

hierarchical links between court presidents of different levels (akin in an administrative system), are also ill-advised.

115. It is noteworthy that where a disciplinary liability is imposed on a judge, it requires a court decision, appealable to a higher court (see Article 110). By contrast, ministerial decisions concerning dismissal of court presidents or reduction of their post allowance for "mismanagement" are not subject to any appeal. It also appears that taking such decisions is not accompanied by appropriate procedural guarantees (i.e. the president concerned is not entitled to be present and make submissions, for example), which would be normally required in disciplinary proceedings.

116. The fact that only post allowance (i.e. not the basic salary of a judge) is seemingly affected does not alter this analysis. Sanctions applicable to court president should be governed by the same rules as disciplinary measures applied in respect of ordinary judges. This is particularly true in Poland, where court presidents are very powerful and play an important role in the case-processing (on this see below).

117. In sum, the Venice Commission considers that the sanctions against court presidents should not be imposed by the MoJ single-handedly, and that the NCJ should play a decisive role in this process.

a. Establishing the Rules of Procedure

118. Under new Article 41, the MoJ, after consultations with the NCJ, will establish the Rules of Procedure for the ordinary courts; those Rules are to cover nearly every aspect of the courts' business (except procedural matters regulated by the respective procedural codes). In addition to regular Rules of Procedure, the MoJ will have the power, after consultations with the NCJ and with the general assembly of judges of the court concerned, to establish "temporary" Rules (for a period not exceeding two years).

119. As with the power of the President of the Republic to establish, almost single-handedly, Rules of Procedure for the SC (see § 79 above), the Venice Commission considers that entrusting similar competency to the MoJ in respect of the ordinary courts is ill-advised. Such solution is objectionable because of the separation of powers principle: development of such Rules should have a substantial judicial input. The Polish authorities explained that this power had already existed under the previous version of the Act. However, this does not mean that this power should be maintained. It is not excluded that the MoJ may play a role in the preparation of the Rules, but judges should not only be consulted but be able to *develop* and *approve* such rules. The power of the MoJ[86] to enact temporary rules is particularly worrying. Nothing in the Act prevents the Minister from imposing such temporary rules for the duration of examination of a particular case, in order to facilitate the task of the prosecution in this case and put additional pressure on the court concerned.

b. Defining the method of distribution of cases in the courts

120. Under the amended Act, cases are to be assigned to the judges on a random basis, which is positive (Article 47a § 1). Furthermore, the amended Act introduces some specific rules of assigning cases to judges. However, in the Rules of Procedure the MoJ is competent to set "detailed rules on the assignment of cases" and the "method of random allocation of cases" (Article 41 § 1 (2) (2a)), and may also fix special rules where the random allocation of cases is impossible or inefficient (see § 1 (4), second part). If there are to be exceptions to the general principle of random allocation of cases, they should be clearly and narrowly formulated in the

[86] Or even an undersecretary of the Ministry, since the new Act permits to delegate those powers of the Minister (see new Article 9aa).

law. Setting of the method of distribution of cases should not be within the discretionary power of the MoJ.

### 2. Powers of the presidents of the courts

121. As shown above, the MoJ has broad powers vis-à-vis court presidents. These powers are particularly important because of the special role played by the court presidents in the Polish judicial system.

122. Article 22 § 1 (1) (b) of the Act (which remained unchanged) provides that the president "acts as a superior to judges" and staff of the court.[87] Presidents of the courts are entitled to dismiss the heads of divisions, their deputies, the heads of sections and inspecting judges – and that may be done despite the opinion of the board of the court (the amended Article 11 § 3). They are competent to assign judges to the divisions and set out their duties (Article 22a § 1 (1)). Presidents of appeal courts have the power issue "written remarks" to lower courts' presidents concerning "errors in the management of the court", which may entail a financial penalty (Article 37e).

123. Most importantly, court presidents have vast (and loosely defined) power related to the assignment of cases to judges, withdrawing of cases, and altering the composition of the benches. Thus, for example, under Article 45 (which remained unchanged) presidents of the courts may replace a judge hearing a case with another judge, for the sake of the "the efficiency of proceedings". Under the amended Article 47 § 1 a court president may assign one or two additional judges to a case, if this case "is likely to last longer". Under Article 47b (unchanged) the president may alter the composition of a bench "if it is impossible to hear the case in the current composition or due to a long-term obstacle to the case being heard in the current composition" (see §§ 1 and 3). It appears that the presidents may use these powers unchecked.

124. The list of powers enjoyed by the court presidents in Poland may be continued: they order internal inspections covering "all activities of the court", appoint inspecting judges (Article 37), "verify the efficiency of proceedings in individual cases" (Article 37b), etc.

125. In short, in Poland courts presidents have extensive and in a number of instances even excessive powers. This is a source of concern by itself; but this is particularly worrying in the light of the hierarchical system of relations between court presidents of different levels and their subordinate position vis-à-vis the MoJ. The Venice Commission reiterates that the MoJ is responsible for setting and implementing penal policies and, at the same time, has vast powers vis-à-vis court presidents. In such a model, the MoJ may be tempted to use court presidents as a channel to put pressure on the whole judiciary.

126. This danger may be attenuated if the NCJ substitutes for the role hitherto ascribed to the MoJ. However, that solution would work only under condition that the NCJ is not itself under the total control of the parliamentary majority, and has a balanced composition, which would require abandoning the reform of the NCJ currently proposed.

## D. Other amendments/proposals

127. The Venice Commission notes that the two Draft Acts, proposed by the President, as well as the Act on Ordinary Courts, contain a number of proposals and amendments which are, at

[87] Point (c) of § 1 (1) provides that the president "appoints and dismisses judges, deputy judges and court referendaries, unless the law provides otherwise"; it is understood, however, that judges are appointed by the President of the Republic on the recommendation of the NCJ and dismissed by a court's decision in a disciplinary case.

least in principle, reasonable. Thus, for example, judges may be required to disclose their assets (new Article 87 of the Act), or be removed from office for the collaboration with the previous authoritarian regime (Article 35 § 1 (8) of the Draft Act on the SC). However, those few reasonable proposals are completely overshadowed by the major flaws of the reform, identified above.

## IV. Conclusions

128. The officially stated goal of the 2017 amendments (both adopted and those which are being discussed) is to enhance the democratic control over the Polish judiciary. The Venice Commission has always stated that the judiciary should not be an entirely self-governing corporation but accountable to the society. However, mechanisms of accountability should not interfere with the independence of the judges, and of the bodies of judicial governance. The judiciary should be insulated from quickly changing political winds. The courts have often to adjudicate on conflicts between individual rights and the State, and that relationship is imperilled when the State takes over the control of judicial functions.

129. The Venice Commission has examined the Act on Ordinary Courts, the Draft Act on the National Council of the Judiciary, and the Draft Act on the Supreme Court, proposed by the President of the Republic. It has come to the conclusion that the Act and the Draft Acts, especially taken together and seen in the context of the 2016 Act on the Public Prosecutor's Office, enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law.

130. Several key aspects of the reform raise particular concern and call for the following recommendations:

### A. The Presidential Draft Act on the National Council of the Judiciary

- The election of the 15 judicial members of the National Council of the Judiciary (the NCJ) by Parliament, in conjunction with the immediate replacement of the currently sitting members, will lead to a far reaching politicisation of this body. The Venice Commission recommends that, instead, judicial members of the NCJ should be elected by their peers, as in the current Act.

### B. The Presidential Draft Act on the Supreme Court

- The creation of two new chambers within the Supreme Court (Disciplinary Chamber and Extraordinary Chamber), composed of newly appointed judges, and entrusted with special powers, puts theses chambers above all others and is ill-advised. The compliance of this model with the Constitution must be checked; in any event, lay members should not participate in the proceedings before the Supreme Court;
- The proposed system of the extraordinary review of final judgments is dangerous for the stability of the Polish legal order. It is in addition problematic that this mechanism is retroactive and permits the reopening of cases decided long before its enactment (as from 1997);
- The competency for the electoral disputes should not be entrusted to the newly created Extraordinary Chamber;
- The early removal of a large number of justices of the Supreme Court (including the First President) by applying to them, with immediate effect, a lower retirement age violates their individual rights and jeopardises the independence of the judiciary as a whole; they should be allowed to serve until the currently existing retirement age;

- The President of the Republic as an elected politician should not have the discretionary power to extend the mandate of a Supreme Court judge beyond the retirement age;
- The five candidates to the positions of the First President of the Supreme Court, presented to the President of the Republic, should all have a significant support of the General Assembly of judges;
- The Act should limit the discretion of the First President in the matters related to the distribution of cases and assigning judges of the Supreme Court to the panels.

### C. The Act on Ordinary Courts

- The decision of the Minister of Justice to appoint/dismiss a court president should be subject to approval by the NCJ or by the general assembly of judges of the respective court, taken by a simple majority of votes. Ideally, general assemblies of judges should submit candidates to positions of presidents to the Minister of Justice for approval;
- The Minister of Justice should not have the discretionary power to extend the mandate of a judge beyond the retirement age;
- The Minister of Justice should not have "disciplinary" powers vis-à-vis court presidents; any sanction on court presidents should be imposed according to the same procedure as a disciplinary sanction against a judge;
- The Act should limit the discretion of the court presidents in the matters related to the distribution of cases and assignment of judges to the panels; exceptions from the general principle of random allocation of cases should be narrowly and clearly defined in the law; lower courts' presidents should not be hierarchically subordinate to the higher courts' presidents.

131. The Venice Commission stresses that the *combination* of the changes proposed by the three documents under consideration, and of the 2016 Act on Public Prosecutor's Office amplifies the negative effect of each of them to the extent that it puts at serious risks the independence of all parts of the judiciary in Poland.

132. The Venice Commission notes that the Polish authorities are open to dialogue, which is encouraging. It calls on the President of the Republic to withdraw his proposals and start a dialogue *before* the procedure of legislation continues. It also urges the Polish Parliament to reconsider the recent amendments to the Act on Ordinary Courts, along the lines indicated in the present opinion.

133. The Venice Commission remains at the disposal of the Polish authorities and the Parliamentary Assembly for further assistance in this matter.