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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

POLAND

URGENT JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW OF THE COUNCIL OF EUROPE

ON

THE DRAFT LAW AMENDING THE LAW ON THE NATIONAL COUNCIL OF THE JUDICIARY

Issued on 8 May 2024 pursuant to Article 14a of the Venice Commission's Revised Rules of Procedure

Endorsed by the Venice Commission at its 139th Plenary Session (Venice, 21-22 June 2024)

On the basis of comments by

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Mr Philip DIMITROV (Member, Bulgaria)
Mr Christoph GRABENWARTER (Member, Austria)
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I. Introduction

1. By letter of 7 March 2024, the Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, Ms Zanda Kalniņa-Lukaševica, requested an opinion of the Venice Commission on the draft Law amending the Law on the National Council of the Judiciary (hereinafter "the draft Law", CDL-REF(2024)015). The Commission decided to prepare the present opinion jointly with the Directorate General of Human Rights and Rule of Law of the Council of Europe ("DGI").

2. By letter of 15 April 2024, the Minister of Justice of Poland, Mr Adam Bodnar, requested the Venice Commission to adopt the present opinion under the urgent procedure, as provided by Article 14a of the Revised Rules of Procedure. On 19 April 2024 the Bureau of the Commission granted the Minister's request.

3. Mr Richard Barrett, Mr Philip Dimitrov, Mr Christoph Grabenwarter, Ms Angelika Nußberger, and Mr Kaarlo Tuori acted as rapporteurs on behalf of the Venice Commission. Mr Gerhard Reissner acted as a rapporteur on behalf of DGI.

4. On 25 and 26 April 2024, a delegation of the Commission composed of Mr Barrett, Mr Dimitrov, Ms Nußberger, Mr Tuori and Mr Reissner, accompanied by Ms Simona Granata-Menghini, Secretary of the Commission, and Mr Taras Pashuk and Mr Szymon Janczarek from the Secretariat, travelled to Warsaw and had meetings with the Minister of Justice, with the Supreme Court, with representatives of parliamentary factions, with the Chancellery of the President, with the Office of the Ombudsman, with the National Council of the Judiciary, the National Electoral Commission (NEC), representatives of the Ministry of Foreign Affairs as well as with representatives of judicial associations and civil society organisations. The Commission is grateful to the Ministry of Foreign Affairs and for the Council of Europe office in Warsaw for the excellent organisation of this visit.

5. This opinion was prepared in reliance on the English translation of the draft Law. The translation may not accurately reflect the original version on all points.

6. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 25 and 26 April 2024. It was issued in accordance with the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019) and pursuant to Article 14a of the Venice Commission's Revised Rules of Procedure on 8 May 2024. Following an exchange of views with Mr Dariusz Mazur, Deputy Minister of Justice of Poland, it was endorsed by the Venice Commission at its 139th plenary session (Venice, 21-22 June 2024).

II. Background

7. The National Council of the Judiciary ("NCJ") was introduced into Polish judicial system in 1989. According to Article 186 of the Constitution, the function of the NCJ is to "safeguard the independence of courts and judges". Art. 187 of the Constitution further provides:

"1. The National Council of the Judiciary shall be composed as follows:
1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;
2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts;
3) 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.
2. The National Council of the Judiciary shall choose, from amongst its members, a chairperson and two deputy chairpersons.

3. The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years.
4. The organisational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute."

8. The Constitution thus provides that the judicial members must be elected from among their peers, but does not identify how they are elected. Until the 2017 reform, the judicial members were elected by the relevant assemblies of judges at different levels, as provided in the 2011 law on the NCJ, for a four-year term of office.

A. The 2017 reform of the NCJ

9. In January 2017, the government announced plans for a large-scale judicial reform regarding the NCJ, the Supreme Court and the ordinary courts. The expressed goal of the 2017 reform was to enhance the democratic accountability of the Polish Judiciary. According to the government, the reform of the NCJ was also required by the judgment of the Constitutional Tribunal of June 2017 to the effect that the existing rules were unconstitutional in that they discriminated against judges of the lower courts.

10. As regards the NCJ, the reform introduced a new procedure for election of the judicial members by the Sejm (lower chamber of the Polish Parliament). This legislative amendment was adopted on 8 December 2017; it took effect on 17 January 2018. On 6 March 2018, the *Sejm* in a single vote elected 15 judges as new members of the NCJ. Subsequent election of new judicial members of the NCJ took place on 12 May 2022; their term of office is to expire in May 2026.

B. Assessment of the 2017 reform by the Venice Commission

11. In an opinion adopted in 2017 at the request of the President of the Parliamentary Assembly, the Venice Commission analysed different aspects of this comprehensive reform and concluded that it jeopardised judicial independence and *"enabled the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice"*.[1] The Venice Commission in particular considered that "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" and recommended that "judicial members of the NCJ should be elected by their peers, as in the current Act".[2]

12. In another opinion adopted in 2020 at the request of the Marshal of the Senate of Poland, the Venice Commission repeated its recommendation to return to the election of the 15 judicial members of the NCJ not by Parliament but by their peers.[3] Moreover, the Commission explained that *"the simultaneous and drastic reduction of the involvement of judges in the work of the [NCJ], filling the new chambers of the Supreme Court with newly appointed judges, mass replacement of court presidents, combined with the important increase of the powers of the President of the Republic and of the Minister of Justice/Prosecutor General – and this was the result of the 2017 reform – was alarming and led to the conclusion that the 2017 reform*

[1] Venice Commission, CDL-AD(2017)031, 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, § 129.
[2] Ibid., § 130.
[3] Venice Commission, CDL-AD(2020)017, Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, § 61.

significantly reduced the independence of the Polish judiciary vis-à-vis the Government and the ruling majority in Parliament."[4]

C. Assessment of the 2017 reform by the Court of Justice of the European Union and by the Supreme Court and the Supreme Administrative Court of Poland

13. On 19 November 2019, the Court of Justice of the European Union (the CJEU) gave a preliminary ruling to the referral by the Supreme Court of Poland on the issues of independence of the NCJ; the CJEU pointed to the following factors: (i) reduction of the mandate of the sitting NCJ members; (ii) politicisation of the new election procedure; (iii) potential irregularities in the actual appointment of some NCJ members.[5] The relevant parts of the CJEU judgment provide as follows:

"141. The referring court has pointed to a series of elements which, in its view, call into question the independence of the [NCJ].
142. In that regard, although one or other of the factors thus pointed to by the referring court may be such as to escape criticism per se and may fall, in that case, within the competence of, and choices made by, the Member States, when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors are taken individually, that conclusion is not inevitable.
143. Subject to those reservations, among the factors pointed to by the referring court which it shall be incumbent on that court, as necessary, to establish, the following circumstances may be relevant for the purposes of such an overall assessment: first, the [NCJ], as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time; second, whereas the 15 members of the [NCJ] elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the legislature among candidates capable of being proposed inter alia by groups of 2,000 citizens or 25 judges, such a reform leading to appointments bringing the number of members of the [NCJ] directly originating from or elected by the political authorities to 23 of the 25 members of that body; third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed [NCJ].
144. For the purposes of that overall assessment, the referring court is also justified in taking into account the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive."

14. Based on that preliminary ruling, the Supreme Court of Poland, in its judgment of 5 December 2019,[6] ruled that the NCJ had not been an authority that was impartial and independent from the legislative and executive powers.

15. Subsequently, on 23 January 2020, the Supreme Court in the composition of three joined Chambers issued a joint resolution in which it agreed with the assessment of the judgment of 5 December 2019 that the NCJ had not been an independent and impartial body and that this had led to defects in the procedures for the appointment of judges carried out on the basis of its recommendations. According to the resolution, court formations including Supreme Court judges appointed through the procedure involving the NCJ were unduly composed within the meaning of the relevant provisions of domestic law.[7]

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[4] Ibid., § 10.
[5] CJEU, Judgment of 19 November 2019 in the case *A.K.* (Independence of the Disciplinary Chamber of the Supreme Court)(C-585/18, C-624/18, C-625/18), notably §§ 140-144.
[6] Supreme Court of Poland, Judgment in the case no. III PO 7/18.
[7] Supreme Court of Poland, Resolution no. BSA1-4110-1/20.

16. On 6 May 2021 the Supreme Administrative Court gave judgments in five cases (II GOK 2/18; II GOK 3/18; II GOK 5/18; II GOK 6/18 and II GOK 7/18), *inter alia* implementing principles from the CJEU judgment of 19 November 2019, in which it held that the NCJ did not offer sufficient guarantees of independence from the legislative and executive. It based its conclusions on the following factors: (i) premature termination of the terms of office of former members of the NCJ; (ii) election of the fifteen judicial members of the NCJ by the *Sejm* and the fact that a result, the number of the NCJ's members directly originating from or appointed by political authorities was twenty-three, out of twenty-five members; (iii) lack of representatives of the Supreme Court or administrative courts, as required by Article 187 § 2 of the Constitution; (iv) irregularities in the election of certain of judicial members; and (v) the manner in which the current NCJ carried out its constitutional duty to safeguard the independence of courts and judges. The Supreme Administrative Court accepted that while each element taken in isolation might not necessarily lead to that conclusion, their combination and the circumstances in which the NCJ had been constituted raised doubts as to its independence.[8]

17. In its judgment of 15 July 2021, the Grand Chamber of the CJEU held that the new disciplinary regime for judges introduced following the reform of 2017 was not compatible with EU law. The CJEU found, *inter alia*, that the Disciplinary Chamber of the Supreme Court had not provided all the guarantees of impartiality and independence, in particular, due to the fact that the process for appointing of its judges had essentially been determined by the NCJ, which had been significantly reorganised by the Polish executive and legislature and whose independence could give rise to reasonable doubts.[9]

D. Assessment of the 2017 reform by the European Court of Human Rights

18. In its judgments adopted in the cases of *Reczkowicz,*[10] *Dolińska-Ficek and Ozimek,*[11] *Advance Pharma Sp. z o.o.*[12] and in the pilot judgment in the case of *Wałęsa,*[13] the European Court of Human Rights (ECtHR) found violations of the right to "a tribunal established by law" under Article 6 ECHR, due to the fact that the judges of the various chambers in the Supreme Court (Disciplinary Chamber, Chamber of Extraordinary Review, Civil Chamber) that dealt with the applicants' cases had been appointed "in an inherently deficient procedure", on the motion of the NCJ which, after March 2018, lacked independence from the legislature and the executive as a result of the 2017 reform that had transferred the power to elect judicial members of the NCJ from the Judiciary to the lower chamber of Parliament.

19. In the case of *Dolińska-Ficek and Ozimek* the ECtHR held that in the situation when the executive and the legislature were enabled to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges so appointed, in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State was required.[14] In *Advance Pharma sp. z o.o.,* as regards the remedial action to be taken, the ECtHR held that while in that context various options were open to the respondent State, it was an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 amendments and its involvement in the judicial appointments procedure perpetuated the

[8] Supreme Administrative Court of Poland, judgments in the cases: II GOK 2/18; II GOK 3/18; II GOK 5/18; II GOK 6/18 and II GOK 7/18.
[9] CJEU, Judgment in the case of *Commission v. Poland (Disciplinary regime for judges)* (C-791/19)
[10] ECtHR, *Reczkowicz v. Poland*, 22 July 2021, § 280.
[11] ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, 8 November 2021, § 353.
[12] ECtHR, *Advance Pharma sp. z o.o v. Poland*, 3 February 2022, § 349.
[13] ECtHR, *Wałęsa v. Poland*, 23 November 2023, §§ 173 and 176.
[14] ECtHR, *Dolińska-Ficek and Ozimek*, § 368.

systemic dysfunction as established by the Court and might in the future result in potentially multiple violations of the right to an "independent and impartial tribunal established by law", thus leading to further aggravation of the rule of law crisis in Poland.[15] In the pilot judgment in the case *Wałęsa*, enlisting the sources of systemic problems underlying Article 6 violation the ECtHR held that the primary problem is the defective procedure for judicial appointments involving the NCJ following the 2017 reform which inherently and continually affects the independence of judges so appointed.[16]

20. In addition, in the case of *Grzęda*, the Grand Chamber of the ECtHR found a violation of Article 6 ECHR due to lack of judicial review of the premature *ex lege* termination of the mandate of a judicial member of the NCJ as a result of the same 2017 reform, which removed from office all judicial NCJ members elected under the previous system. Referring to the importance of the NCJ's mandate to safeguard judicial independence and to the link between the integrity of the judicial appointment process and the requirement of judicial independence, the Court considered that similar procedural safeguards to those that should be available in cases of dismissal or removal of judges should likewise be available where a judicial member of the NCJ has been removed from his position. The Court further emphasised the need to protect a judicial council's autonomy, notably in matters concerning judicial appointments, from encroachment by the legislative and executive powers, and its role as a bulwark against political influence over the judiciary. In assessing any justification for excluding access to a court with regard to membership of judicial governance bodies, the Court considered it necessary to take into account the strong public interest in upholding the independence of the judiciary and the rule of law. It also had regard to the overall context of the various reforms undertaken by the Polish Government which have resulted in the weakening of judicial independence and adherence to rule-of-law standards.[17] Moreover, in finding a violation, the Grand Chamber stated that *"…the whole sequence of events in Poland … vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the NCJ and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline. … As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened. …"*[18]

E. Execution of the ECtHR judgments

21. Exercising its role as the body supervising the execution of the ECtHR judgments, the Committee of Ministers of the Council of Europe recalled in December 2022 and in June 2023 that the main underlying problem leading to the violation of Article 6 ECHR in the *Reczkowicz* group of cases was the appointment of judges upon a motion of the NCJ as constituted under the impugned 2017 framework, which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled interference by the executive and the legislature in judicial appointments; and that this problem had systematically affected appointments of judges of all types of courts, which could result in potentially multiple violations of the right to an "independent and impartial tribunal established by law"; it thus deplored the position of the Polish authorities rejecting the need for remedial action regarding the composition of the NCJ and the status of deficiently appointed judges and their decisions.[19]

[15] ECtHR, *Advance Pharma sp. z o.o*, §§ 364-365.
[16] ECtHR, *Wałęsa,* §§ 324, 328-329.
[17] ECtHR, *Grzęda v. Poland*, 15 March 2022, § 349.
[18] ECtHR, *Grzęda v. Poland*, 15 March 2022, § 348.
[19] CM, decision of 8 December 2022, para. 5 and decision of 7 June 2023, para. 8.

22. In the latter decision, the Committee of Ministers exhorted the authorities to rapidly elaborate measures to: (i) restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ; (ii) address the status of all judges appointed in deficient procedures involving the NCJ as constituted after March 2018 and of decisions adopted with their participation; (iii) ensure effective judicial review of the NCJ's resolutions proposing judicial appointments to the President of Poland, including those of Supreme Court judges, respecting also the suspensive effect of pending judicial review; (iv) ensure examination of the questions as to whether the right to a tribunal established by law has been respected, without any restrictions or sanctions for applying the requirements of the Convention.[20]

23. By an *Interim Resolution* adopted on 7 December 2023, the Committee of Ministers exhorted again the authorities to rapidly elaborate measures to restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish Judiciary to elect judicial members of the NCJ.[21]

24. In December 2023, the Committee of Ministers noted, as regards the case of *Grzęda,* that the premature *ex lege* termination of a term of office of a judicial member of the NCJ was still excluded from judicial review; and stressed again the need to elaborate and adopt measures to provide for judicial review of *ex lege* termination of the term of office of judicial members of the NCJ.[22]

25. Leading up to December 2023, in their correspondence with the Committee of Ministers, the Government maintained that the appointment of judicial members to the NCJ by the Sejm did not endanger the independence of the Polish courts; they asserted that these appointments were made in accordance with both the Polish Constitution and EU law.[23]

26. In December 2023, following the change in Government, the newly appointed Prime Minister established the Inter-ministerial Team for the Restoration of the Rule of Law and Constitutional Order to coordinate the activities of the Government, conduct analytical work and submit legislative proposals to restore the rule of law. The work of the Team involves not only representatives of ministries responsible for the area covered by the Team's work, but also experts and representatives of bodies, organisations, institutions and other entities working together to reinstate the state of lawfulness. Meetings of this team are held regularly.[24] On 25 March 2024, the Committee of Ministers was informed that the Polish Government planned a series of measures to meet their obligations under the ECHR. The proposed reforms primarily targeted the NCJ, the Supreme Court, the Constitutional Tribunal, and advocated for the separation of the roles of the Minister of Justice and the Prosecutor General.[25] The present draft Law is part of this action plan.

F. Scope of the present opinion

27. On 12 April 2024 the Sejm (lower chamber of the Polish Parliament) adopted the draft Law and submitted it to the Senate (the upper chamber). Several of the Venice Commission's interlocutors informed it to have participated in public hearings before the Senate's committee.

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[20] Ibid, para. 9.
[21] CM, Interim Resolution CM/ResDH(2023)487, 7 December 2023.
[22] CM decision of 7 December 2023, para. 3, and Interim Resolution CM/ResDH(2023)487.
[23] See Communications from the authorities (05/04/2023) and (12/10/2023) concerning the cases of *Broda and Bojara, Reczkowicz and Xero Flor w Polsce sp. z o.o. v. Poland*.
[24] See Communication from the authorities (21/03/2024) concerning the cases of *Reczkowicz, Broda and Bojara and Grzeda v. Poland*.
[25] See Action Plan (22/03/2024) - Communication from Poland concerning the case of *Walesa v. Poland.*

The examination of this draft Law in the plenary session of the Senate is expected in the first part of May 2024. This urgent opinion should be made available to the Senate in time for this examination.

28. Given the short time available, the present opinion cannot cover all the aspects of the draft Law, and will only focus on its main features, especially those that, during the visit to Warsaw, have appeared to be the most controversial, namely:

- the election of fifteen judicial members of the NCJ by the judicial community (new Art. 11f(1));
- the exclusion of the right to stand for election of those judges who were appointed or promoted during the activities of the NCJ as reformed in 2017 (Art. 2(2) of the draft Law);
- the organisation of the election process by the State Electoral Commission (new Art 11g, Art 11h);
- the early termination of the functions of the current judicial members of the NCJ on the date when the new members of the NCJ have been elected (Art. 3 of the draft Law);
- the lack of a judicial remedy against the *ex lege* early termination of the functions of the current judicial members of the NCJ;
- the establishment of a Social Council, competent to give non-binding opinions to the NCJ (new Art. 27a).

The absence of remarks on other aspects of the draft law should not be interpreted as tacit approval.

III. Analysis

A. Preliminary remarks

29. The Venice Commission wishes to stress at the outset that the reform of the National Council of the Judiciary of Poland is to be analysed first and foremost as a measure of execution of the judgments of the ECtHR, notably in the cases of *Reczkowicz*, *Dolińska-Ficek and Ozimek*, *Advance Pharma Sp. z o.o.* and *Wałęsa* (see paras. 17-18 above). Poland as a party to the ECHR, has accepted the jurisdiction of the ECtHR, which, under Article 32 ECHR, covers "all matters concerning the interpretation and application of the Convention and the Protocols thereto", and has undertaken to abide by the judgments of the ECtHR in any case to which it is a party, as provided in Article 46 § 1 of the Convention. Poland is thus under an international obligation in this respect. The Commission has previously recalled that the enforcement of the ECtHR's judgments is a critical component of the ECHR system. The right to individual petition would be illusory if a final, binding judgment of the ECtHR remained unenforced. The mechanism set up by the Convention for supervising the execution of judgments, under the Committee of Ministers' responsibility (Article 46 § 2 of the Convention), demonstrates the importance of effective implementation of judgments. The ECtHR's authority and the system's credibility both depend to a large extent on the effectiveness of this mechanism of execution of judgments. As also underlined by the Committee of Ministers, "speedy and efficient execution of judgments is essential for the credibility and efficacy of the [Convention] as a constitutional instrument of European public order on which the democratic stability of the continent depend".[26]

30. While Poland "in principle remains free to choose the means by which it will discharge its obligations under Article 46 § 1 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment",[27] the ECtHR has provided "general guidance as

[26] Venice Commission, CDL-AD(2020)009, Opinion on draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the ECtHR, para. 51.
[27] ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], Application no. 32772/02, 20 June 2009, § 88.

to the type of individual and/or general measures that might be taken in order to put an end to the situation incompatible with the Convention that it has found to exist".[28] The ECtHR has thus indicated that "the violation of the applicant's rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges so appointed. In this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State is required. In that context, various options are open to the respondent State; however, it is an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuates the systemic dysfunction as established above by the Court and may in the future result in potentially multiple violations of the right to an "independent and impartial tribunal established by law", thus leading to further aggravation of the rule of law crisis in Poland."[29] The ECtHR has thus explicitly found that the rule of law crisis in Poland has its roots in the removal of the right of the judiciary to elect judicial members of the NCJ and that the continued operation of the present NCJ may lead to the aggravation of such crisis. In this context, the draft Law can be seen as a measure aiming to "restore" the rule of law in Poland.

31. The Venice Commission wishes to stress in this respect that any measure taken with a view to "restoring" the rule of law has to meet the overall requirements of the rule of law. However, in this context some balancing between different – apparently conflicting – elements of the rule of law is required.

32. In conclusion, in the present opinion the Venice Commission will not examine the question of *whether or not* a reform aiming to restore the right of the judiciary to elect the judicial members of the NCJ is necessary – as this necessity has been clearly stated by the ECtHR – but primarily the question of *to what extent the means chosen* by the Polish authorities to achieve this aim in the draft Law are in line with European standards of the rule of law.

B. Election of the judicial members of the NCJ by their peers

33. As noted above, in its previous opinions regarding the 2017 reform, the Venice Commission recommended returning to the election of judicial members of the NCJ by their peers. Both the ECtHR and the CJEU have consistently held that the election procedure for the judicial members of the NCJ, as introduced by 2017 reform, did not guarantee the independence of the NCJ and that it also, through judicial appointments on the proposal of recomposed NCJ, jeopardised the independence of courts, guaranteed by Art. 6(1) ECHR, Art. 19(1) TEU and Art. 47(1) CFREU. The same position was taken by the Supreme Court, which had requested the preliminary ruling of the CJEU and to which the CJEU had entrusted the final assessment. The Committee of Ministers, supervising the execution of ECtHR rulings, has urged Poland to rapidly amend its legislation to ensure the independence of the NCJ through introducing legislation guaranteeing the right of the Polish Judiciary to elect judicial members of the NCJ.

34. It is against the background of this specific international obligation to restore the independence of the NCJ that the domestic authorities have elaborated the draft Law. According to the Explanatory Note (CDL-REF(2024)016), the primary objective of the proposed law is to "restore the method of election of judges to the NCJ" to ensure the independence of the NCJ from the legislature and the executive in the procedure for appointment of judges.

35. The objective of the draft Law to respect and apply the principle of election of judicial members of the NCJ by their peers is not only legitimate, but it is required by the decisions of the

[28] ECtHR, *Broniowski v. Poland* [GC], no. 31443/96, § 194.
[29] ECtHR, *Advance Pharma sp z o.o. v. Poland*, §§ 364, 365.

ECtHR and the CJEU and the Venice Commission and DGI commend the Polish authorities for this proposed change.

C. Election procedure

36. The draft Law provides that the judicial members of the NCJ will be chosen through direct elections managed by the National Electoral Commission, instead of assemblies of judges as in the pre-2017 system.

37. A direct election model is also found in other European systems and is acceptable, provided that the representation of different courts as required by Art. 187(1) of the Constitution is guaranteed. In this regard, the draft Law provides quotas for judges of different levels and jurisdictions (new Art. 11f(1)), which is a way to ensure wide representation of the judiciary in the NCJ as required by the Constitution and European standards.[30] Other models of direct or indirect elections would be possible, but the choice belongs to the Polish authorities, provided that it meets the relevant standards.

38. Article 11.f(2) of the draft Law provides that "a judge may cast a vote for one candidate". This seems to mean that a judge has only one vote which he/she can cast for any candidate regardless which category this judge is from. This interpretation supports the aim that the members of the NCJ should act in the interests of the judiciary as such and not in the interest of a group of judges of a certain type of court.

39. In the Sejm, the draft Law was amended and the right to nominate a judge as candidate was also granted to the Polish Bar Council, the National Bar Council of Attorneys-at-Law and the Polish National Council of Notaries. The involvement of these bodies can be seen as an element of additional involvement and an official acknowledgment of the interest of the relevant stakeholders in an adequate composition of the NCJ. *De facto*, it is most unlikely that they will put forward candidates which would not have found the support of the necessary number of judges, and the interests of these entities without doubt would have been articulated by comments on the candidates which will be nominated by the other actors, as will be done by the public at large, by several NGOs and others.

40. The elections are to be managed by the National Electoral Commission (NEC), which is the body in charge of all kinds of elections at all levels, from Elections to the European Parliament to national or local elections. It is composed of one judge of the Constitutional Court, one judge of the Supreme Administrative Court, and seven members elected by the Sejm who must have the qualifications to become a judge. The members are appointed for a non-renewable term of nine years. While this is a body designed to manage elections for general bodies of representation, and while it is preferable in principle that the elections of representative bodies of the judiciary be managed by the judiciary itself, the Commission and DGI have been informed that the NEC has already the task of managing other elections (such as those for the agricultural commissions) and it enjoys public trust as a neutral body; it has experience and the necessary infrastructures and facilities to fulfil this role. Its task is only to control if the formal criteria are met. In addition, the draft law facilitates judicial review of the decisions of the NEC providing for the possibility to appeal to the Supreme Administrative Court in case the NEC refuses to accept the application of a candidate for member of NCJ, which is an adequate regulation. The Venice Commission and DGI therefore find that, in the current specific circumstances of Poland, the managing role of the NEC is suitable to safeguard the integrity of the election procedure. The draft Law does not

[30] CM, Rec (2010)12, Judges : independence, efficiency and responsibilities, § 48; CCJE, Opinion no. 10 on Council for the Judiciary in the service of society, § 27; European Charter on the Statute of Judges, § 1.3, Venice Commission, CDL-AD(2010)004, Report on the independence of the judicial system, Part I: the independence of the judges, § 32.

regulate the elections in as detailed a manner as for general elections, which is acceptable as there is a comparatively much more limited number of candidates and voters.

41. The draft law provides for a public hearing of the candidates (new Art. 11o), aiming to enhance transparency and foster trust in the process. While this is commendable in principle, the procedure must be shaped very carefully. Although there are limitations on questions and participation outlined in Art. 11o (7), those limitations are constrained narrowly and may not suffice to shield the process from politicisation or possible abuse. A preferable approach would be to determine a clear scope of the hearings and involve designated entities (e.g., ombudsman, judicial associations, civil society organisations) as filters, to pose questions, ensuring relevance and integrity of the process. The Venice Commission and DGI recommend providing therefore stricter grounds, scope, and conditions for participation in the public hearings.

D. Right to vote and right to stand for the election to the NCJ

42. The draft Law grants to all judges the right to propose candidates to the NCJ and to vote. Instead, according to Art. 2 (2) of the draft Law, the right to stand for election that will be held for the first time after the adoption of the draft Law will not be granted to those judges who were appointed or promoted during the activities of the NCJ as reformed in 2017. The draft provision excludes from that restriction judges who were promoted during that period but only if they return to their previously occupied position in the judiciary. The method for the process of return is not explained in the draft Law. This concept is therefore uncertain and could lead to disputes as to whether an individual is able to be a candidate or not. According to the information provided by the Commission's interlocutors, the overall number of judges appointed after 2017 ranges from 20% to 30% (between 2,500 and 3,500 out of approximately 10,000 judges). No statistical data have been made available to the Venice Commission as to the number of new appointments[31] in comparison to promotions.

43. This restriction is based on the premise that a judge appointed to the NCJ *"in violation of the basic rule of the procedure for the appointment of judges"* cannot be considered as independent and impartial because she or he participated in a procedure considered to be deficient. However, the concerns regarding the independence and impartiality of these judges stem solely from procedural flaws in their appointment or promotion. The wholesale blanket exclusion of such a large cohort of judges lacks individual assessment, and thus raises questions of proportionality. In addition, first-time judges being nominated after judicial training would be excluded from the right to be candidate even though they had no choice to enter the legal profession but to accept their nomination by the NCJ. Career choices may also have appeared unavoidable, as the NCJ has remained in office several years.

44. This approach fails to accord relevance to the fact that the election of a judicial member through a fair procedure by the judicial community could alleviate concerns regarding his/her independence and impartiality. Moreover, if there are additional concerns that electing the judges who were appointed/promoted based on the 2017 reform to the new NCJ would pose functional challenges, particularly in relation to determining the status of these judges and potentially creating conflicts of interest for NCJ members from this group, the problem could be solved through strict procedural rules for recusal.

45. Finally, the proposed different treatment may constitute a dangerous prejudice to the assessment of the status of those judges, who were appointed/promoted based on the 2017 reform, without comprehensive debate among all the stakeholders and considering all the consequences, including the impact on court decisions adopted by those judges.

[31] According to the website of the Chancellery of the President of the Republic, between 2018 and 2024, 3310 persons were appointed to serve as judges and trainee judges (assessors). See at https://www.prezydent.pl/kancelaria/statystyki/statystyki-nominacji-sedziowskich-i-asesorskich.

46. The Venice Commission underlines that the membership of judges in the judicial councils may be subject to various eligibility criteria, including the length of their judicial experience (including possibly in the same function), as is the practice in numerous Venice Commission member states.[32]

47. In conclusion, the Venice Commission and DGI recommend reconsidering the eligibility criteria for judges seeking candidacy in the election for the NCJ.

E. Mandate of the members in the current composition of the NCJ

48. The draft Law provides for an early termination of functions of the current judicial members of the NCJ once the new judicial members have been elected under the new procedure (Art. 3).

49. It must be recalled that an *ex lege* early dismissal of sitting judicial members of the NCJ has already taken place in Poland, as a result of the 2017 reform and that such measure had been criticised, among others, by the Venice Commission and by the ECtHR. It is therefore necessary to analyse whether the early removal under the present draft Law repeats the wrong approach of the 2017 reform or it should be assessed differently, on account of the fact that its aim is to restore the rule of law and human rights protection as they are seen to have been distorted by the 2017 reform.

50. The Polish government justifies the *ex lege* early dismissal of the sitting members of the NCJ on two grounds. First, they argue that the appointment of the sitting judicial members was unconstitutional and therefore not protected by constitutional guarantees. Second, it refers to the international obligation to implement the judgments of the ECtHR and the CJEU. These arguments need to be analysed in turn.

1. The (un)constitutionality of the election of the current members

51. It has to be noted in the first place that the Polish Constitution provides that the judicial members of the NCJ must be elected, but it does not explicitly state that they must be elected *by judges*. Art. 187(1)(2) of the Constitution states only that *"15 judges [shall be] chosen from amongst the judges of the Supreme Court, common courts, administrative courts, and military courts"*. However, while the prerogative of interpreting national constitutions rests with the national authorities, particularly the Constitutional Tribunal, the Commission finds it appropriate under the given circumstances to refer in this context to a systemic, teleological and historical interpretation of the Constitution. Since Parliament has the right - based on Art. 187(1)(3) of the Constitution - to elect 6 members from among its members (4 in the Sejm and 2 in the Senate), it is only logical that the "share" of Parliament should not be increased. This view is also supported by a teleological interpretation, because the selection of judges to the NCJ should entrench and not undermine the principles of the separation of powers and the independence of the judiciary. This interpretation is further supported by the historical interpretation, given that the election of judicial members of the NCJ by their peers had been a well-established tradition in Poland and was already foreseen in the Round Table Agreement of 1989.

52. Furthermore, Art. 187 (3) of the Constitution provides that the NCJ members' "*term of office … shall be four years"*). While the current judicial members of the NCJ took their offices in 2022, their appointment was made without due regard of the fact that in 2018 the term of office of the then sitting members of the NCJ had been terminated prematurely. The interruption of the four-

[32] For example: 15 years in Bulgaria; 10 years in Albania, Armenia; 7 years in Romania; 5 years in Georgia, Hungary; 3 years in Lithuania; in Spain 3 judges must have more than 25 years of experience (See DGI – DCJ, Comparative Overview on Judicial Councils in Europe, (2022)1, 14 March 2022, p. 7).

year term of office of the sitting members of the NCJ in 2018 had been incompatible with the clear constitutional provision on a four-year term fixed in Article 187(3) of the Constitution.

53. The Venice Commission and DGI, while acknowledging that the prerogative of interpreting national constitutions rests with the national authorities, particularly the Constitutional Tribunal, find it fitting to affirm that the proposed interpretation of the Constitution by the Government within the framework of the current draft Law is reasonable. Further, the Commission and DGI share the view of the Polish government that the persons elected in a manner and in circumstances conflicting with the Constitution cannot rely on the security of tenure provided by that very Constitution.

2. The international obligation to implement ECtHR judgments

54. The extensive body of case-law from the ECtHR, as outlined above, clearly establishes an unequivocal international obligation for Poland to rapidly restore the independence of the National Council of the Judiciary (NCJ) by introducing legislation guaranteeing the right of the Polish Judiciary to elect the judicial members of the NCJ.

55. In this context, particular regard should be had to the requirement that restoration of the independence of the NCJ should be "rapid" as the position of the members of the NCJ is crucial for the independence and credibility of the judiciary. Thus, the participation of wrongly elected members of the NCJ in its decisions may result in further violation of human rights. In particular, the election of new judges by the defective NCJ renders their appointment flawed and results in judicial formations which would not be "established by law" within the meaning of Article 6 ECHR. Thus, the continuation of the present situation is detrimental to the reputation and acceptance of the judiciary.

56. Accordingly, the Government's reference to the international obligations to justify the proposed early termination of office for the current members of the NCJ is equally persuasive; it will be analysed in detail below.

3. Principle of security of tenure: limits and exceptions

57. Moreover, while the principle of security of tenure for office-holders in general and for members of the Judicial Councils in particular is crucial, stemming from legal certainty and the rule of law,[33] it is not absolute and allows for exceptions. The Venice Commission has stated that parliaments should refrain from adopting measures which would jeopardise the continuity in membership of the judicial council, as removing all members of a judicial council could be a means for an incoming government or new parliament to influence cases pending before the council.[34] However, the Venice Commission has accepted exceptions to this principle in the case of a significant improvement of the overall system in order not to paralyse the necessary reform efforts.[35] The Commission has thus promoted a case-by-case assessment of the purpose, effects and circumstances of an early ending of the mandate. The ECtHR likewise found that exceptions may be required as "*upholding those principles at all costs … may in certain circumstances inflict*

[33] See in this regard the reasoning of the ECtHR in *Grzęda v. Poland* [GC], 15 March 2022, § 284: *"The Court also takes note of the fact that numerous Council of Europe and other international bodies have consistently supported the view that the judicial members of the NCJ were entitled to serve a full term of office: the Parliamentary Assembly of the Council of Europe; the Council of Europe Commissioner for Human Rights; the Venice Commission; the CCJE; GRECO; the OSCE/ODIHR; the United Nations Special Rapporteur on the Independence of Judges and Lawyers; and the European Parliament and the European Commission (…)."*

[34] Venice Commission, CDL-AD(2013)007, Georgia – Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, § 71.

[35] Venice Commission, CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, §60, with further references.

even further harm on the rule of law and on public confidence in the judiciary. … *a balance must therefore be struck in such instances to determine whether there is a pressing need – of a substantial and compelling character – justifying a departure from the principle of legal certainty … and from the principle of irremovability of judges, as relevant, in the particular circumstances of a case*".[36]

58. In the Commission's and DGI's view, in the present case it can be assumed that an early termination of the mandates of those judges who have been elected by the Sejm on the basis of Article 9a(1) would lead to a significant improvement of the system, in that it would restore the content of the provisions regulating the method of election of judges to the National Council of the Judiciary in line with the Constitution and mitigate the negative consequences of the regulations in force since 2018. It would also ensure that the judicial members are elected by their peers, which corresponds to European standards, including those of the Venice Commission. Furthermore, the change in the composition of the NCJ would meet the standards set out in the case law of the CJEU, the ECtHR and the Polish Supreme Court and the Supreme Administrative Court. In particular, it could not raise suspicion to be motivated by the intention to influence the decisions of the NCJ in the partisan interests of the government as this change is required by several judgments of international courts. In addition, the renewal of the composition of the NCJ would be made under a different election model, which would not be in the hands of the parliamentary majority but would be given back to the judiciary.[37]

59. Finally, it cannot be argued that the incumbent judicial members of the NCJ should be protected from early termination of the constitutional four-year mandate, because such protection should have applied in the first place to those fifteen judges whose mandates had been terminated by means of the 2017 amendments. Therefore, the present situation cannot be compared with the *ex lege* dismissal of the NCJ judicial members in 2017. On the contrary, the current judges elected by the Sejm were elected in a procedure which lacked independence from the legislature and the executive.[38]

60. In the opinion of the Venice Commission and DGI, the requirement of security of tenure can only apply when the relevant appointment, nomination or election was made in compliance with the Constitution and with European standards To hold otherwise would mean that it would be possible for a government to disregard or circumvent the constitutional provisions on appointment and subsequently invoke the constitutional principle of security of tenure to make such appointment irreversible, a situation which would defeat the rule of law. It would indeed be contradictory to provide constitutional protection to an unconstitutional situation.

61. It is true that it could be argued that even if the appointment procedure lacked independence from the legislature and the executive, legal certainty as part of the rule of law requires not to interrupt the mandates, but to "correct" the flawed appointment gradually, in the next election

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[36] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18,* § 240, 1 December 2020.

[37] The Venice Commission has previously found that in cases when the new manner of appointment reduces politicisation the replacement of all the members may be justified: Venice Commission, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy in the Republic of Moldova, CDL-AD(2020)007, § 39; *a contrario*, see Venice Commission, Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service of Montenegro, CDL-AD(2021)030, §§ 47-48.

[38] The ECtHR, as concerns the quashing by the Constitutional Court of the Supreme Court resolution's finding as to the manifest breach of domestic and international law due to the deficient judicial appointment procedure involving the NCJ, held that *"[c]onsidering the apparent absence of a comprehensive, balanced and objective analysis of the circumstances before it in Convention terms, the Court finds that the Constitutional Court's evaluation must be regarded as arbitrary and as such cannot carry any weight in the Court's conclusion as to whether there was a manifest breach, objectively and genuinely identifiable as such, of the domestic law involved in the procedure for judicial appointments to the Disciplinary Chamber"*. ECtHR, *Reczkowicz*, § 262.

process, thus preserving stability and continuity. However, it should be noted that the position of the members of the NCJ is crucial for the independence and credibility of the judiciary. The ECtHR has held that the continued participation of the members of the Polish NCJ whose election lacked independence from the legislature and the executive, in the election of new judges renders the appointment of the latter flawed. As a result, the courts in which such judges sit would not be "established by law" within the meaning of Article 6 ECHR. Thus, in the view of the Venice Commission and of DGI, there is no justification under stability and continuity for maintaining the present NCJ in office until the end of the current mandate; on the contrary, the continuation of the present situation perpetuates and aggravates the rule of law crisis in Poland.

62. The draft Law caters for legal certainty by providing that the mandate of the sitting NCJ members will only be terminated when the results of the new elections are final. Furthermore, the ECtHR has held that "a *rapid* remedial action on the part of the Polish State is required". In the particular circumstances of this case, there is therefore a pressing need which justifies a departure from the principles of legal certainty and of security of tenure.

63. In view of these all considerations, the Venice Commission and DGI are of the opinion that the *ex lege* early dismissal of sitting judicial members of the NCJ appears justified in the particular circumstances of the Polish case, and compatible with European standards.

F. Access to court in case of early removal of the NCJ judicial members

64. The proposed measure on early dismissal of sitting judicial members of the NCJ raises the question of whether there should be an effective judicial remedy available to the sitting members to challenge their dismissal. Neither the current domestic system nor the draft Law provides for such a remedy. In order to assess whether there could be an issue under Article 6 of the ECHR, the Commission will analyse whether there is a genuine and serious dispute over a "right" which the current members of the NCJ could claim on arguable grounds under domestic law and whether there would be reasons justifying an exception.

1. Existence of an arguable claim

65. In the Grzęda case, the ECtHR held that "in the light of the domestic legal framework in force at the time of his election and during his term of office, (…) the applicant could arguably claim an entitlement under Polish law to protection against removal from his position as a judicial member of the NCJ during that period."[39] The Court noted that the applicant had been elected "in accordance with the relevant provisions of the Constitution and the applicable legislation." It is questionable instead whether the 2017 reform conferred an arguable claim on the sitting members of the NCJ of entitlement to serve the whole mandate, in view of the fact that such reform was in conflict with constitutional and international law (as discussed above). While this matter should be up to a court to decide, the Commission doubts that the current members of the NCJ can arguably claim their right to remain in office.

2. Justification of an exception

66. Even on the assumption that there is an arguable claim, it is doubtful whether the exclusion of access to court would violate the Convention. There are strong arguments for considering the exclusion of access to court[40] as justified. First, in contrast to the ECtHR case of *Grzęda*, the termination of office of the judicial members of the NCJ elected by the Sejm would not have

[39] Paras 266-268. See also *Loquifer V. Belgium*, Applications no. 79089/13, 13805/14 and 54534/14, judgment 20/07/2021.

[40] The 2024 reform law does not explicitly state that access to the courts is excluded, but this is implicit in the *ex lege* dismissal.

negative consequences but, on the contrary, positive consequences for the independence of the NCJ.

67. In addition, in the case of *Gyulumyan and others*, the ECtHR emphasised that *"the Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary and that the power of a government to undertake reforms of the judiciary cannot be called into question, on condition that any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies."*[41] In that particular case, the lack of access to court for early termination of office for Constitutional Court judges was compatible with the ECHR, given that the Constitutional Court had a special status in the Armenian judiciary and the premature termination of judges' mandate had been based on the constitutional amendment, which pursued a legitimate aim. It was part of a broader constitutional reform, which was not directed against the judges specifically. Moreover, the objective was to ensure the high democratic standards concerning the independence of the Court and not to undermine the legitimacy of the Constitutional Court. Therefore, the exclusion of access to a court was objectively justified.[42]

68. Although the NCJ may not have a comparable special status as the Armenian Constitutional Court, the other arguments appear convincing: like in the *Gyulumyan and others* case, the lack of access to court is part of a broader reform, not aimed at undermining the legitimacy but at restoring the independence of the NCJ and, in general, at reversing the widely criticised negative impact of the 2017 reform on the judicial independence in the country.

69. Further, the objective of rapidly restoring the NCJ in a composition based on the election of judges by their peers could not be achieved if the incumbent judges had the right to bring their cases individually before courts.

70. As concerns a possible right to compensation, the Venice Commission and DGI observe that in Poland the judicial members of the NCJ continue to occupy their positions in the judiciary with the judicial salary and only receive extra remuneration for each day when they are required to sit as member of the NCJ (per diem).

71. In view of the urgent necessity to reform the NCJ, the Venice Commission and DGI are therefore of the view that it could be justified to exclude the right of access to court to challenge the early termination of mandate. Nevertheless, despite the difficulty in identifying impartial judges to decide on these matters, the Commission and DGI consider that in order to prevent any risk of finding a violation of Article 6 ECHR by the ECtHR it would be appropriate to provide a remedy, which, in order not to jeopardise the impact of this reform, should not suspend the termination of mandate.

G. Social Council

72. The draft Law envisages the establishment of a "Social Council", as an advisory body to the NCJ (new Art. 27a). It seems that the underlying objective is to enhance the participation of civil society and the public in the affairs of the NCJ, especially considering that the Polish Constitution does not adequately address this aspect. Questions may arise regarding the constitutionality of the advisory council in the absence of explicit constitutional backing. Furthermore, there is room to question whether such a council effectively ensures the legitimate influence of civil society, or if this influence would be better facilitated through reforms to the composition of the NCJ itself.

73. The provisions of the draft Law on the tasks of the Social Council and the applicable procedures are not sufficiently detailed. The Council is supposed to give opinions on judicial

[41] ECtHR, *Gyulumyan and others v. Armenia*, no. 25240/20, §74, 21 November 2023.
[42] ECtHR, *Gyulumyan and others v. Armenia*, no. 25240/20, §84, 21 November 2023.

candidates and other matters as requested by the NCJ Presidium but leaving the "detailed procedure" to the Council itself may be problematic. Experience on similar bodies in other countries suggest that trust can be undermined if there is tension between the decision-making and advisory bodies. The process of assessing judicial candidates is sensitive and, rather than being left to practice, needs clearer guidelines in the law, including specifying the grounds for advisory opinion, its scope, rules on collecting information, duties of the NCJ in respect of the submitted opinion, including the need to provide reasons for not following it.

H. Procedure for the adoption of the draft Law

74. The Venice Commission takes note that the discussion of the reform took place in a political climate of mistrust and persisting societal tensions. Against this background a proper and transparent procedure for the adoption of a new law is of particular importance. It is therefore commendable that the Ministry of Justice and then the Sejm Committee on Justice and Human Rights held public consultations in the course of preparation of this draft Law. The time afforded for consultations was sufficient, in view of the urgency of the reform. The result of the consultation was significant, with many differentiated opinions on the draft Law. The consultation process was also extensive, even though the current NCJ members argued that they had not been able to comment on the draft Law during the hearing of the legal affairs committee in the Senate. Otherwise, the consultation involved a wide range of stakeholders, professional associations of judges, as well as civil society organisations.

75. The Venice Commission and DGI find that this approach is clearly a significant improvement compared to the previous practice when expedited procedure was used by Polish authorities to adopt important judicial reforms, as criticised by the Venice Commission.[43]

I. The need for constitutional safeguards

76. While the new arrangements proposed by the draft Law are important and far-reaching, it is important to ensure their stability. It would be counterproductive to the goal of restoring confidence in the judiciary if the statutory rules could be changed at the next change of government. It therefore appears to be advisable to enshrine in the Constitution itself the method of election of the NCJ members, the security of their tenure, the main functions of the NCJ,[44] and the forms of participation of civil society. The matter of the joint term of the members of the NCJ and the composition of the NCJ alongside European standards (and best practices) could also be addressed on this occasion.

IV. Conclusions

77. At the request of the Parliamentary Assembly of the Council of Europe, the Venice Commission has assessed the draft Law amending the law on the National Council of the Judiciary of Poland and, at the request of the Polish Minister of Justice, it has done so through its urgent procedure. Given the short time available, the present opinion cannot cover all the aspects of the draft Law, and will only focus on its main features, especially those that, during the visit to Warsaw, have appeared to be the most controversial.

78. The Venice Commission wishes to stress at the outset that the reform of the National Council of the Judiciary of Poland is to be analysed first and foremost as a measure of execution of the

[43] Venice Commission, CDL-AD(2020)017, Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, § 18.

[44] CCJE, Opinion 2021(24), Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, § 10.

judgments of the ECtHR in the cases of *Reczkowicz*, *Dolińska-Ficek and Ozimek*, *Advance Pharma Sp. Z o.o.* and *Wałęsa.* Poland is under an international obligation to abide by these judgments. The ECtHR has explicitly found that the rule of law crisis in Poland has its roots in the removal of the right of the judiciary to elect judicial members of the NCJ and that the continued operation of the present NCJ may lead to the aggravation of such crisis. In this context, the draft Law can therefore be seen as a measure aiming to "restore" the rule of law in Poland. The Venice Commission wishes to stress in this respect that any measure taken with a view to "restoring" the rule of law has to meet the overall requirements of the rule of law. However, in this context some balancing between different – apparently conflicting – rule of law principles is required.

79. In the present opinion the Venice Commission did not examine the question of *whether or not* a reform aiming to restore the right of the judiciary to elect the judicial members of the NCJ is necessary – as this necessity has been clearly stated by the ECtHR – but primarily the question of *to what extent the means chosen* by the Polish authorities to achieve this aim in the draft Law are in line with European standards of the Rule of law.

80. As concerns the election of fifteen judicial members of the NCJ by the judicial community, the direct election model provided in the draft Law meets the European standards, as it provides election by the judges themselves and quotas for judges of different levels and jurisdictions, which is a way to ensure wide representation of the judiciary in the NCJ.

81. As concerns the exclusion of the right to stand for election for judges who were appointed or promoted during the activities of the NCJ as reformed in 2017, the Venice Commission and DGI are of the view that the prospected wholesale blanket exclusion of between 2 000 and 3 000 judges out of approximately 10 000 from being candidates lacks individual assessment, and thus raises questions of proportionality. The Venice Commission and DGI thus recommend reconsidering the eligibility criteria for judges seeking candidacy in the election for the NCJ.

82. As concerns the organisation of the election process by the National Electoral Commission, the Venice Commission and DGI find that this managing role is suitable to safeguard the integrity of the election procedure under the present circumstances. They recommend providing stricter grounds, scope, and conditions for participation in the public hearings.

83. As concerns the early termination of the functions of the current judicial members of the NCJ on the date when the new members of the NCJ have been elected, the Venice Commission and DGI, while upholding the principle that tenure for office-holders in general and for members of the Judicial Councils in particular should be secure, take note of the fact that the reform will safeguard the independence of the judiciary, that it follows European standards and that it is designed to remedy the manner of appointment of the present NCJ in line with the judgments of the European Court of Human Rights. In the opinion of the Venice Commission and DGI, the *ex lege* early dismissal of sitting judicial members of the NCJ thus appears justified in the particular circumstances of the Polish case, and compatible with European standards.

84. As concerns a judicial remedy against the *ex lege* early termination of the functions of the current judicial members of the NCJ, given that the reform is not aimed at undermining the legitimacy but at restoring the independence of the NCJ, and in light of the urgent necessity to reform the latter, the Venice Commission and DGI are of the view that it could be justified not to provide for such remedy; however, they consider that, in order to prevent any risk of finding of a breach of Article 6 ECHR by the ECtHR, it would be appropriate to provide a venue of redress, which should not suspend the termination.

85. As concerns the establishment of a Social Council, while there is room to question whether such a council effectively ensures the legitimate influence of civil society, or if this influence would be better facilitated through reforms to the composition of the NCJ itself, the Venice Commission and DGI recommend specifying the grounds for advisory opinion, its scope, rules on collecting

information, duties of the NCJ in respect of the submitted opinion, including the need to providing reasons for not following it.

86. Finally, the Venice Commission and DGI find that it is advisable to enshrine in the Constitution itself, when the circumstances permit, the method of election of the NCJ members, the security of their tenure, the main functions of the NCJ, and the forms of participation of civil society.

87. The Venice Commission and DGI remain at the disposal of the Parliamentary Assembly and the Polish authorities for any further assistance in the matter.