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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

POLAND

JOINT URGENT 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

Endorsed by the Venice Commission on 18 June 2020
by written procedure
replacing the 123rd Plenary Session

on the basis of comments by

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Ms Claire BAZY-MALAURIE (Member, France)
Mr Paolo CAROZZA (Member, the United States of America)
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I. Introduction

1. By letter of 30 December 2019, the Marshal of the Senate of the Republic of Poland, Mr Tomasz Grodzki, requested an opinion of the Venice Commission on the amendments to the laws on the judiciary, passed by the Polish Sejm on 20 December 2019 (CDL-REF(2020)002), hereinafter "the Amendments"), from the perspective of judicial independence. In his letter the Marshal indicated that the Senate would like to receive an opinion before the end of the upcoming session of the Senate at which the Amendments have to be discussed (15-17 January 2020).

2. Ms Claire Bazy-Malaurie (member, Vice-President, France), Mr Richard Barrett (member, Ireland), Mr Paolo Carozza (member, United States of America), Mr Philip Dimitrov (member, Vice-President, Bulgaria), Ms Regina Kiener (member, Vice-President, Switzerland) and Mr Kaarlo Tuori (member, Finland) acted as rapporteurs for this Opinion. Mr Mats Melin (Sweden) was appointed by the Directorate General of Human Rights and the Rule of Law (DG I) to act as a further rapporteur on behalf of DG I.

3. On 6 January 2020, the Bureau of the Venice Commission, acting on the basis of Article 14.a of the Rules of Procedure, and given the urgency of the matter, authorised the rapporteurs to prepare an urgent opinion, jointly with DG I, as requested by the Marshal of the Senate. On 9 – 10 January 2020, a delegation of the Commission composed of Mr Barrett, Mr Dimitrov, and Mr Melin, accompanied by Thomas Markert, Secretary of the Commission, and Grigory Dikov, legal officer, visited Warsaw. The delegation had meetings with members of the Senate, both from the majority in the Senate and the minority from the governing party, the Vice-Speaker of the Sejm, the President and judges of the Supreme Court, as well as a separate meeting with the President and judges of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, with the Ombudsman, with the President and members of the National Council for the Judiciary (the NCJ), as well as with civil society representatives, representatives of the Bar, and of judges' and prosecutors' associations. Regrettably, the meeting at the Ministry of Justice was cancelled at the last moment. The Venice Commission thanks the Polish Senate for its assistance in the organisation of the visit and hopes that its Opinion will assist the Polish Senate in fulfilling its constitutional obligations as a legislative organ.

4. While the rapporteurs met with many interlocutors (both proponents and critics of the reform), the very short notice for the preparation of the Opinion made it impossible to examine the Amendments in a comprehensive manner, so this Opinion focuses only on the most important elements of the Amendments.[1] The absence of remarks on other aspects of the Amendments should not be interpreted as their tacit approval.

5. This Opinion was drafted on the basis of an unofficial translation of the Amendments, as well as of the three main legal acts modified thereby: the Act on the Organisation of the Common Courts (hereinafter the Act on the Common Courts), the Act on the Supreme Court, and the Act on the National Council of the Judiciary.[2] Inaccuracies may occur in this opinion as a result of incorrect translation.

6. This urgent Opinion was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019). It was endorsed by the Venice Commission on 18 June 2020, through a written procedure which replaced the 123rd Plenary session in Venice, due to the COVID-19 disease.

[1] Some of the provisions introduced by the Amendments to the Act on the Common Courts are reproduced in other acts – the Act on the Supreme Court, etc. The comments made in the present Opinion with reference to the amended provisions of the Act on the Common Courts are applicable, *mutatis mutandis*, to other acts to be amended.

[2] See the consolidated versions of the three acts with the amendments incorporated in the text: CDL-REF(2020)004, CLD-REF(2020)005, and CDL-REF(2020)003 accordingly.

II. Background

7. The Amendments, approved by the Sejm and now under deliberation in the Senate, are the latest link in the series of reforms, starting from the reform of the Constitutional Tribunal in late 2015 and early 2016,[3] which were followed by the amendments to the laws on the judiciary of 2017. The 2017 reform was analysed by the Venice Commission in its Opinion of December 2017 (the 2017 Opinion).[4]

A. Judicial reform of 2017 – an outline

8. The stated goal of the 2017 reform was to enhance the democratic accountability of the Polish judiciary. However, in the 2017 Opinion the Venice Commission concluded that, instead, this reform jeopardised the judicial independence and "enabled the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice" (§ 129 of the 2017 Opinion).[5] As a result of the 2017 reform:

- The judicial community in Poland lost the power to delegate representatives to the National Council of the Judiciary (the NCJ), and hence its influence on recruitment and promotion of judges. Before the 2017 reform 15 (out of 25) members of the NCJ were judges elected by their peers. Since the 2017 reform those members are elected by Parliament. Taken in conjunction with the immediate replacement, in early 2018, of all the members appointed under the old rules, this measure led to a far reaching politicisation of the NCJ;
- Changes in the method of nomination of candidates to the position of the First President of the Supreme Court deprived the participation of the judges in the selection procedure of any meaningful effect and put the decision in the hands of the President of the Republic. At the same time, the Minister of Justice (who is, in the Polish system, also the Prosecutor General)[6] obtained the power to appoint/dismiss court presidents of the lower courts at his discretion during the transitional period of six months. In 2017-2018 the Minister of Justice replaced over a hundred court presidents and vice-presidents. After this period, removal of court presidents remained in the hands of the Minister, with virtually no effective checks attached to this power.[7] The Minister of Justice also obtained other "disciplinary" powers vis-à-vis court presidents, and presidents of higher courts, in turn, have now large administrative powers vis-à-vis presidents of lower courts. That created a hierarchical structure of subordination within the judiciary, in administrative matters, with the Minister of Justice/Prosecutor General at its top;
- These measures were coupled with the reinforcement of the mechanisms of control within the judiciary: two new chambers within the Supreme Court were created in 2017: the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs (the Extraordinary Chamber). These new chambers were staffed with newly appointed judges, selected by the new NCJ, and entrusted with special powers – including the power of the Extraordinary Chamber to quash final judgments taken by lower courts or by the Supreme Court itself by way of extraordinary review, or the power of the Disciplinary Chamber to discipline other judges. That put these new chambers above all others and created *de facto* a "Supreme Court within a Supreme Court".

[3] See CDL-AD(2016)026, Poland - Opinion on the Act on the Constitutional Tribunal.
[4] See 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.
[5] This assessment was shared by other authoritative European bodies. Thus, in a later statement, the Bureau of the CCJE (CCJE-BU(2018)6REV) concluded that the reform, then adopted, entails a major step back as regards judicial independence, separation of powers and the rule of law in Poland.
[6] See CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended.
[7] The NCJ retained consultative power in respect of dismissal of court presidents – see Article 3 § 2 (5) of the Act on the NCJ and Article 27 § 5a of the Act on Ordinary Courts: a president may not be dismissed by the Minister of Justice only if it is opposed at the same time by the college of the relevant court and by the 2/3 of the NCJ.

9. It should be stressed that the Venice Commission never advocated a self-governing judiciary as a general standard, and that it is very much conscious of the diversity of legal systems in Europe in this respect. There are democratic countries where the judiciary is independent even though judicial appointments are made by the executive. Nevertheless, the Venice Commission has always welcomed that practically all new democracies, where in the recent history the judiciary was subordinated to other branches of power, have established judicial councils.[8] Such councils help in ensuring that the judicial community may make a meaningful input in decisions concerning judges.[9] This was the choice made by the Polish constituent assembly, which is reflected in Article 186 of the Polish Constitution stating that "the National Council of the Judiciary shall safeguard the independence of courts and judges", as well is in Article 187 which provides that 15 members of the Council should be chosen "from amongst the judges".

10. The simultaneous and drastic reduction of the involvement of judges in the work of the National Council for the Judiciary, 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 significantly reduced the independence of the Polish judiciary vis-à-vis the Government and the ruling majority in Parliament.

B. Developments in 2018 - 2019

11. In the 2017 Opinion the Venice Commission noted that "the Polish authorities were open to dialogue" (§ 132). Despite that, the reform was adopted and implemented without any major changes.[10] Reorganisation of the NCJ and mass replacement of court presidents by the Minister of Justice was followed by an intensification of the disciplinary procedures against ordinary judges. Inquiries ("explanatory proceedings") were opened by the disciplinary officers in respect of more than forty judges who were vocal in criticizing the reform or who questioned the legitimacy of the newly created judicial chambers or of other judges appointed under the new rules.[11]

12. On the one side, supporters of the reform led a public campaign accusing the judiciary of corporatism, corruption, links to the communist regime, etc. On the other side, political opposition in Parliament, major associations of judges, leading NGOs and some individual judges publicly condemned the reform as a major encroachment on judicial independence. Several Polish courts addressed to the Court of Justice of the European Union (the CJEU) requests for preliminary rulings on whether parts of the Polish judiciary after the reform still could be considered as independent. Similar requests were submitted by a number of other

[8] See CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, § 32; see also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, § 46; CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, § 5.

[9] In this respect it is important to recall the standards of the Council of Europe, and in particular Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges, where, in § 46, the Committee of Ministers stressed that "the authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers." Even where those decisions are taken by the head of state, the government or the legislative power, the Committee of Ministers requires "an independent and competent authority drawn in substantial part from the judiciary" to be authorised "to make recommendations or express opinions which the relevant appointing authority follows in practice".

[10] One notable exception concerned the retroactive lowering of the retirement age for the judges: this measure was revoked at the end of 2018. Other changes to the laws on the judiciary were relatively minor and did not address the key issues raised in the 2017 Opinion.

[11] Associations of judges and many NGOs complained of other forms of pressure and intimidation coming from the authorities - see, in particular, a very detailed report "Current situation of the Polish judiciary", prepared in 2019 by the Association of Polish Judges "Themis".

European courts. In addition, the European Commission initiated infringement proceedings before the CJEU.

13. On 19 November 2019, the CJEU adopted a judgment in the case of A.K. and others (Independence of the Disciplinary Chamber of the Supreme Court, C 585/18, C 624/18 and C 625/18), answering a request for preliminary ruling, submitted by the Chamber of Labour Law and Social Insurance of the Supreme Court (the Labour Chamber). The issue before the CJEU was whether Article 47 of the Charter of Fundamental Rights of the European Union ("Right to an effective remedy and to a fair trial") precluded cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not independent and impartial (in that case – the newly established Disciplinary Chamber of the Supreme Court).

14. The CJEU reaffirmed the principle of the primacy of EU law in EU member States and ruled that national courts had not only the right but the obligation to disapply provisions of national law granting jurisdiction to such a court (§ 166). The CJEU considered that a court is not an independent and impartial tribunal when (§ 171) "the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts […] as to the direct or indirect influence of the legislature and the executive and its neutrality […]". With specific regard to the means by which the members of the court have been appointed (in this case – with the involvement of the NCJ), the CJEU noted that although one or other factors may escape criticism *per se*, when taken together, in addition to the circumstances in which choices were made, they may throw doubt on the independence of a body involved in the appointment procedure (§ 142).

15. In sum, the CJEU did not decide itself on the matter of independence of either the Disciplinary Chamber or the NCJ but left this decision to the referring court (i.e. the Labour Chamber), to be taken based on the guidance provided by the CJEU judgments. In doing so, the CJEU clearly stated that national courts applying EU law *have a duty* to disregard provisions of the national law if the body, which has, under the national rules, jurisdiction to hear a case where the EU law may be applied, does not meet the requirements of independence and impartiality, according to the test proposed by the CJEU.

16. Following the CJEU judgment of 19 November, on 5 December 2019 the Labour Chamber of the Supreme Court concluded that the Disciplinary Chamber did not fulfil the requirements of an independent and impartial tribunal. Despite this judgment the Disciplinary Chamber continues its activities and one of the main purposes of the Amendments seems to be to make it impossible for any court (possibly except the Extraordinary Chamber – on this see more below) to question the legitimacy of any court established in accordance with the current legislation.

17. In sum, the Polish legal order faces a schism between the old judicial institutions and judges, on one side, and, on the other, those bodies and judges who were created/appointed on the basis of the new rules introduced by the legislative amendments of 2017. There is a risk of legal chaos with the decisions of some courts not recognised as valid by other courts.

III. The process of adoption of the Amendments

18. As the rapporteurs were told during the visit, the draft Amendments were introduced in an expedited procedure, as a private bill (i.e. by some MPs belonging to the majority, and not by the Government). The Sejm had less than 24 hours to discuss them.[12] The Venice Commission has previously criticized the practice of using an accelerated procedure for adoption of acts of

[12] The Bill was submitted on 12 December 2019, the first reading took place on 19 December 2019, the Justice and Human Rights Committee adopted the report on 20 December 2019, and the second reading took place on the very same day.

Parliament regulating important aspects of the legal or political order.[13] The accelerated procedure provided for private bills should not be used in order to avoid meaningful public consultations.[14] As explained to the rapporteurs, the bill was introduced and adopted without consultations even with the main stakeholders – judges and judicial bodies. If the Senate returns the Amendments to the Sejm for reconsideration, the Venice Commission urges the Government and the ruling majority to conduct proper deliberations on this bill, which should involve meaningful consultations with the main stakeholders, experts and the civil society, and a meaningful dialogue with the political opposition.

IV. Analysis of the amendments

19. The present Opinion will focus on five main proposals of the Amendments, which can be summarised as follows:

- the Amendments prohibit any political activity of judges and oblige them to disclose publicly their membership in associations;
- the Amendments declare that any person appointed by the President of the Republic is a lawful judge, and it is prohibited to question his/her legitimacy. Doing so is a disciplinary offence punishable, potentially, with dismissal. Only the Extraordinary Chamber can decide whether a judge is independent and impartial;
- new disciplinary offences and sanctions in respect of judges and court presidents are introduced by the Amendments;
- the Amendments transfer some competencies of the assemblies of judges to the colleges composed of the court presidents appointed by the Minister of Justice;
- the Amendments change the process of the election of the First President of the Supreme Court, lowering the quorum to 32 judges (out of approximately 120) in the third round of voting.

A. International legal framework

20. Before going into the analysis of those main points, the Venice Commission stresses that any legislative reform should be in line not only with the constitutional framework, but also with the obligations of Poland under the European Convention on Human Rights, EU law, and other international law.[15] Most importantly, everyone under the jurisdiction of Poland is entitled to a fair hearing before an independent and impartial court – this right is guaranteed (in addition to Article 45(1) of the Constitution of Poland) by Article 6 § 1 of the European Convention on Human Rights (the ECHR), Article 47 of the EU Charter of Fundamental Rights, Article 19(1), second sentence, of the Treaty on European Union, and Article 14 § 1 of the International Covenant on Civil and Political Rights.

21. The notion of "independence and impartiality" should be interpreted in compliance with the case-law of the bodies specifically entrusted with the interpretation of those treaties. At the European level, the independence of judges should be evaluated with reference to the case-law of the European Court of Human Rights (the ECtHR) and the CJEU. In addition, standards of the Council of Europe are to be taken into account in defining whether the judges are independent.[16]

22. In matters regulated by EU law, the principle of the primacy of EU law applies. The CJEU stated in this respect that any court of a EU member State "has […] the obligation pursuant to the principle of cooperation […] fully to apply the directly applicable law of the Union and to protect

[13] CDL-AD(2018)021, § 39
[14] CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, § 75, with further references.
[15] See in this regard Article 91 §2 of the Polish Constitution, according to which a ratified international agreement takes precedence over the national statute if the statute cannot be reconciled with the agreement.
[16] See, in particular, Recommendation CM/Rec(2010)12, cited above.

the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the rule of law of the Union [references omitted]". Any impediment to disapplying the provisions of the national law which contravene the EU law is a violation of the EU law in itself: "[any] provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent directly applicable Union rules from having full force and effect are incompatible with the requirements which are the very essence of Union law [references omitted]".[17]

23. Finally, by virtue of Article 267 of the Treaty on the Functioning of the European Union (TFEU), whether a question regarding the application of EU law arises, Polish court may address a request for a preliminary ruling to the CJEU on those matters. National courts of a final instance are obliged to do it.

B. Freedom of expression and freedom of assembly of judges

24. Amended Article 107 § 1 of the Act on the Common Courts makes it a disciplinary offence to question the legitimacy of the appointment of other judges, and the validity of the "constitutional mandate of an organ of the Republic of Poland" (p. 3). It also makes it an offence for judges to be involved in "public activities that are incompatible with the principle of judicial independence and the impartiality" (p. 4 of Article 107 § 1). New Article 9d provides that the bodies of judicial self-government cannot deliberate on "political matters" – in particular, to adopt "resolutions undermining the principles of functioning of authorities of the Republic of Poland and its constitutional bodies".

25. The Venice Commission will deal with the disciplinary responsibility of judges for judicial acts below.[18] As to the statements made in public and extrajudicially, the Venice Commission observes that the prohibition introduced by Article 107 § 1 limits the judges' freedom of speech, guaranteed by Article 10 of the European Convention on Human Rights (the ECHR). Whether or not this limitation is proportionate will vary depending on the circumstances of a particular case, including the subject matter of the speech (in particular whether it is within those subjects on which judges have a legitimate public role to play), the form and manner in which the judges express themselves, and the severity of the ensuing sanctions.[19]

26. Judges have a duty of restraint and discretion in cases where the authority and impartiality of the judiciary are likely to be called in question.[20] In principle, it is appropriate for the law to limit the political activity of judges and to prohibit them from being "involved in public activities that are incompatible with the principle of judicial independence and the impartiality." On the other hand, as the ECtHR held in the case of *Baka v. Hungary*, "questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 [references omitted]. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter [reference omitted]" (§ 165). Given the context in which the Amendments were introduced, and

[17] Judgment of the CJEU (Grand Chamber) of 8 September 2010, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, §§ 53 and 56

[18] See also new Article 42a which is discussed in more detail in the following section

[19] The Amendments introduce, in addition to the currently existing disciplinary punishments, new pecuniary sanctions, consisting of a penalty in the amount of one month's basic salary of the judge, plus the allowances to which the judge/prosecutor is entitled (new Article 109 § 1(2b) of the Act on the Ordinary Courts, and similar provisions in other amended acts).

[20] See the ECtHR Grand Chamber judgment of 23 June 2016 in the case of *Baka v. Hungary*, no. 20261/12, § 164, and the case-law referred to in that judgment. See also *Simić v. Bosnia-Herzegovina*, no. 75255/10, 15 November 2016.

the language of the new provisions, it is clear that they are aimed *essentially* at suppressing criticism of the manner in which the "new" NCJ was formed, and of the composition and powers of the newly created chambers. In the case of *Previti v. Italy* the ECtHR considered that judges, being legal experts, may criticise legal reforms initiated by the Government, where such criticism is expressed in an appropriate manner.[21] The formula used in Article 107 is very broad and does not take into account the fact that the criticism of the recent legislative amendments (if this is what new Article 107 is aiming at) contributes to the matters of public interest. Thus, Article 107, as formulated, may lead to results incompatible with Article 10 of the ECHR.[22]

27. The same logic applies to new Article 9d, which may be interpreted as preventing bodies of judicial self-government from expressing critical opinions on the "functioning of the authorities". Collective freedom of speech is not less important than an individual one, and bodies of judicial self-government should not be prevented from discussing, even in a critical tone, issues related to the administration of justice.

28. There are new provisions to be added to Article 88 about the duty of the judges, *inter alia*, to submit declarations of past political party membership and current membership in associations. This information is to be made public. The proposal that judges must make declarations about assets, business interests or activities which might constitute a conflict of interest is not unusual. Moreover, it is not uncommon, from the comparative point of view, to have rules prohibiting political engagement of judges in the form of active membership in political parties and *a fortiori* from holding leadership positions there.[23] This prohibition results already from Article 178 § 3 of the Polish Constitution, which seems appropriate, in the light of the communist past of Poland.

29. What is more problematic is a duty to declare current membership in associations, including professional associations of judges.[24] The introduction of such an obligation in a context of conflict between judicial associations, on the one hand, and the Ministry of Justice, on the other, and in a situation where the Minister of Justice received increased powers in questions related to promotions, discipline, and administration of courts, creates a risk that the information obtained by the Minister about the judges' membership will be used for ulterior purposes. It is equally unclear why this information should be made public.

30. In sum, the Venice Commission considers that these provisions require revision: the law should explicitly allow judges and their associations to participate in the public discussion on the matters related to the administration of the judiciary and criticise the legislative amendments or the Government's policies vis-à-vis the judiciary.

C. Prohibition to question the lawfulness of the judge's appointment

31. Several provisions of the Amendments eliminate the competence of the Polish courts to examine whether another court decision was issued by a person appointed as a judge in compliance with the Constitution, European law and other international legal standards. These amendments are seemingly designed to have a nullifying effect on the CJEU ruling of 19 November 2019 and the Supreme Court judgment of 5 December 2019, and on other pending proceedings where the competence of the newly appointed judges has been challenged.

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[21] (Dec), no 45291/06, 8 December 2009: "The fact that, in application of the principles of democracy and pluralism, certain judges or groups of judges may, in their capacity as legal experts, express reservations or criticism regarding the Government's legislative proposals do not undermine the fairness of the judicial proceedings to which these proposals might apply".

[22] Cf. for example CCJE Opinion No. 3 (2002) para. 34 and Opinion No. 18 (2015) para. 32.

[23] See Opinion No. 3 of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002), pars. 30

[24] See Opinion No. 3 of the CCJE, cited above, para. 34, which guarantees the judge's right to join professional unions, with the exception of the right to strike. See also the UN Basic Principles on the Independence of the Judiciary, pp. 8 and 9

32. In particular, new Article 55 § 1 stipulates that a person who has been appointed as a judge by the President of the Republic and who has taken an oath should be regarded as a judge. New Article 42a prohibits courts (except the Extraordinary Chamber) from questioning (a) the powers of courts, constitutional state bodies and law enforcement and control bodies, and (b) the jurisdiction of a judge dealing with a case.

33. In order to guarantee that no judge in Poland questions the validity of an appointment made by the new NCJ, amended Article 107 § 1 of the Acts on the Common Courts (on disciplinary offences) prohibits "actions questioning … the effectiveness of the appointment of a judge or the constitutional mandate of an organ of the Republic of Poland". This provision seems to cover statements made by the judge extrajudicially (on this see above, Section B). It also prohibits *procedural* actions which challenge the validity of appointment of other judges.

34. Finally, new Article 45b introduced to the Act on the NCJ provides that once the President of the Republic appoints a person as a judge, on the basis of a proposal by the NCJ, any appeal proceedings which challenge the decision of the NCJ "shall be discontinued by operation of the law". It appears that, by virtue of Article 12 of the Amendments, these new provisions will have a retroactive effect and invalidate any proceedings (and the resulting judgments) which might question the appointments which had already been made by the President.

35. All motions challenging the independence and impartiality of judges are henceforth to be decided by the Extraordinary Chamber (see new §§ 2 – 4 of Article 26 of the Act on the Supreme Court). That being said, motions based on the alleged illegality of appointment of a judge or his/her authority to perform judicial function should be "left unprocessed" (§ 3). The Extraordinary Chamber is given a special competence to quash decisions of other courts, including other chambers of the Supreme Court, if those decisions contest the legitimacy of other judges (§ 4).

36. These provisions, taken together, significantly curtail the possibility to examine the question of institutional independence of Polish courts by those courts themselves. This approach raises issues under Article 6 § 1 of the ECtHR, since judicial review should involve examination of all relevant aspects of the independence of the tribunal, including institutional ones. Thus, as demonstrated by the ECtHR's case-law, the composition of the body which appoints judges is relevant from the stand-point of the requirement of "independence".[25] There are other institutional elements which should be assessed – for example, the risk of an arbitrary removal of a judge by the Minister of Justice,[26] or the risk of undue pressure by the president of the court in which the judge works.[27] In the opinion of the Venice Commission, national judge should not be prevented from examining these aspects of the case, along with other elements which may affect the "independence and impartiality" requirement under Article 6 § 1 of the ECHR. This is certainly true when the normal chain of appeals is concerned; however, the Strasbourg Court did not have an occasion to examine situations when one national court contests the legitimacy of another judicial body (with the reference to the lack of independence or otherwise) outside of the normal chain of appeals, and what should be a proper procedural framework for resolving such disputes.

37. Furthermore, the above provisions, taken together, aim at nullifying the effects of the CJEU ruling. This is a serious challenge to the principle of the primacy of EU law. In the preliminary ruling of 19 November 2019, the CJEU clearly held that it was a *duty* of the referring court to examine the question of independence of the Disciplinary Chamber, in particular by looking at the composition of the selecting body (the NCJ). Polish courts dealing with the consequences of the CJEU judgment of 19 November 2019 or confronted with an issue of judicial independence

[25] See ECtHR, *Oleksandr Volkov v. Ukraine* (no. 21722/11), §§ 109 – 117 and 130; *Özpinar v. Turkey*, no. 20999/04, §§ 78-79.
[26] See ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 53
[27] See ECtHR, *Parlov-Tkalčić v. Croatia*, no. 24810/06, § 86

in a different context, will be put in an impossible position of choosing between following the requirements of the EU law as interpreted by the CJEU, or using legal avenues provided by the TFEU, and abiding by the new law.

38. The Explanatory Memorandum attached to the Amendments argues for a wide jurisdiction of the Constitutional Tribunal in the matters where a conflict with the EU may arise, on the basis of the *ultra vires* and constitutional identity doctrines developed in the case-law of constitutional jurisdictions of some other European States, for example, Germany. The Venice Commission is aware of those doctrines and about the ongoing judicial dialogue between the CJEU and national constitutional and supreme courts. However, the adoption of the Amendments now under deliberation in the Senate and an eventual ruling by the Polish Constitutional Tribunal invalidating the Supreme Court decision would signify an open defiance of the primacy of EU law and the status granted to the CJEU by Article 19(1) of the Treaty.

39. The proponents of the reform, whom the rapporteurs met in Warsaw, argued that these provisions were aimed at avoiding legal chaos, where every judge appointed under the old rules would challenge the legitimacy of judges appointed under the new rules. Indeed, such development cannot be excluded. And, indeed, in a normal situation, the decision of the President to appoint a judge creates a strong presumption of legality of such appointment. As the rapporteurs were told during the visit, in the Polish legal order the decisions of the President to accept or reject the proposal of the NCJ on judicial appointments are seen as not subject to judicial review. This is a reasonable approach. However, even if the decision of the President to accept or reject a candidate is not justiciable, the Polish courts still have the obligation (under the ECHR and within the framework of the application of EU law) to ensure that only courts fulfilling the requirements of independence and impartiality may adjudicate cases.

40. The solution proposed by the Amendments is to centralise questions related to the independence and impartiality of judges in the hands of the Extraordinary Chamber (see Article 26 § 2 and 82 § 2 of the Act on the Supreme Court). The idea of creating a procedural framework for settling such disputes is not devoid of merit: for example, a national court which entertains doubts in this regard may refer that question to a higher court. But this procedural framework will be compatible with the requirements of the ECHR and EU law only if that higher court itself is independent and impartial. Regretfully, the solution proposed in the Amendments is untenable, for the following reasons. First of all, it appears that the motion of the referring court should be "left unprocessed" if the legality of the appointment procedure is at issue (see § 3 of Article 26), so these matters will not be addressed even by the Extraordinary Chamber. And, second, in cases where the Extraordinary Chamber is given a *specific* competence to examine judgments of other courts in which the legality of the appointment procedure was contested (see § 4 of Article 26), the Extraordinary Chamber will inevitably act as a judge in its own case, since it was created as a result of the 2017 reform and the judges sitting there were appointed by the new NCJ. For the Venice Commission, in view of the doubts it expressed previously regarding the independence of the new NCJ, and of the two new chambers, it is inappropriate to give the Extraordinary Chamber the power to assess the independence of judges or courts, including itself and the Disciplinary Chamber.

41. In addition, new Article 55 § 4 is contrary to the principle of a lawful judge (enshrined in to Article 6 § 1 of the ECHR and Article 47 of the Charter): it will be henceforth impossible to challenge a judge on the ground that the case has been allocated to him/her unlawfully and/or arbitrarily, or that the rules on territorial and substantive jurisdiction were breached. This provision may lead to abusive redistribution of cases to "loyal" judges. Such arbitrary allocation of cases is further facilitated by new provisions on the distribution of work-load in the courts which would increase the discretion of the court presidents (see, for example, new Article 22a, and new Article 37e §2), and the new rule *de facto* permitting allocation of cases to a judge from another district court (see new Article 77 § 9a which permits to delegate a judge of the district court to

another court "simultaneously with performing duties in his official place" of work, i.e. in the district where this judge normally works).[28]

42. The Amendments in this part are supposed to counter a situation which was created by the 2017 reform of the NCJ and of the Supreme Court. In the opinion of the Venice Commission, it is necessary to return to the question of composition of the NCJ, in order to bring the method of appointment of its judicial members in accordance with the European standards and best practices. That would remove the risk of legal chaos, although the question of validity of judicial appointments made in the meantime would have to be addressed by the Polish authorities.

43. In the short-term perspective, the Venice Commission urges the Polish authorities to remove provisions (on disciplinary offences and other) which prevent the courts from examining the questions of independence and impartiality of other judges from the standpoint of the EU law and the ECHR.

D. New disciplinary offences and sanctions

44. As stressed above, new Article 107 affects the free speech of judges and may be problematic under the ECHR and EU law. However, it is very troubling in other respects too. New § 1 contains overbroad and open-ended definitions and thus threatens the principle of legality. For instance, it prohibits "acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary" and "an infringement of the dignity of the office". Both of these invite very subjective interpretations and could easily be abused to interfere improperly in judicial roles.

45. Furthermore, the Amendments require the presidents of the courts to submit annual reports to the Minister of Justice. If the Minister refuses to accept the report and the formal appeal provisions before the NCJ do not resolve the case in favour of the president, this could result in a disciplinary punishment of the relevant president (see new Article 37h, concerning presidents of the courts of appeal), including a dismissal. Dismissal of the president on this ground or on other grounds mentioned in Article 27 § 1 can only be vetoed if the college of the relevant court (composed of court presidents subordinated to the Minister) opposes it and if 2/3 members of the NCJ vote against the dismissal. In practice it means that the Minister has a virtually unrestrained power to dismiss court presidents.

E. Composition and competencies of the bodies of judicial self-government; new powers of the Minister of Justice

46. The Amendments change the rules on judicial self-government. First of all, general assemblies of judges of a certain level (see, for example, Article 33 of the Act on Common Courts, currently in force, which speaks of the general assembly of *all appeal court judges*) are replaced with general assemblies of judges of a *particular* court (see new Article 33). Naturally, presidents of the courts, appointed by the Minister of Justice (see Articles 23 § 1, 24 § 1 and 25 § 1) will have more influence within such bodies. The subordination of the presidents of courts to the Minister is further increased; while under the current regulations the president has to submit an annual report to the general assembly of judges (see current Article 37h § 1), under the Amendments this report will have to be submitted directly to the Minister of Justice (see new Article 37h § 1).

47. More importantly, general assemblies are stripped of their most important functions. Currently they are entitled to give opinions on candidates to the judicial positions and to give opinions on the reports of the presidents of the relevant court (see, for example, current Article

[28] The practice of arbitrary re-allocation of cases was condemned by the ECtHR under the heading of "independence and impartiality" in the case of *Sutyagin v. Russia*, no. 30024/02, 3 May 2011, §§ 178 – 193.

34 in conjunction with Article 37h). However, these powers will be transferred to the colleges of the respective courts and/or to the Minister of Justice.

48. Currently the colleges are comprised mostly of the members elected by judges themselves at the general assemblies (see current Article 28 § 1 and Article 30 § 1), and thus are representative of the judicial community. However, in the future colleges will only consist of the court presidents (see new Articles 28 § 1 and 30 § 1). This increased role of court presidents is of particular concern in a situation where the Minister of Justice replaced more than hundred court presidents in a short period of time. Under the Amendments, general assemblies may only select *delegates* to take part in the meetings of the college where the opinion on candidates is discussed (see new Articles 34 § 1 (2) and 36 § 1 (2)). Those delegates will have no right to vote on other questions, such as, for example, on the dismissal of court presidents (see new Article 28 § 7, in conjunction with current Article 27 § 2).

49. The Amendments strengthen the influence of the Minister of Justice on the disciplinary prosecutors. While the Disciplinary Prosecutor for judges of common courts and two deputies were already appointed by the Minister of Justice under the current legislation, hitherto the deputy disciplinary officers attached to the regional courts had to be selected from among judges proposed by the assembly of judges of the respective court. New Article 112 § 6 removes the role of the assembles of judges and enables the higher-level disciplinary prosecutors to select the lower level disciplinary prosecutors.

50. In sum, the participation of judges in the decision-making on key issues concerning their practical work is further reduced by the Amendments,[29] and the already considerable powers of the Minister of Justice (who is at the same time the Prosecutor General in the Polish system) are further increased. The Venice Commission urges the Parliament of Poland not to adopt those changes.[30]

F. New rules on election of the First President of the Supreme Court

51. The Amendments further reduce the participation of the judges in the process of selection of the First President of the Supreme Court.[31] Article 183 § 1 of the Polish Constitution provides for the involvement of the judges of the Supreme Court in the process of election of the First President. This model is a matter of constitutional choice, but it implies that only a judge enjoying confidence of his/her colleagues may be appointed by the President of the Republic as a First President.

52. The method of selection of the First President has already been changed in 2017. Before the 2017 reform, the President of the Republic selected the First President from *two* candidates proposed by the General Assembly of judges of the Supreme Court. That method reflected the model of power-sharing between the President and the judicial community, enshrined in Article 183 § 3 of the Polish Constitution.[32] Even if the President preferred the second candidate, this candidate would still enjoy an important support amongst his/her fellow judges.

53. As a result of the 2017 reform, the First President is to be appointed by the President of the Republic from a list of *five* candidates proposed by the General Assembly (Article 12 § 1 of the Act on the Supreme Court). Since each judge can only cast one vote, this model may result in a

[29] A further example of this worrying trend of increased executive involvement in judicial governance is Article 4 of the Amendments which gives a power to the President of the Republic to define the internal rules of the Supreme Administrative Court.
[30] See the 2017 Opinion, §§ 102 and 130, the ninth bullet-point.
[31] The mandate of the currently serving First President of the Supreme Court expires in few months.
[32] Which reads as follows: "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."

situation where the final list of five candidates will include those who accumulated a very high number of votes, and those who received very few. Article 183 does not specify exactly how many candidates must be on the list, but in the new model the President of the Republic will be capable of choosing a candidate who has little support amongst his/her colleagues.[33]

54. It appears that the Amendments try to pre-empt a possible boycott by the majority of judges of the Supreme Court of the process of election of candidates to the position of the First President. First of all, the Amendments introduced a position of the First President *ad interim*, appointed single-handedly by the President of the Republic. Secondly, the rules on quorum required for electing five candidates are changed; if in the first two rounds the quorum is not attained, in the third round the presence of only 32 (out of about 120) judges is necessary to elect candidates to the position of a new First President (new Article 13 § 4 and 13a § 3).

55. The proposed voting mechanism strengthens further the influence of small groups of judges, to the detriment of a majority of the judges of the Supreme Court. The possibility for the President to choose among five candidates, some of whom may have little support amongst their colleagues, reduces the voting procedure to a formality. The Venice Commission strongly recommends returning to the procedure of election of the First President which existed before 2017, or, alternatively, to design such a model which would guarantee that all candidates proposed to the President of the Republic enjoy support of a significant number of the Supreme Court judges.

G. Retroactivity of the Amendments

56. Some of the provisions introduced by the Amendments have a retroactive effect. For example, Article 14 of the Amendments stipulates that the provisions on disciplinary liability shall apply to acts committed before the date of entry into force of the Amendments. Article 12 § 1 applies the new Article 45c of the Act on the NCJ to current cases. Article 12 § 2 retrospectively deprives earlier court applications of legal effect. Art 12 §§ 3 and 4 provide that appeal proceedings and judicial actions in individual cases are invalid or "shall not produce legal effects". Furthermore, by virtue of the new Article 82 § 4 of the Act on the Supreme Court the Extraordinary Chamber is not bound by earlier decisions adopted by the Supreme Court.

57. If the intention of the Amendments is, indeed, to nullify judgments which are already final, this is at odds with the principle of legal certainty, which are amongst core elements of the rule of law.[34] While rules can be changed by the legislator for the future, settled legal judgments should not be undone, and *res judicata* should be respected.

V. Conclusion

58. At the invitation of the Marshal of the Senate, the Venice Commission examined the recent amendments to the laws on the judiciary, adopted by the Sejm in December 2019. It recalls that already in its 2017 Opinion on Poland it expressed strong concerns over the reform, initiated by the Government at that time. This reform "enabled the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice" and thereby "posed a grave threat to the judicial independence" (§ 129).

59. Unfortunately, some of the December 2019 amendments may be seen as further undermining the independence of the judiciary, while trying to resolve problems resulting from the reform of 2017. Thus, by virtue of those amendments, the judges' freedom of speech and association is seriously curtailed. Polish courts will be effectively prevented from examining

[33] See in this respect the criticism by the Venice Commission of a similar amendment in respect of the Constitutional Tribunal: CDL-AD(2016)026, Poland - Opinion on the Act on the Constitutional Tribunal, § 26.
[34] See CDL-AD(2016)007, the Rule of Law Checklist, p. B (6), (7) and (8).

whether other courts within the country are "independent and impartial" under the European rules. The participation of judges in the administration of justice is further reduced: bodies of judicial self-governance are replaced, in important matters, with the colleges composed of the court presidents appointed by the Minister of Justice. New disciplinary offences are introduced and the influence of the Minister of Justice on disciplinary proceedings is increased further. Appeal courts will no longer be able to assess the correct composition of lower level court chambers, depriving litigants of an important guarantee. Provisions are introduced which could further reduce the role of the judges of the Supreme Court in the process of selection of the First President. Finally, some of those provisions may be interpreted as having a nullifying effect in respect of the judgments which are already final.

60. The Venice Commission understands that Polish legal order faces a difficult situation: as a result of the controversial reform of 2017, "old" judicial institutions *de facto* refused to recognise the legitimacy of the "new" ones. This "legal schism" should be quickly resolved, which will certainly require further legislative amendments. The amendments of December 2019, however, are not suitable to achieve this goal. They diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments. Thus, the Venice Commission recommends not to adopt those amendments.

61. Other solutions have to be found. In order to avoid further deepening of the crisis, the Venice Commission invites the Polish legislator to seriously consider the implementation of the main recommendations contained in the 2017 Opinion of the Venice Commission, namely:

- to return to the election of the 15 judicial members of the National Council of the Judiciary (the NCJ) not by Parliament but by their peers;
- to significantly revise the composition and internal structure of the two newly created "super-chambers", and reduce their powers, in order to transform them into normal chambers of the Supreme Court;
- to return to the pre-2017 method of election of candidates to the position of the First President of the Supreme Court, or to develop a new model where each candidate proposed to the President of the Republic enjoys support of a significant part of the Supreme Court judges;
- to restore the powers of the judicial community in the questions of appointments, promotions, and dismissal of judges; to ensure that court presidents cannot be appointed and dismissed without the significant involvement of the judicial community.

62. Further legislative measures will be required to implement those recommendations, and the Venice Commission remains at the disposal of the Polish authorities for further assistance in this matter.