

# RECOMMENDATIONS

## COMMISSION RECOMMENDATION (EU) 2018/103

of 20 December 2017

regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) On 27 July 2016, the Commission adopted a Recommendation regarding the rule of law in Poland <sup>(1)</sup>, setting out its concerns on the situation of the Constitutional Tribunal and recommending how these should be addressed. On 21 December 2016 and on 26 July 2017, the Commission adopted complementary Recommendations regarding the rule of law in Poland <sup>(2)</sup>.
- (2) The Recommendations of the Commission were adopted under the Rule of Law Framework <sup>(3)</sup>. The Rule of Law Framework sets out how the Commission will react should clear indications of a threat to the rule of law emerge in a Member State of the Union and explains the principles which the rule of law entails. The Rule of Law Framework provides guidance for a dialogue between the Commission and the Member State in order to prevent the emergence of a systemic threat to the rule of law that could develop into a 'clear risk of a serious breach' which would potentially trigger the use of the 'Article 7 TEU Procedure'. Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can initiate a dialogue with that Member State under the Rule of Law Framework.
- (3) The European Union is founded on a common set of values enshrined in Article 2 of the Treaty on European Union ('TEU'), which include the respect for the rule of law. The Commission, beyond its task to ensure the respect of EU law, is also responsible, together with the European Parliament, the Member States and the Council, for guaranteeing the common values of the Union.
- (4) Case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the European Commission for Democracy through Law ('Venice Commission'), provides a non-exhaustive list of these principles and hence defines the core meaning of the rule of law as a common value of the Union in accordance with Article 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law <sup>(4)</sup>. In addition to upholding those principles and values, State institutions also have the duty of loyal cooperation.
- (5) In its Recommendation of 27 July 2016, the Commission explained the circumstances in which it decided, on 13 January 2016, to examine the situation under the Rule of Law Framework and in which it adopted, on 1 June 2016, an Opinion concerning the rule of law in Poland. The Recommendation also explained that the exchanges between the Commission and the Polish Government were not able to resolve the concerns of the Commission.
- (6) In its Recommendation, the Commission found that there was a systemic threat to the rule of law in Poland and recommended that the Polish authorities take appropriate action to address this threat as a matter of urgency.

<sup>(1)</sup> Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland (OJ L 217, 12.8.2016, p. 53).

<sup>(2)</sup> Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2017/146 (OJ L 22, 27.1.2017, p. 65); and Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146 (OJ L 228, 2.9.2017, p. 19).

<sup>(3)</sup> Communication from the Commission to the European Parliament and the Council of 11 March 2014, 'A new EU Framework to Strengthen the Rule of Law', COM(2014) 158 final.

<sup>(4)</sup> See COM(2014) 158 final, section 2, Annex I.

- (7) In its Recommendation of 21 December 2016, the Commission took into account the latest developments in Poland that had occurred since the Commission's Recommendation of 27 July 2016. The Commission found that whereas some of the issues raised in its last Recommendation had been addressed, important issues remained unresolved, and new concerns had arisen in the meantime. The Commission also found that the procedure which had led to the appointment of a new President of the Tribunal raised serious concerns as regards the rule of law. The Commission concluded that there continued to be a systemic threat to the rule of law in Poland. The Commission invited the Polish Government to solve the problems identified as a matter of urgency, within two months, and to inform the Commission of the steps taken to that effect. The Commission noted that it remained ready to pursue a constructive dialogue with the Polish Government on the basis of the Recommendation.
- (8) On 26 July 2017, the Commission adopted a third Recommendation regarding the Rule of Law in Poland, complementary to its Recommendations of 27 July and 21 December 2016. In its Recommendation, the Commission took into account the developments that had occurred in Poland since the Commission's Recommendation of 21 December 2016. The concerns of the Commission relates to the lack of an independent and legitimate constitutional review and to the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland. In its Recommendation, the Commission considers that the situation of a systemic threat to the rule of law in Poland as presented in its Recommendations of 27 July 2016 and 21 December 2016 has seriously deteriorated.
- (9) In particular, the Recommendation underlines that the law on the National Council for the Judiciary of 15 July 2017 and the law on the Supreme Court of 22 July 2017, should they enter into force, would structurally undermine the independence of the judiciary in Poland and would have an immediate and concrete impact on the independent functioning of the judiciary as a whole. Given that the independence of the judiciary is a key component of the rule of law, these new laws increase significantly the systemic threat to rule of law as identified in the previous Recommendations. The Recommendation underlines that the dismissal of Supreme Court judges, their possible reappointment and other measures contained in the law on the Supreme Court would very seriously aggravate the systemic threat to the rule of law. Among the recommended action, the Commission recommends that the Polish authorities ensure that the two laws on the Supreme Court and on the National Council for the Judiciary do not enter into force and that any justice reform uphold the rule of law and comply with EU law and with European standards on the independence of the judiciary and is prepared in close cooperation with the judiciary and all interested parties. The Commission also asked the Polish authorities not to take any measure to dismiss or force the retirement of the Supreme Courts judges as these measures will very seriously aggravate the systemic threat to the rule of law. The Commission stated that should the Polish authorities take any measure of this kind, it would stand ready to immediately activate Article 7(1) TEU.
- (10) The Commission invited the Polish Government to solve the problems identified in this Recommendation within one month of receipt of the Recommendation.
- (11) On 31 July 2017, the *Sejm* was formally notified about the decision of the President of the Republic to veto the law amending the Law on National Council for the Judiciary and the Law on the Supreme Court.
- (12) On 4 August and on 16 August 2017 the Polish Government wrote to the Commission with a request for clarifications to its Recommendation of 26 July 2017, to which the Commission responded by letters of 8 August and 21 August 2017 respectively.
- (13) On 28 August 2017, the Polish Government sent a reply to the Recommendation of 26 July 2017. The reply disagreed with all the issues raised in the Recommendation and did not announce any new action to address the concerns identified by the Commission.
- (14) On 30 August 2017, the opinion of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) concluded that the suspended law on the Supreme Court does not comply with international standards on judicial independence <sup>(1)</sup>.

<sup>(1)</sup> OSCE Office for Democratic Institutions and Human Rights (ODIHR), 30 August 2017, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland.

- (15) On 11 September 2017, the Polish Government initiated a campaign named 'Fair Courts' aimed at gaining social support for the ongoing judicial reform. The National Council for the Judiciary and ordinary courts published several statements rectifying allegations directed against courts, judges and the Council during the campaign.
- (16) On 11 September 2017, the Constitutional Tribunal in a panel of five judges declared the unconstitutionality of certain provisions of the Code of Civil Procedure allowing ordinary courts and the Supreme Court to assess the legality of the appointment of the President and the Vice-President of the Tribunal <sup>(1)</sup>.
- (17) On 13 September 2017, the Minister of Justice started exercising the powers to dismiss court presidents and vice-presidents pursuant to the new law on Ordinary Courts Organisation.
- (18) On 15 September and 18 October 2017, the National Council for the Judiciary criticised the Minister of Justice's decisions to dismiss court presidents. The Council indicated that such an arbitrary power of the Minister of Justice violates the constitutional principle of independence of courts and might adversely affect the impartiality of judges.
- (19) On 15 September 2017, the *Sejm* appointed a person to an already occupied position of the Constitutional Tribunal, and the President of the Republic accepted the oath on 18 September 2017.
- (20) On 15 September 2017 the *Sejm* adopted the law on the National Freedom Institute – Centre for Civil Society Development which centralises the distribution of funds including for civil society organisations.
- (21) On 22 September 2017, the United Nations Human Rights Council discussed the reports on Poland submitted within the framework of the third periodic review which contain recommendations on judicial independence and the rule of law.
- (22) On 25 September 2017, the Commission informed the Council on the situation of the rule of law in Poland. There was broad agreement on the fact that the Rule of Law is a common interest and a common responsibility and on the need for Poland and the Commission to engage in a dialogue in order to find a solution.
- (23) On 26 September 2017, the President of the Republic transmitted to the *Sejm* two new draft laws on the Supreme Court and on the National Council for the Judiciary.
- (24) On 3 October 2017, the *Sejm* sent the two presidential draft laws on the Supreme Court and the National Council for Judiciary for consultation to relevant stakeholders, including the Ombudsman, the Supreme Court and the National Council for the Judiciary.
- (25) On 6 and 25 October 2017, the Supreme Court published its opinions on the two new draft laws on the Supreme Court and the National Council for the Judiciary. The opinions consider that the draft law on the Supreme Court would substantially curb its independence and that the draft law on the Council for the Judiciary cannot be reconciled with the concept of a democratic state governed by the rule of law.
- (26) On 11 October 2017, the Parliamentary Assembly of the Council of Europe adopted a resolution on new threats to the rule of law in Council of Europe member States, expressing concerns also about developments in Poland, which put at risk respect for the rule of law, and, in particular, the independence of the judiciary and the principle of the separation of powers <sup>(2)</sup>.
- (27) On 13 October 2017, the European Network of Councils for the Judiciary (ENCJ) issued an opinion <sup>(3)</sup> on the new draft law on the National Council for the Judiciary, underlining its inconsistency with European standards on Councils for the Judiciary.
- (28) On 23 October 2017, following the third cycle of the Universal Periodic Review of Poland, the UN High Commissioner for Human Rights requested that the Polish authorities accept the UN recommendations on upholding judicial independence.

---

<sup>(1)</sup> K 10/17.

<sup>(2)</sup> PACE, 11 October 2017, Resolution 2188 (2017), New threats to the rule of law in Council of Europe member States: selected examples.

<sup>(3)</sup> ENCJ, 13 October 2017, Opinion of the ENCJ Executive Board on the request of the Krajowa Rada Sądownictwa (National Council for the Judiciary) of Poland.

- (29) On 24 October 2017, the Constitutional Tribunal in a panel including two unlawfully appointed judges declared the unconstitutionality of provisions of the law on the Supreme Court, on the basis of which, inter alia, the current First President of the Supreme Court had been appointed.
- (30) On 24 October 2017, the Constitutional Tribunal, in a panel comprising two unlawfully appointed judges, declared the constitutionality of provisions of the three laws on the Constitutional Tribunal of December 2016, including the provisions on the basis of which the two unlawfully appointed judges adjudicating in the case had been allowed to adjudicate in the Constitutional Tribunal. The motion of the Polish Ombudsman on recusal of the two unlawfully appointed judges from this case had been rejected by the Constitutional Tribunal.
- (31) On 27 October 2017, the United Nations Special Rapporteur for the Independence of Judges and Lawyers, Mr Diego García-Sayán, presented his preliminary observations <sup>(1)</sup>, according to which the two draft laws on the Supreme Court and the National Council for the Judiciary raise a series of concerns as regards judicial independence.
- (32) On 31 October 2017, the National Council of the Judiciary adopted an opinion on the new draft law on the National Council for the Judiciary presented by the President of the Republic. The Council observes that the draft law is fundamentally inconsistent with the Polish Constitution by providing the *Sejm* with the power to appoint judges-members of the Council and by prematurely terminating constitutionally protected terms of office of the current judges-members of the Council.
- (33) On 10 November 2017, the Consultative Council of European Judges (CCJE) adopted a statement raising concerns on the judicial independence in Poland <sup>(2)</sup>.
- (34) On 11 November 2017, the Ombudsman sent a letter to the President of the Republic comprising an assessment of the two new draft laws on the Supreme Court and on the National Council for the Judiciary and recommending that they should not be adopted as they would not guarantee that the judicial branch will remain independent from the executive branch and that citizens will be able to exercise their constitutional right to have access to an independent court.
- (35) On 13 November 2017, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) adopted an opinion on the new draft law on the Supreme Court asserting that the reviewed provisions are incompatible with international standards on judicial independence <sup>(3)</sup>.
- (36) On 15 November 2017, the European Parliament adopted a resolution on the situation of the rule of law and democracy in Poland, expressing support for the Rule of Law Recommendations issued by the Commission, as well as for the infringement proceedings, and considering that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU <sup>(4)</sup>.
- (37) On 24 November 2017, the Council of Bars and Law Societies of Europe (CCBE) called on Polish authorities not to adopt the two draft laws on the Supreme Court and on the National Council for the Judiciary as they could undermine the separation of powers guaranteed by the Polish constitution <sup>(5)</sup>. On 29 November 2017, the Organisation of Judges 'Iustitia', the Helsinki Foundation for Human Rights and Amnesty International issued a joint statement criticising the legislative procedure on the two presidential draft laws.
- (38) On 5 December 2017 the European Network of Councils for the Judiciary (ENCJ) adopted an opinion criticising the draft law on the National Council for the Judiciary for not respecting the ENCJ's standards <sup>(6)</sup>.

<sup>(1)</sup> United Nations Special Rapporteur on the independence of judges and lawyers, 27 October 2017, Preliminary observations on the official visit to Poland (23-27 October 2017).

<sup>(2)</sup> CCJE(2017)9, 10 November 2017, Statement as regards the Situation on the Independence of the Judiciary in Poland.

<sup>(3)</sup> OSCE-ODIHR, 13 November 2017, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017).

<sup>(4)</sup> European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)).

<sup>(5)</sup> CCBE, 24 November 2017, Resolution of the Plenary Session of the Council of Bars and Law Societies of Europe (CCBE).

<sup>(6)</sup> ENCJ, 5 December 2017, Opinion of the ENCJ Executive Board on the adoption of the amendments to the law on the National Council for the Judiciary.

- (39) On 8 December 2017, the Venice Commission, at the request of the Parliamentary Assembly of the Council of Europe, adopted an opinion on the draft law on the National Council for the judiciary, the draft law on the Supreme Court, and the law on the Ordinary Courts Organisation, as well as opinion on the law on the public prosecutor's office <sup>(1)</sup>. The Venice Commission has come to the conclusion that the law and the draft laws, especially taken together and seen in the context of the 2016 law on the public prosecutor's office, enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law. It calls on the President of the Republic to withdraw his proposals and start a dialogue before the procedure of legislation continues. It also urges the Polish Parliament to reconsider the recent amendments to the law on Ordinary Courts Organisation.
- (40) On 8 December 2017, the Council of Europe Commissioner for Human Rights issued a statement regretting the adoption by the *Sejm* of the laws on the Supreme Court and on the National Council for the Judiciary which would further undermine the independence of the judiciary.
- (41) On 8 December 2017, the two draft laws were adopted by the *Sejm*. On 15 December 2017, the two laws were approved by the Senate.

HAS ADOPTED THIS RECOMMENDATION:

1. The Republic of Poland should duly take into account the Commission's analysis set out hereafter and take the measures figuring in section 4 of this Recommendation so that the concerns identified are addressed within the time limit set.

#### 1. SCOPE AND OBJECTIVE OF THE RECOMMENDATION

2. The present Recommendation complements the Recommendations of 27 July 2016, 21 December 2016 and 26 July 2017. In addition to the concerns raised in these Recommendations, it raises new concerns of the Commission with regard to the rule of law in Poland which have arisen since then. The concerns relate to the following issues:
  - (a) the law on the Supreme Court, adopted by the *Sejm* on 8 December 2017;
  - (b) the law amending the law on the National Council for the Judiciary and certain other laws ('law on the National Council for the Judiciary'), adopted by the *Sejm* on 8 December 2017.
3. The concerns and the recommended actions set out in the Recommendation of 26 July 2017 relating to the Constitutional Tribunal, the law on Ordinary Court Organisation and the law on the National School of Judiciary <sup>(2)</sup> remain valid.

#### 2. THE THREATS TO JUDICIAL INDEPENDENCE

4. The law on the Supreme Court and the law on the National Council for the Judiciary contain a number of provisions which raise grave concerns as regards the principles of judicial independence and separation of powers.

##### 2.1. The Supreme Court

###### 2.1.1. Dismissal and compulsory retirement of current Supreme Court judges

5. The law on the Supreme Court lowers the general retirement age of Supreme Court judges from 70 to 65 <sup>(3)</sup>. This measure applies to all judges currently in office. Judges who attained 65 years of age, or will attain that age within 3 months from the entry into force of the law, will be retired <sup>(4)</sup>.

<sup>(1)</sup> Opinion 904/2017 CDL(2017)035 of the Venice Commission 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 ('CDL(2017)035'), and Opinion 892/2017 CDL(2017)037 of the Venice Commission on the Act on the Public Prosecutor's Office as amended ('CDL(2017)037').

<sup>(2)</sup> The law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws ('law on the National School of Judiciary').

<sup>(3)</sup> Article 37(1) of the law on the Supreme Court. This provision also applies to Supreme Administrative Court judges since Article 49 of the law of 25 July 2002 on administrative court organisation stipulates that matters related to the Supreme Administrative Court that are not governed by that act (the retirement regime is not) are governed *mutatis mutandis* by the law on the Supreme Court.

<sup>(4)</sup> Article 111(1) of the law on the Supreme Court. In addition, according to Article 111(3) of the law on the Supreme Court, all judges of the military chamber (regardless of their age) will be dismissed and retired without the possibility to ask the President of the Republic for prolongation of their active mandate.

6. By lowering the retirement age and applying it to current Supreme Court judges, the law terminates the mandate and potentially retires a significant number of current Supreme Court judges: 31 of the 83 (37 %) according to the Supreme Court. Applying such a lowered retirement age to current judges of the Supreme Court has a particular strong negative impact on this specific Court, which is composed of judges who are by nature at the end of their career. Such compulsory retirement of a significant number of the current Supreme Court judges allows for a far reaching and immediate recomposition of the Supreme Court. That possibility raises particular concerns in relation to the separation of powers, in particular when considered in combination with the simultaneous reforms of the National Council for the Judiciary. In fact: due to the lowering of the retirement age all new judges will be appointed by the President of the Republic on the recommendation of the newly composed National Council for the Judiciary, which will be largely dominated by the political appointees. A forced retirement of current Supreme Court judges also raises concerns as regards the principle of irremovability of judges, which is a key element of the independence of judges as enshrined in the case law of the Court of Justice and of the European Court of Human Rights <sup>(1)</sup>, and in European standards <sup>(2)</sup>. In its opinion on the draft law on the Supreme Court, the Venice Commission underlines that the early retirement of the currently sitting judges undermines both their security of tenure and the independence of the Court in general <sup>(3)</sup>.
7. Judges should be protected against dismissal through the existence of effective safeguards against undue intervention or pressure from other State powers <sup>(4)</sup>. Judicial independence requires guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute <sup>(5)</sup>. The irremovability of judges during their term of office is a consequence of their independence and thus included in the guarantees of Article 6(1) ECHR <sup>(6)</sup>. As a consequence, judges must only be dismissed individually, if this is justified on the basis of a disciplinary procedure concerning their individual activity and presenting all guarantees for the defence in a democratic society. Judges cannot be dismissed as a group and judges cannot be dismissed for general reasons not related to individual behaviour. The above guarantees and safeguards are lacking in the present case and the provisions concerned constitute a flagrant violation of the independence of judges of the Supreme Court and of the separation of powers <sup>(7)</sup>, and therefore of the rule of law.
8. In addition, the mandate of six years of the current First President, established in the constitution, will be prematurely terminated (constitutionally it should end in 2020). If the mandate of the First President is terminated, the appointment of an 'acting First President' by the President of the Republic will occur outside the normal procedure <sup>(8)</sup>: according to the constitution the First President should be appointed by the President of the Republic from among candidates proposed by the general assembly of the Supreme Court <sup>(9)</sup>. Such a premature termination of a constitutionally enshrined mandate constitutes a serious violation of the principle

<sup>(1)</sup> ECtHR Case *Campbell and Fell v The United Kingdom*, 28 June 1984, para 80; Case *Henryk Urban and Ryszard Urban v Poland*, 30 November 2011 (final), para 45; Case *Fruni v Slovakia*, 21 June 2011 (final) para 145; and Case *Brudnicka and others v Poland*, 3 March 2005 (final) para 41.

<sup>(2)</sup> Para 49 and 50 of the Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities ('2010 CoE Recommendation').

<sup>(3)</sup> CDL(2017)035 para 48.

<sup>(4)</sup> Judgement of 31 May 2005 in Case C-53/03 *Syfait and Others*, ECLI:EU:C:2005:333, para 31; Judgement of 4 February 1999 in Case C-103/97 *Köllensperger and Atzwanger*, ECLI:EU:C:1999:52, para 20.

<sup>(5)</sup> Judgement of 9 October 2014 in Case C-222/13 *TDC*, ECLI:EU:C:2014:2265, para 29-32; Judgement of 19 September 2006 in Case C-506/04 *Wilson*, ECLI:EU:C:2006:587, para 53; Judgement of 4 February 1999 in Case C-103/97 *Köllensperger and Atzwanger*, ECLI:EU:C:1999:52, para 20-23; Judgement of 17 September 1997 in Case C-54/96 *Dorsch Consult*, ECLI:EU:C:1997:413, para 36; Judgement of 29 November 2001 in Case C-17/00, *De Coster*, ECLI:EU:C:2001:651, para 18-21; Judgement of 13 December 2017 in Case C-403/16, *Hassani*, ECLI:EU:C:2017:960, para 40; ECtHR Case *Baka v. Hungary*, 20261/12, 23 June 2016, para 121.

<sup>(6)</sup> ECtHR Case *Campbell and Fell v The United Kingdom*, A80 (1984), 28 June 1984, para 80.

<sup>(7)</sup> The new rules contradict the principle of irremovability of judges as a key element of the independence of judges as enshrined in the 2010 CoE Recommendation (para 49). Accordingly, Supreme Court judges should have guaranteed tenure, and their mandates should not be prematurely terminated. Also decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities, and where the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice (para 44-48).

<sup>(8)</sup> According to Article 111(4) of the law on the Supreme Court the President of the Republic will entrust heading of the Supreme Court to a Supreme Court judge of his own choosing. Such an 'acting First President' will exercise their functions until the General Assembly of judges presents 5 candidates to the post of the First President of the Supreme Court (Article 12). The General Assembly of Supreme Court judges will be able to at present these candidates no sooner than at least 110 judges of the Supreme Court have been appointed.

<sup>(9)</sup> Article 183(3) of the Polish constitution stipulates that the First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.

of irremovability and security of tenure. The appointment of an acting First President according to an ad hoc procedure without involvement of the judiciary raises serious concerns as regards the principle of separation of powers.

9. According to the explanatory memorandum of the law, the recomposition of the Supreme Court is indispensable because of the way the Supreme Court handled after 1989 the 'decommunisation' cases and because there are still judges in the Court who either worked for, or adjudicated under, the previous regime <sup>(1)</sup>. The European Court of Human Rights has clearly underlined that a lustration process must be individualised (e.g. distinctions must be made between different levels of involvement with the former regime) and considers that lustration measures taking place long after the end of the communist regime may be less justified in view of the diminishing risks existing over newly created democracies <sup>(2)</sup>. There are other proportionate measures which the state could adopt in order to deal with individual judges having a communist background (which would include transparent proceedings applied in individual cases before impartial organs acting on the basis of criteria pre-established by law) <sup>(3)</sup>.
10. In its opinion on the draft law on the Supreme Court, the Venice Commission considers that it is hard to see why a person who was deemed fit to perform official duties for several more years to come would suddenly be considered unfit. The explanatory memorandum of the law may be understood as implying that, as a result of the reform, most senior judges, many of whom have served under the previous regime, would retire. If this reading is correct, such approach is unacceptable: if the authorities doubt the loyalty of individual judges, they should apply the existing disciplinary or lustration procedures, and not change the retirement age.
11. The Venice Commission concludes that the early removal of a large number of justices of the Supreme Court (including the First President) by applying to them, with immediate effect, a lower retirement age violates their individual rights and jeopardises the independence of the judiciary as a whole; they should be allowed to serve until the currently existing retirement age <sup>(4)</sup>. The Venice Commission underlines in particular that the early retirement of the currently sitting judges undermines both their security of tenure and the independence of the Court in general <sup>(5)</sup>.
12. Finally, these provisions raise constitutionality concerns. As noted by the Supreme Court and the Ombudsman, the dismissal and forced retirement of current Supreme Court judges violate the principle of judicial independence and directly affects the right to an independent court. The Ombudsman notes that the institution of an acting First President of the Supreme Court constitutes a violation of the rule of law by breaching the principle of non-assumption of competences of state powers, the principle of separation and balance of powers, and the principle of judicial independence.

#### 2.1.2. *The power to prolong the mandate of Supreme Court judges*

13. According to the law, Supreme Court judges affected by the lowered retirement age and wishing to prolong their active mandate can make a request to the President of the Republic <sup>(6)</sup>.
14. As regards the power of the President of the Republic to decide to prolong the active mandate of Supreme Court judges, there are no criteria, no time-frame for taking a decision and no judicial review provided for in the law. A judge who has asked for the prolongation is 'at the mercy' of the decision of the President of the Republic. In addition, the President of the Republic will be in position to decide *twice* on the prolongation (each time for 3 years). These elements affect the security of tenure and will allow the President of the Republic to exert influence over active Supreme Court judges. The regime is contrary to the 2010 CoE Recommendation which requires that decisions concerning the selection and career of judges should be based on objective criteria pre-established by law and that there should be an independent and competent authority drawn in substantial part

<sup>(1)</sup> Page 2 of the explanatory memorandum.

<sup>(2)</sup> ECtHR Case *Sõro v. Estonia*, 3 September 2015, para 60-62.

<sup>(3)</sup> Para 44-47 and 50 of the 2010 CoE Recommendation.

<sup>(4)</sup> Opinion CDL(2017)035 para 130.

<sup>(5)</sup> Opinion CDL(2017)035 para 48.

<sup>(6)</sup> The request is to be made via the First President of the Supreme Court who provides an opinion on a judge's request. For the prolongation of the First President's mandate, the First President needs to provide to the President of the Republic the opinion of the college of the Supreme Court. In the process of making the decision, the President of the Republic may seek a non-binding opinion of the NCJ (cf. Article 37(2) in conjunction with Article 111(1) of the law on the Supreme Court. It is noted that according to the Supreme Court's opinion, under the constitution such a decision by the President of the Republic would require a countersignature of the Prime Minister, in accordance with Article 144(1) and (2) of the Polish constitution.

from the judiciary authorised to make recommendations or express opinions which the relevant appointing authority follows in practice <sup>(1)</sup>. It also requires that judges concerned should have the right to challenge a decision relating to their career <sup>(2)</sup>.

15. The new retirement regime adversely impacts the independence of judges <sup>(3)</sup>. The new rules create an additional tool through which the President of the Republic can exert influence on individual judges. In particular, the lack of any criteria for prolongation of the mandates allow for undue discretion, undermining the principle of irremovability of judges. While decreasing the retirement age, the law allows judges to have their mandate extended by the President of the Republic for up to 6 years. Also, there is no time-frame for the President of the Republic to make a decision on the extension of the mandate, which allows the President to retain influence over the judges concerned for the remaining time of their judicial mandate. Even before the retirement age is reached, the mere prospect of having to request the President for such a prolongation could exert pressure on the judges concerned.
16. In its opinion on the draft law on the Supreme Court, the Venice Commission underlines that this power of the President of the Republic gives him excessive influence over Supreme Court judges who are *approaching* retirement age. For this reason, the Venice Commission concludes that the President of the Republic as an elected politician should not have the discretionary power to extend the mandate of a Supreme Court judge beyond the retirement age <sup>(4)</sup>.
17. The new rules also raise constitutionality concerns. According to the Supreme Court and the Ombudsman's opinions, the new mechanism of prolongation of judicial mandates does not respect the principle of legality and separation of powers.

### 2.1.3. *The extraordinary appeal*

18. The law introduces a new form of judicial review of final and binding judgements and decisions, the extraordinary appeal <sup>(5)</sup>. Within three years <sup>(6)</sup> from the entry into force of the law the Supreme Court will be able to overturn <sup>(7)</sup> completely or in part <sup>(8)</sup> any final judgement delivered by a Polish court in the past 20 years, including judgements delivered by the Supreme Court, subject to some exceptions <sup>(9)</sup>. The power to lodge the appeal is vested in, inter alia, the Prosecutor General and the Ombudsman <sup>(10)</sup>. The grounds for the appeal are broad: the extraordinary appeal can be lodged if it is necessary to ensure the rule of law and social justice and the ruling cannot be repealed or amended by way of other extraordinary remedies, and either it (1) violates the principles or the rights and freedoms of persons and citizens enshrined in the Constitution; or (2) it is a flagrant breach of the law on the grounds of misinterpretation or misapplication; or (3) there is an obvious contradiction between the court's findings and the evidence collected <sup>(11)</sup>.

<sup>(1)</sup> Para 46 and 47. This regime would also raise concerns with the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality CM(2016)36 final (at C. ii; '2016 CoE Action Plan') and CCJE benchmarks (Opinion No 1 on Standards concerning the Independence of the Judiciary and the Irremovability of Judges (para 25)).

<sup>(2)</sup> Para 48 of the 2010 CoE Recommendation.

<sup>(3)</sup> Para 49 of the 2010 CoE Recommendation.

<sup>(4)</sup> Cf. Opinion CDL(2017)035 para 51 and 130.

<sup>(5)</sup> Article 89(1) of the law on the Supreme Court.

<sup>(6)</sup> Article 115 of the law on the Supreme Court. After the three-year period the appeal would need to be lodged within five years from a moment when the judgement concerned became final and lawful and within one year if the cassation appeal has been made, unless extraordinary appeal is brought to the detriment of the defendant, in such a case the appeal can be lodged no later than one year after the ruling becomes final (or, if the cassation has been lodged, no later than six months upon the examination of the cassation; cf. Article 89(4) of the Law on the Supreme Court).

<sup>(7)</sup> If five years have elapsed since the contested ruling became final and the ruling has had irreversible legal effects or if warranted by the principles or the rights and freedoms of persons and citizens enshrined in the Constitution, the Supreme Court may confine itself to confirming that the contested ruling is in breach of the law and indicating the circumstances which led it to issue such a decision (Cf. Article 89(4) and Article 115(2) of the law on the Supreme Court).

<sup>(8)</sup> Article 91(1) of the law on the Supreme Court.

<sup>(9)</sup> Criminal cases cannot be extraordinarily appealed from to the detriment of the defendant more than one year after the ruling becomes final (or, if the cassation has been lodged, no later than six months upon the examination of the cassation); there is also no possibility of appeals against judgements establishing the nullity of a marriage, annulling a marriage or pronouncing a divorce (only in so far as one or both of the parties remarried after the ruling became final) or a decision on adoption. The extraordinary appeal cannot concern petty offences or minor tax offences; cf. Article 89(3) and 90(3) and (4) of the law on the Supreme Court.

<sup>(10)</sup> Article 89(2) of the law on the Supreme Court.

<sup>(11)</sup> Article 89(1) items 1-3 of the law on the Supreme Court.



19. This new extraordinary appeal procedure raises concerns as regards the principle of legal certainty which is a key component of the rule of law <sup>(1)</sup>. As noted by the Court of Justice, attention should be drawn to the importance, both for the EU legal order and national legal systems, of the principle of *res judicata*: ‘in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question’ <sup>(2)</sup>. As noted by the European Court of Human Rights, extraordinary review should not be an ‘appeal in disguise’, and ‘the mere possibility of there being two views on the subject is not a ground for re-examination’ <sup>(3)</sup>.
20. In its opinion on the draft law on the Supreme Court, the Venice Commission underlined that the extraordinary appeal procedure is dangerous for the stability of the Polish legal order. The opinion notes that it will be possible to reopen any case decided in the country in the past 20 years on virtually any ground and the system could lead to a situation in which no judgement will ever be final anymore <sup>(4)</sup>.
21. The new extraordinary appeal also raises constitutionality concerns. According to the Supreme Court and the Ombudsman, the law affects the principle of stability of jurisprudence and the finality of judgements <sup>(5)</sup>, the principle of protecting trust in the state and law as well as the right to have a case heard within a reasonable time <sup>(6)</sup>.

#### 2.1.4. Other provisions

22. As underlined in the opinion of the Venice Commission and of other bodies <sup>(7)</sup>, a number of other provisions in the Law on the Supreme Court raise concerns as regards the principles of judicial independence and separation of powers.
23. The new law establishes a new disciplinary regime for Supreme Court judges. Two types of disciplinary officers are foreseen: *the disciplinary officer of the Supreme Court* appointed by the College of the Supreme Court for a four-year term of office <sup>(8)</sup>, and *the extraordinary disciplinary officer appointed on a case-by-case basis by the President of the Republic* from among Supreme Court judges, ordinary judges, military court judges and prosecutors <sup>(9)</sup>. Under Polish law, only disciplinary officers can decide on the initiation of disciplinary proceedings against judges. The appointment of an extraordinary officer by the President of the Republic occurs without involvement of the judiciary and equals to a request to initiate a preliminary investigation. Appointment of an extraordinary disciplinary officer to an ongoing disciplinary proceeding excludes the disciplinary officer of the Supreme Court from that proceeding <sup>(10)</sup>. The fact that the President of the Republic (and in some cases also the Minister of Justice <sup>(11)</sup>) has the power to exercise influence over disciplinary proceedings against Supreme Court judges by appointing a disciplinary officer who will investigate the case (‘disciplinary officer’) which will exclude the

<sup>(1)</sup> ECtHR Case *Brumărescu v. Romania*, 28 October 1999, para 61; Case *Ryabikh v. Russia*, 3 March 2003, para 54 and 57; Case *Miragall Escolano and others v Spain*, 25 January 2000, para 33; also *Phinikaridou v Cyprus*, 20 December 2007 para 52.

<sup>(2)</sup> Judgement of 30 September 2003 in Case C-224/01 *Köbler*, ECLI:EU:C:2003:513, para 38.

<sup>(3)</sup> *Moreira Ferreira v. Portugal (No 2)*, 11 July 2017 (final), para 62.

<sup>(4)</sup> Opinion CDL(2017)035 para 58, 63 and 130.

<sup>(5)</sup> Both principles have been considered to be part of the rule of law by the Constitutional Tribunal; cf. judgements of the Constitutional Tribunal SK 7/06 of 24 October 2007 and SK 77/06 of 1 April 2008.

<sup>(6)</sup> Judgement SK 19/05 of 28 November 2006; SK 16/05 of 14 November 2007.

<sup>(7)</sup> In particular opinions of the Supreme Court of 6 and 23 October, and 30 November 2017, the opinion of the Ombudsman of 11 November 2017 and the OSCE-ODIHR opinion of 13 November 2017.

<sup>(8)</sup> Article 74 of the law on the Supreme Court.

<sup>(9)</sup> Article 76(8) of the law on the Supreme Court; the President of the Republic can appoint the extraordinary disciplinary officer from among prosecutors proposed by the State Prosecutor if a disciplinary case concerns disciplinary misconduct that satisfies the criteria of an intentional crime prosecuted by public indictment or of intentional tax crimes.

<sup>(10)</sup> Article 76(8) of the law on the Supreme Court.

<sup>(11)</sup> According to article 76(9) of the law on the Supreme Court, the Minister of Justice can notify the President of the Republic about the need to appoint an extraordinary disciplinary officer if there is a case of disciplinary misconduct that satisfies the criteria of an intentional crime prosecuted by public indictment or intentional tax crime. It appears that whether a case satisfies these criteria will be determined autonomously by the Minister of Justice and the President of the Republic as their decisions on appointing the extraordinary disciplinary officer cannot be appealed from.

disciplinary officer of the Supreme Court from an on-going proceeding, creates concerns as regards the principle of separation of powers and may affect judicial independence. Such concerns have also been raised in the opinions of the OSCE-ODHIR and of the Supreme Court <sup>(1)</sup>.

24. The law also removes a set of procedural guarantees in disciplinary proceedings conducted against ordinary judges <sup>(2)</sup> and Supreme Court judges <sup>(3)</sup>: evidence gathered in violation of the law could be used against a judge <sup>(4)</sup>; under certain conditions evidence presented by the judge concerned could be disregarded <sup>(5)</sup>; the time-barring for disciplinary cases would be suspended for the period of disciplinary proceedings, which means that a judge could be subject to a proceeding for an indefinite duration <sup>(6)</sup>; finally, disciplinary proceedings could continue even if the judge concerned was absent (including when the absence was justified) <sup>(7)</sup>. The new disciplinary regime also raises concerns as to its compliance with the due process requirements of Art. 6(1) ECHR which are applicable to disciplinary proceedings against judges <sup>(8)</sup>.
25. The law modifies the internal structure of the Supreme Court, supplementing it with two new chambers. A new chamber of extraordinary control and public matters will assess cases brought under the new extraordinary appeal procedure <sup>(9)</sup>. This new chamber will be composed in majority of new judges <sup>(10)</sup> and will ascertain the validity of general and local elections and examining electoral disputes, including electoral disputes in European Parliament elections <sup>(11)</sup>. In addition, a new autonomous <sup>(12)</sup> disciplinary chamber composed solely of new judges <sup>(13)</sup> will be tasked with reviewing in the first and second instance disciplinary cases against Supreme Court judges <sup>(14)</sup>. These two new largely autonomous chambers composed with new judges raise concerns as regards the separation of powers. As noted by the Venice Commission, while both chambers are part of the Supreme Court, in practice they are above all other chambers, creating a risk that the whole judicial system will be dominated by these chambers which are composed of new judges elected with a decisive influence of the ruling majority <sup>(15)</sup>. Also, the Venice Commission underlines that the law will make the judicial review of electoral disputes particularly vulnerable to political influence, creating a serious risk for the functioning of Polish democracy <sup>(16)</sup>.
26. The law introduces lay judges, to be appointed by the Senate of the Republic <sup>(17)</sup>, to proceedings before the Supreme Court concerning the extraordinary appeals and disciplinary cases examined by the Supreme Court. As observed by the Venice Commission, introducing lay judges to the two new chambers of the Supreme Court puts the efficiency and quality of justice in danger <sup>(18)</sup>.

<sup>(1)</sup> OSCE-ODHIR opinion of 13 November 2017; para 119-121; Supreme Court opinion of 6 October, page 34.

<sup>(2)</sup> According to Article 108(17)-(19) of the law on the Supreme Court, the Minister of Justice is given the power to set the number of and appoint disciplinary judges for ordinary court judges without consulting the judiciary. Additionally, the Minister of Justice would be able to personally control disciplinary cases conducted against ordinary court judges through disciplinary officers and an extraordinary disciplinary officer of the Minister of Justice appointed by himself (including under certain circumstances also from the prosecutors). Disciplinary officers appointed by the Minister of Justice would be able to reopen closed investigations at request of the Minister of Justice.

<sup>(3)</sup> According to the law, provisions enshrined in the Law on Ordinary Court Organisation including those concerning procedural aspects of disciplinary proceedings apply *mutatis mutandis* to Supreme Court judges; cf. Article 72(1) and Article 108 in conjunction with Article 10(1) of the law on the Supreme Court. The law on the Supreme Court amends in its Article 108 the law on Ordinary Courts Organisation.

<sup>(4)</sup> Article 108(23) of the law on the Supreme Court in terms of Article 11 5c added to the law on Ordinary Courts Organisation.

<sup>(5)</sup> If the evidence was presented after time prescribed, cf. Article 108(22) of the law on the Supreme Court.

<sup>(6)</sup> Article 108(13) item b of the law on the Supreme Court.

<sup>(7)</sup> Article 108(23) of the law on the Supreme Court.

<sup>(8)</sup> ECtHR Case *Vilho Eskelinen and others v Finland*, 19 April 2007 para 62; Case *Olujić v Croatia*, 5 February 2009, para 34-43; Case *Harabin v Slovakia*, 20 November 2012 para 118-124; and Case *Baka v Hungary*, 23 June 2016, para 100-119.

<sup>(9)</sup> Article 26 and Article 94 of the law on the Supreme Court.

<sup>(10)</sup> Article 134 of the law on the Supreme Court; the former chamber of labour, social security and public affairs is split into two chambers, the chamber of labour and social security and the new chamber of extraordinary control and public affairs; this new chamber will be composed by new judges as all current judges are transferred to the chamber of labour and social security; current Supreme Court judges can request a transfer to this new chamber.

<sup>(11)</sup> A full list of tasks dealt with by this chamber is found in Article 26.

<sup>(12)</sup> The president of the disciplinary chamber is autonomous *vis-à-vis* the First President of the Supreme Court and budget of that chamber can be substantially increased in comparison to the overall budget of the Supreme Court (cf. Article 7(2) and (4), and Article 20 of the law on the Supreme Court).

<sup>(13)</sup> According to Article 131 of the law on the Supreme Court, until all the judges of the Supreme Court in the Disciplinary Chamber have been appointed, other Supreme Court judges cannot be transferred to a post in that Chamber.

<sup>(14)</sup> A full list of tasks dealt with by the disciplinary chamber is found in Article 27 of the law on the Supreme Court.

<sup>(15)</sup> Opinion CDL(2017)035 para 92.

<sup>(16)</sup> Opinion CDL(2017)035 para 43.

<sup>(17)</sup> Article 61(2) of the law on the Supreme Court.

<sup>(18)</sup> Opinion CDL(2017)035 para 67.

## 2.2. The National Council for the Judiciary

27. According to the Polish Constitution the independence of judges is safeguarded by the National Council for the Judiciary <sup>(1)</sup>. The role of the National Council for the Judiciary has a direct impact on the independence of judges in particular as regards their promotion, transfer, disciplinary proceedings, dismissal and early retirement. For example, the promotion of a judge (e.g. from district court to regional court) requires the President of the Republic to once again appoint the judge, and therefore the procedure for judicial assessment and nomination involving the National Council for the Judiciary will have to be followed again. Also assistant judges who are already performing tasks of a judge must be assessed by the National Council for the Judiciary prior to their appointment as judge by the President of the Republic.
28. For this reason, in Member States where a Council for the Judiciary has been established, its independence is particularly important for avoiding undue influence from the Government or the Parliament on the independence of judges <sup>(2)</sup>.
29. The law on the National Council for the Judiciary increases the concerns regarding the overall independence of the judiciary by providing the premature termination of the mandate of all judges-members of the National Council for the Judiciary, and by establishing an entirely new regime for the appointment of its judges-members which allows a high degree of political influence.
30. According to Article 6 of the law on the National Council for the Judiciary the mandates of all the current judges-members of the National Council for the Judiciary will be terminated prematurely. This termination decided by the legislative powers raises concerns for the independence of the Council and the separation of powers. The Parliament will gain a decisive influence on the composition of the Council to the detriment of the influence of judges themselves. This recomposition of the National Council for the Judiciary could already occur within one and a half month after the publication of the law <sup>(3)</sup>. The premature termination also raises constitutionality concerns, as underlined in the opinion of the National Council for the Judiciary, of the Supreme Court and of the Ombudsman.
31. Also, the new regime for appointing judges-members of the National Council for the Judiciary raises serious concerns. Well established European standards, in particular the 2010 Recommendation of the Committee of Ministers of the Council of Europe, stipulate that 'not less than half the members of [Councils for the Judiciary] should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary' <sup>(4)</sup>. It is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary. However, where such a Council has been established, as it is the case in Poland, its independence must be guaranteed in line with European standards.
32. Until the adoption of the law on the National Council for the Judiciary, the Polish system was fully in line with these standards since the National Council for the Judiciary was composed of a majority of judges chosen by judges. Articles 1(1) and 7 of the law amending the law on the National Council for the Judiciary would radically change this regime by providing that the 15 judges-members of the National Council for the Judiciary will be

<sup>(1)</sup> Article 186(1) of the Polish Constitution: 'The National Council of the Judiciary shall safeguard the independence of the courts and judges'.

<sup>(2)</sup> For example, in the context of disciplinary proceedings against judges conducted by a Council, the European Court of Human Rights has questioned the level of influence of the legislative or executive authorities given that the Council was composed by a majority of members appointed directly by these authorities; ECtHR Case *Ramos Nunes de Carvalho E Sá v Portugal*, 55391/13, 57728/13 and 74041/13, 21 June 2016, para 77.

<sup>(3)</sup> Mandates of current judges-members would expire on the day preceding the beginning of a joint term of office of the new judges-members of the Council, but no later than 90 days from the entry into force of the law. The timeline is as follows: within three days following publication of the law, the Marshal of the *Sejm* announces the start of the nomination procedure. Within 21 days from this announcement candidates to posts of judges-members of the Council are presented to the Marshal of the *Sejm* by the authorized entities (groups of at least 25 judges or 2 000 citizens). Upon the lapse of this 21 days term, the Marshal transmits the list of candidates to parliamentary clubs which will have seven days to propose up to nine candidates from that list. Subsequently the appointment procedure according to regular provisions takes place (see below); cf. Article 6 and 7 of the law amending the law on the National Council for the Judiciary and Article 1(1), and (3) in terms of added Articles 11a and 11d of the law amending the law on the National Council for the Judiciary.

<sup>(4)</sup> Para 27; see also C item (ii) of the 2016 CoE Action Plan; para 27 of the CCJE Opinion No 10 on the Council for the Judiciary in the service of society; and para 2.3 of the ENCJ standards in 'Councils for the Judiciary' Report 2010-11.

appointed, and can be re-appointed, by the *Sejm* <sup>(1)</sup>. In addition, there is no guarantee that under the new law the *Sejm* will appoint judges-members of the Council endorsed by the judiciary, as candidates to these posts can be presented not only by groups of 25 judges, but also by groups of at least 2 000 citizens <sup>(2)</sup>. Furthermore, the final list of candidates to which the *Sejm* will have to give its approval *en bloc* is pre-established by a committee of the *Sejm* <sup>(3)</sup>. The new rules on appointment of judges-members of the National Council for the Judiciary significantly increase the influence of the Parliament over the Council and adversely affect its independence in contradiction with the European standards. The fact that the judges-members will be appointed by the *Sejm* with a three fifths majority does not alleviate this concern, as judges-members will still not be chosen by their peers. In addition, in case such a three fifths majority is not reached, judges-members of the Council will be appointed by the *Sejm* with absolute majority of votes.

33. This situation raises concerns from the point of view of the independence of the judiciary. For example, a district court judge who has to deliver a judgment in a politically sensitive case, while the judge is at the same time applying for a promotion to become a regional court judge, may be inclined to follow the position favoured by the political majority in order not to put his/her chances to obtain the promotion into jeopardy. Even if this risk does not materialise, the new regime does not provide for sufficient guarantees to secure the appearance of independence which is crucial to maintain the confidence which tribunals in a democratic society must inspire in the public <sup>(4)</sup>. Also assistant judges will have to be assessed by a politically influenced National Council for the Judiciary prior to their appointment as judge.
34. The Venice Commission concludes that the election of the 15 judicial members of the National Council of the Judiciary by Parliament, in conjunction with the immediate replacement of the currently sitting members, will lead to a far reaching politicisation of this body. The Venice Commission recommends that, instead, judicial members of the National Council for the Judiciary should be elected by their peers, as in the current Act <sup>(5)</sup>. It also observed that the law weakens the independence of the Council with regard to the majority in Parliament and contributes to a weakening of the independence of justice as a whole <sup>(6)</sup>.
35. In their opinions concerning the draft law, the Supreme Court, the National Council for the Judiciary and the Ombudsman raised a number of concerns as regards the constitutionality of the new regime. In particular, the National Council for the Judiciary notes that under the Polish constitution, the Council serves as a counterweight to the parliament which has been constitutionally authorized to decide on the content of law. The political appointment of judges-members and the premature termination of mandates of the current judges-members of the Council therefore violates the principles of separation of powers and judicial independence. As explained in the previous Recommendations, an effective constitutional review of these provisions is currently not possible.

### 3. FINDING OF A SYSTEMIC THREAT TO THE RULE OF LAW

36. For the reasons set out above, the Commission considers that the concerns expressed in the Rule of Law Recommendation of 26 July 2017 relating to the laws on the Supreme Court and the National Council for the Judiciary have not been addressed by the two new laws on the Supreme Court and the National Council for the Judiciary.
37. Furthermore, the Commission observes that none of the other concerns set out in the Recommendation of 26 July 2017 relating to the Constitutional Tribunal, the law on Ordinary Courts Organisation and the law on the National School of Judiciary have been addressed.
38. Consequently, the Commission considers that the situation of a systemic threat to the rule of law in Poland as presented in its Recommendations of 27 July 2016, 21 December 2016, and 26 July 2017 has seriously deteriorated further. The law on the National Council for the Judiciary and the law on the Supreme Court, also

<sup>(1)</sup> The Constitution stipulates that the National Council for the Judiciary is composed of ex officio members (the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a presidential appointee) and elected members. The elected members consist of four deputies 'chosen by the *Sejm*', two senators 'chosen by the *Senate*' and 15 judges ('chosen from amongst' the common, administrative and military courts and the Supreme Court).

<sup>(2)</sup> Article 1(3) of the law on the National Council for the Judiciary adding an Article 11a(2) and (3): it is noted that each group (of judges and of citizens) may lodge more than one nomination for a judge-member of the Council.

<sup>(3)</sup> If parliamentary clubs do not present, in total, 15 candidates, the Presidium of the *Sejm* will choose them in order to create a list of 15 candidates which is then transmitted to the *Sejm* committee (cf. Article 1(3) adding Article 11c and Article 11d(1)-(4)).

<sup>(4)</sup> ECtHR Cases *Morice v France*, 29369/10, 23 April 2015, para 78; *Cyprus v. Turkey*, 25781/94, 10 May 2001, para 233.

<sup>(5)</sup> Opinion CDL(2017)035 para 130.

<sup>(6)</sup> Opinion CDL(2017)035 para 31.

in combination with the law on the National School of Judiciary, and the law on the Ordinary Courts Organisation significantly increase the systemic threat to the rule of law as identified in the previous Recommendations. In particular:

- (1) the compulsory retirement of a significant number of the current Supreme Court judges combined with the possibility of prolonging their active judicial mandate, as well as the new disciplinary regime for Supreme Court judges, structurally undermine the independence of the Supreme Court judges, whilst the independence of the judiciary is a key component of the rule of law;
  - (2) the compulsory retirement of a significant number of the current Supreme Court judges also allows for a far reaching and immediate recomposition of the Supreme Court. That possibility raises concerns in relation to the separation of powers, in particular when considered in combination with the simultaneous reforms of the National Council for the Judiciary. In fact all new Supreme Court judges will be appointed by the President of the Republic on the recommendation of the newly composed National Council for the Judiciary, which will be largely dominated by the political appointees. As a result, the current parliamentary majority will be able to determine, at least indirectly, the future composition of the Supreme Court to a much larger extent than this would be possible in a system where existing rules on the duration of judicial mandates operate normally – whatever that duration is and with whichever state organ the power to decide on judicial appointments lies;
  - (3) the new extraordinary appeal procedure raises concerns in relation to legal certainty and, when considered in combination with the possibility of a far reaching and immediate recomposition of the Supreme Court, in relation to the separation of powers;
  - (4) the termination of the mandate of all judges-members of the National Council for the Judiciary as well as the reappointment of its judges-members according to a process which allows a high degree of political influence, equally are a serious case for concern;
  - (5) the new laws raise serious concerns as regards their compatibility with the Polish Constitution as underlined by a number of opinions, in particular from the Supreme Court, the National Council for the Judiciary and the Ombudsman. However, as explained in the Rule of Law Recommendation of 26 July 2017, an effective constitutional review of these laws is no longer possible.
39. The Commission underlines that whatever the model of the justice system chosen, the rule of law requires to safeguard the independence of the judiciary, separation of powers and legal certainty. It is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary the role of which is to safeguard judicial independence. However, where such a Council has been established by a Member State, as it is the case in Poland where the Polish Constitution has entrusted explicitly the National Council for the Judiciary with the task of safeguarding judicial independence, the independence of such Council must be guaranteed in line with European standards. It is with great concern that the Commission observes that as a consequence of the new laws referred to above, the legal regime in Poland would no longer comply with these requirements.
40. Moreover, actions and public statements against judges and courts in Poland made by the Polish Government and by members of Parliament from the ruling majority have damaged the trust in the justice system as a whole. The Commission underlines the principle of loyal cooperation between state organs which is, as highlighted in the opinions of the Venice Commission, a constitutional precondition in a democratic state governed by the rule of law.
41. Respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States.
42. The proper functioning of the rule of law is also essential in particular for the seamless operation of the Internal Market because economic operators must know that they will be treated equally under the law. This cannot be assured without an independent judiciary in each Member State.
43. The Commission notes that a wide range of actors at European and international level have expressed their deep concern about the two new laws on the Supreme Court and the National Council for the Judiciary, in particular the Venice Commission, the United Nations Special Rapporteur for the Independence of Judges and Lawyer, the OSCE Office for Democratic Institutions and Human Rights and the representatives of the judiciary across Europe, including the Consultative Council of European Judges, European Network of Councils for the Judiciary and the Council of Bars and Law Societies of Europe.

44. In its resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland, the European Parliament stated that it is deeply concerned at the redrafted legislation relating to the Polish judiciary and called on the Polish President not to sign new laws unless they fully guarantee the independence of the judiciary.

#### 4. RECOMMENDED ACTION

45. The Commission recommends that the Polish authorities take appropriate action to address the systemic threat to the rule of law identified in section 2 as a matter of urgency.
46. In particular, the Commission recommends that the Polish authorities take the following actions with regard to the newly adopted laws in order to ensure their compliance with the requirements of safeguarding the independence of the judiciary, of separation of powers and of legal certainty as well as with the Polish Constitution and European standards on judicial independence:
- (a) ensure that the law on the Supreme Court is amended so as to:
    - not apply a lowered retirement age to the current Supreme Court judges;
    - remove the discretionary power of the President of the Republic to prolong the active judicial mandate of the Supreme Court judges;
    - remove the extraordinary appeal procedure;
  - (b) ensure that the law on the National Council for the Judiciary is amended so that the mandate of judges-members of the National Council for the Judiciary is not terminated and the new appointment regime is removed in order to ensure election of judges-members by their peers;
  - (c) refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.
47. In addition, the Commission recalls that none of the following actions, recommended in its Recommendation of 26 July 2017, relating to the Constitutional Tribunal, the law on Ordinary Courts Organisation and the law on the National School of Judiciary have been taken and therefore reiterates its recommendation to take the following actions:
- (d) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed and by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected;
  - (e) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016;
  - (f) ensure that the law on Ordinary Courts Organisation and on the National School of Judiciary is withdrawn or amended in order to ensure its compliance with the Constitution and European standards on judicial independence; concretely, the Commission recommends in particular to:
    - remove the new retirement regime for judges of ordinary courts, including the discretionary power of the Minister of Justice to prolong their mandate;
    - remove the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts and remedy decisions already taken;
  - (g) ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence and is prepared in close cooperation with the judiciary and all interested parties.
48. The Commission underlines that the loyal cooperation which is required amongst the different state institutions in rule of law related matters is essential in order to find a solution in the present situation. The Commission also encourages the Polish authorities to implement the opinions of the Venice Commission on the law on the National Council for the Judiciary, the law on the Ordinary Courts Organisation and the law on the Supreme Court as well as to seek the views of the Venice Commission on any new legislative proposal aiming to reform the justice system in Poland.

49. The Commission invites the Polish Government to solve the problems identified in this Recommendation within three months of receipt of this Recommendation, and to inform the Commission of the steps taken to that effect.
50. The present Recommendation is issued at the same time as the reasoned proposal presented by the Commission in accordance with Article 7(1) TEU regarding the rule of law in Poland. The Commission is ready, in close consultation with the European Parliament and the Council, to reconsider that reasoned proposal, should the Polish authorities implement the recommended actions set out in the present Recommendation within the time prescribed.
51. On the basis of this Recommendation, the Commission is ready to pursue a constructive dialogue with the Polish Government.

Done at Brussels, 20 December 2017.

*For the Commission*  
Frans TIMMERMANS  
*First Vice-President*

---