

PERMANENT MISSION  
OF THE REPUBLIC OF POLAND  
TO THE UNITED NATIONS OFFICE  
AT GENEVA



MISSION PERMANENTE  
DE LA REPUBLIQUE DE POLOGNE  
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A GENEVE

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The Permanent Mission of the Republic of Poland to the United Nations Office and other Organizations at Geneva presents its compliments to the Office of the UN High Commissioner for Human Rights.

With reference to the communication sent by Mr Diego García-Sayán, Special Rapporteur on the independence of judges and lawyers, on July 26<sup>th</sup>, 2017, the Permanent Mission of the Republic of Poland has the honour to transmit the Polish Government response to the Special Rapporteur questions about recent legislative changes to Poland's judiciary.

The Permanent Mission of the Republic of Poland avails itself of this opportunity to renew to the Office of the UN High Commissioner for Human Rights the assurances of its highest consideration.



Geneva, 29 August 2017

Special Procedures Branch  
Office of the UN High Commissioner for Human Rights  
Geneva

### **The Polish Government information concerning judicial reforms in Poland**

Further to the questions about recent legislative changes to Poland's judiciary which were asked by the Special Rapporteur on the independence of judges and lawyers, Mr Diego García-Sayán, and communicated by the Office of the High Commissioner for Human Rights to the Ministry of Foreign Affairs on 26 July 2017, please find below replies prepared by the Ministry of Justice:

1. Please provide any additional information and comments which you may have on the above mentioned allegations.
2. Please provide detailed information on how the recently adopted law on the common courts complies with international human rights instruments, as well as Poland's Constitution, with regard to judicial independence.

It should be noted that the National Council of the Judiciary (NCJ) fulfils no judicial functions, nor does it administer justice. This is clearly laid down in Article 175 (1) of the Polish Constitution, which stipulates, "The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts." The NCJ is not included in this catalogue because under Article 186 (1) of the Polish Constitution, it is a body which is separate from the judicial branch, and whose task is to safeguard the independence of courts and judges. In Poland, it is not up to the NCJ to settle court disputes or deliver judgements about citizens' rights and duties; in contrast to certain other legal systems, it does not play the role of a disciplinary body/court either. The NCJ's powers are relatively limited compared with similar councils in other countries.

The question of whether the election by Parliament of judges to serve as council of the judiciary members politicizes such body and makes it susceptible to outside pressures was indirectly examined by the European Court of Human Rights (ECtHR) in connection with Article 6 of the European Convention on Human Rights. One may refer to the case of *Olujić v. Croatia*, on which the ECtHR delivered its judgment on 5 May 2009. The applicant was the First President of the Supreme Court of Croatia, and a member of the country's National Judicial Council. By decision of this Council, which was acting in the capacity of a disciplinary court, he was deprived of his post and removed from the judicial office for disciplinary offences. In the case in question, the ECtHR examined (at the stage of admissibility of the application) whether a judicial council adjudicating as a disciplinary court can be treated as a court or tribunal within the meaning of Article 6 of the Convention. Ultimately, the Court found that for the purposes of Article 6 of the Convention, a judicial council, as a tribunal, need not be part of the judiciary, and that it is sufficient for it to meet the functional criteria of a court. In such a case, the body in question must meet a number of conditions set out in Article 6 of the Convention, including independence (especially from the executive branch) and impartiality; procedural guarantees must also be

safeguarded. In paragraph 38 of the aforementioned judgment, the ECtHR clearly states that in order to establish whether a tribunal is independent regard must be had, among other things, to the manner of appointment of its members, their term of office, and the existence of guarantees against outside pressures. When considering the independence of Croatia's National Judicial Council, the ECtHR took into account the fact that under the legal system subject to assessment, members of Croatia's National Judicial Council were elected by Parliament for an eight-year term of office, and that they could be dismissed in the circumstances and in compliance with the procedure set out by the law on the council's functioning (the existence of such circumstances was pronounced by one of the houses of Parliament, see paragraph 40 of the judgment). The ECtHR also took note of such issues as the judicial council's budgetary independence (paragraph 39 of the judgment). The Court found that in conducting disciplinary proceedings and deciding whether to remove a judge from office, Croatia's National Judicial Council acted as a court or tribunal within the meaning of Article 6 of the Convention. Most importantly, it confirmed that this was the way it treated a judicial council elected by Parliament. Thus the Court considered the aspect of council members' election by Parliament, but in finding a violation of Article 6 of the Convention it did so for totally different reasons.

Another point that should be stressed is the fact that the current procedures for electing NCJ members do not guarantee a proper representation on the NCJ of the lowest-ranking judges, in particular those from district courts. Judges themselves have also pointed out the lack of a democratic system of electing NCJ members. In its resolution no 4 of 26 February 2014, the Meeting of Representatives of Regional Judges' Assemblies drew attention to the fact that "the multi-stage process of selecting members of the National Council of the Judiciary includes undemocratic curial elections which employ voter qualification on the basis of official positions." In the resolution in question the judges stress that the law "favours appellate judges who number 500 and have two representatives, whereas regional and district judges whose total number stands at around nine thousand have eight such representatives." The resolution states that the laws in force "divide the judicial community." The lack of transparency of NCJ activities in procedures to appoint judges was also quoted in the resolution of 6 November 2015 adopted by the Assembly of Judges of the Przemysl Regional Court, which accused the NCJ of completely ignoring the opinions of judges in the appointment process. The Iustitia Polish Judges Association has also repeatedly highlighted the need to ensure democratic procedures of electing NCJ members, so that judges of all instances, especially those at the lowest level, will be guaranteed a genuine representation that is proportional to their number. Members of the Association argued that the system in place today weakens the position of district judges in the bodies of judicial self-government, for which there is no justification. Although the inconsistency of the

regulations in force with the Polish Constitution was explicitly signalled to the NCJ by the judges (in the aforementioned resolution of 26 February 2014, the Meeting of Representatives of Regional Judges' General Assemblies requested the NCJ to submit a relevant motion to the Constitutional Tribunal), the NCJ found no grounds to put forward such a motion (resolution no WOK 401-17/14 of 31 July 2014).

Notwithstanding the above, it should be noted that compared with its original content, the bill was substantially modified in the course of parliamentary work. Thus, according to the new wording of Art. 11 and 12 of the NJC Law, the Sejm could choose judge members of the NJC only from among the judges who were earlier nominated by legal practitioners: associations of judges or prosecutors, statutorily in charge of representing their respective professions, a group of at least 25 judges or prosecutors, the Polish Bar Council, the National Council of Legal Advisers or the National Council of Notaries. The foregoing adds weight to the claim that the allegations of this body becoming politicized are groundless in the light of the influence that the legal profession, in particular judicial professional bodies, has in appointing candidates to the NJC.

It should be furthermore noted that the amendment to NJC laws did not come into force, having been referred by the President to the Sejm pursuant to Art. 122(5) of the Polish Constitution (i.e. vetoed).

As to the other two laws in question – amendments to the Law on Common Courts and the Law on the Supreme Court – it should be first and foremost noted that they were submitted to the Sejm as MPs initiatives, although they essentially have the government's support.

As the question does not feature any in-depth analysis to demonstrate the essence of criticism levelled at the laws, it is difficult to take a detailed position on the sweeping statements expressing concern over the principle of tri-partite separation of powers, judicial independence or the influence of the executive on the judiciary.

Addressing briefly the above issues in the context of the amendment to the Law on Common Courts it should be argued that it does not seem to be in breach of any domestic or international norms of judicial independence. Leaving aside the broadly supported regulations which aim to streamline the courts' functioning and ensure mechanisms allowing more efficient judicial activities, what seems to raise reservations is the extension of the Minister of Justice's powers over appointing and dismissing court presidents and their deputies. However, the Minister of Justice's authority over court presidents applies only to their administrative work, without any interference in their jurisdictional roles. In its judgement dated 7 November 2013 in case K 31/12, the Constitutional Tribunal held that the courts' administrative activities may fall under the Minister of Justice's supervision provided that the principle of separation and balance of powers is observed.

It should also be borne in mind that the amendment to the Law on Common Courts provides for a significant limitation of the court president's authority over judges, by introducing the principle of random allocation of cases without the president's ability to influence such allocation, which considerably restricts the judicial administration's leeway in controlling how the cases are allocated and eliminates uneven workloads for judges, thus strengthening the constitutional guarantee of the case being examined by an impartial and independent court. At the same time the law limited the possibilities for transferring judges between divisions within courts, which restricts the court president's power to influence the judges in a court he or she manages.

Importantly, as regards the Minister of Justice's influence in appointing and dismissing court presidents, it must be recalled that in May 2004, that is when the Republic of Poland was entering the EU, the Minister of Justice under Art. 27 of the Law on Common Courts had the right to dismiss a court president after consulting the National Council of the Judiciary, such opinion being non-binding, i.e. court presidents enjoyed a lower standard of protection from being dismissed than that which is currently provided for in the amendment to the Law on Common Courts.

As regards the Law on the Supreme Court it should be pointed out that the claim that its provisions will force Court judges to resign (step down) from the functions they hold at this Court remains nothing but unsubstantiated. Adopted by Parliament (and vetoed by the President, just like the amendment to the Law on the National Council of the Judiciary), the Law on the Supreme Court introduces a systemic change to this Court's organisation and functioning, while according to Art. 180(5) of the Polish Constitution, in the case of a reorganization of the court system a judge may be assigned to another court or retired with his or her full remuneration retained. To the extent specified above, the law fully meets constitutional standards. It is worth recalling that the essence of judicial independence is embodied in, among others, the guarantee of judicial irremovability from office and of appropriate benefits after retirement, which is something that the Law on the Supreme Court does not violate, as it stipulates retirement in the case of reorganization of the court system with full remuneration retained. The goal of judicial independence is to ensure the parties the right to a fair trial before an impartial court, and not to guarantee judges any powers or privileges.

3. Please provide detailed information on the measures adopted by the Polish Government to ensure that any future amendments to the law on the Supreme Court and the law on the National Council of the Judiciary comply with international human rights standards, as well as the fundamental principles of the independence of the judiciary and separation of powers.

Considering the principle of the tri-partite separation of powers, the Government has no means of taking definitive measures that could ensure a specific direction of legal solutions adopted by Parliament in the future with respect to the functioning of the judiciary. The Government side may take part in legislative work on bills sponsored by MPs and present its position while respecting the need to observe the principle of the tri-partite separation of powers; however, the Government has no powers to impose final legal solutions to be adopted by the legislator.