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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

POLAND

**JOINT OPINION OF THE VENICE COMMISSION AND THE
DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF LAW
(DGI)**

ON

**EUROPEAN STANDARDS REGULATING
THE STATUS OF JUDGES**

**Adopted by the Venice Commission
at its 140th Plenary Session
(Venice, 11-12 October 2024)**

On the basis of comments by

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I. Introduction

1. By letter of 10 July 2024, the Minister of Justice of Poland, Mr Adam Bodnar, requested an opinion by the Venice Commission focusing on four questions relating to European standards regulating the status of judges. The Commission decided to prepare the present opinion jointly with the Directorate General Human Rights and Rule of Law of the Council of Europe (“DGI”).
2. Mr Martin Kuijer, Mr Richard Barrett, Mr Philip Dimitrov, Ms Angelika Nussberger, and Mr Kaarlo Tuori acted as rapporteurs on behalf of the Venice Commission. Mr Gerhard Reissner acted as a rapporteur on behalf of DGI.
3. In view of the abstract nature of the questions raised by the opinion, no country visit took place in the framework of the preparation of the opinion.
4. The Rapporteurs have received numerous spontaneous communications from various stakeholders in Poland about the situation of the judiciary, demonstrating an interest to be consulted.
5. This opinion was drafted on the basis of comments by the rapporteurs. The draft opinion was examined at the joint meeting of the Sub-Commissions on the Judiciary and on the Rule of Law on 10 October 2024. Written comments from the Ministry of Justice were received on 10 October 2024. Following an exchange of views with Mr Adam Bodnar, Minister of Justice of Poland, it was adopted by the Venice Commission at its 140th Plenary Session (Venice, 11-12 October 2024).

II. Scope of the opinion

6. In his request, the Minister of Justice put the following questions to the Commission:
 - Can resolutions of the National Council of the Judiciary regarding the appointment of judges be invalidated *ex tunc*, thereby implying that the appointee was never legally appointed? Would it align with the principle of the rule of law to require judges and other legal professionals to return to their previous positions following the invalidation of such resolutions?
 - Do such appointees have the right to seek judicial recourse? Is allowing these appointees to participate in new judicial selection processes, subject to judicial review, sufficient to ensure their right to a fair trial?
 - Is the system of delegating judges to the courts where they served prior to the enactment of the law, until they complete their pending cases, and for a period of two years, consistent with the principles of rule of law and legal certainty to maintain judicial efficiency during the re-evaluation period?
 - Lastly, is it consistent with the principles of legal certainty and rule of law to allow parties who questioned a judge's impartiality or independence, based on their appointment by the current Council, to challenge the judgments issued by these judges?
7. In his letter, the Minister referred to different models of solutions concerning the status of the judges who were appointed in a procedure involving the National Council of the Judiciary (hereafter “NCJ”) as constituted under the 2017 Amending Act and the validity of the decisions adopted with their participation. The Commission will not comment on any proposed model. The present opinion focuses on responding to the questions put in the request, based on the parameters applied by the Venice Commission in line with European standards.

III. Background of the opinion

8. In 1989, the NCJ was introduced into the Polish judicial system. According to Article 186 of the Polish [Constitution](#), the function of the NCJ is to “safeguard the independence of courts and

judges”. Following parliamentary elections in Poland in October 2015, far-reaching judicial reforms were carried out. These reforms also affected the NCJ and were previously analysed by the Venice Commission in 2017.¹ The Commission reached the conclusion that the reforms “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”.² In subsequent case-law of the Court of Justice of the European Union (hereafter “CJEU”)³ and the European Court of Human Rights (hereafter “ECtHR”),⁴ the NCJ in its new composition was deemed to be no longer an independent and impartial body which had led to defects in the procedures for appointment of judges. The ECtHR concluded that the participation of judges whose appointment is affected by the procedural deficiencies in judicial decision-making may violate the right to a fair trial under Article 6 of the European Convention on Human Rights (hereafter “ECHR”). Likewise, the CJEU found such regression to be in violation of EU law.⁵

9. Following the parliamentary elections held in October 2023, a new government was elected in December 2023. The current government announced an Action Plan aimed at restoring the rule of law in Poland.⁶ One of the key measures included in this Action Plan is the issue of the status of judicial nominations made on the recommendation of the NCJ in the years 2018-2023. As noted in the Urgent Joint Opinion of the Venice Commission and DGI on the draft law amending the Law on the National Council of the Judiciary of Poland,⁷ the overall number of judges appointed after 2017 ranges from 20% to 30% of the Polish judiciary (between 2,500 and 3,500 out of approximately 10,000 judges).

IV. The scope of the international obligations arising from the execution of ECtHR judgments in respect of Poland

10. The issue of how to deal with judges who have been appointed via a deficient procedure has to be seen first and foremost against the background of the obligation by Poland to execute the judgments of the ECtHR.⁸ It is highly sensitive as it affects *inter alia* the security of tenure of those judges (security of tenure is not only protected at the international level but also by Article 180 of the Polish Constitution).

11. In its pilot judgment in the case of *Wałęsa v. Poland*,⁹ the ECtHR concluded that the scope of the international obligation is not limited to a reform of the deficient NCJ, but also extends to “address the status of all judges appointed in the deficient procedure”.¹⁰ The ECtHR agreed with

¹ Venice Commission, [CDL-AD\(2017\)031](#), Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts. See also: Venice Commission, [CDL-AD\(2020\)017](#), Poland - Urgent Joint Opinion of the Venice Commission and the 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.

² [CDL-AD\(2017\)031](#) op. cit. para. 129.

³ See its preliminary ruling on 19 November 2019 in the case A.K. (Independence of the Disciplinary Chamber of the Supreme Court) ([C-585/18](#), C-624/18, C-625/18); its Grand Chamber judgment on 15 July 2021 in the case of Commission v. Poland (Disciplinary regime for judges) ([C-791/19](#)); and its Grand Chamber judgment on 5 June 2023 in the case of ([C-204/21](#)). See also the case *Repubblica* of 20 April 2021 ([C-896/19](#)).

⁴ See *inter alia*: ECtHR [GC], 15 March 2022, [Grzęda v. Poland](#) appl. no 43572/18; ECtHR 3.2.2022, [Advance Pharma sp. z o.o v. Poland](#) appl. no 1469/20; ECtHR 08.11.2021, [Dolińska-Ficek and Ozimek v. Poland](#) appl. no 49868/19 and 57511/19; ECtHR 22.07.2021 [Reczkowicz v. Poland](#), appl. no 43447/19.

⁵ In its judgement [C-896/19](#) *Repubblica* of 20.4.2021.

⁶ See *Polish Minister of Justice presents Action Plan for restoring the rule of law*, 21 February 2024, <https://www.gov.pl/web/justice/polish-minister-of-justice-presents-action-plan-for-restoring-the-rule-of-law>

⁷ Venice Commission, [CDL-AD\(2024\)018](#), Poland – Urgent Joint Opinion on the draft law amending the law on the National Council of the Judiciary, para. 42.

⁸ *Ibid.*, paras. 29-32.

⁹ ECtHR [GC], [Wałęsa v. Poland](#), 23 November 2023, appl. no. 50849/21.

¹⁰ The ECtHR endorsed the indications as to the general measures given by the Committee of Ministers in the decision adopted at its 1468th meeting on 5-7 June 2023, whereby it exhorted Poland to take measures to “(i) restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary

the Polish Supreme Court's resolution of its joined Chambers of 23 January 2020 that the effects of the lack of independence of the reformed NCJ vary depending on the type of court and its position within the judiciary,¹¹ most adversely affecting the appointments to the Supreme Court. The ECtHR stressed that Poland is under an international obligation to take "rapid action".

12. The ECtHR has not determined how to "address" the status of those judges. The obligation under Article 46 of the ECHR does, in principle, not entail an international obligation to choose a particular solution.¹² Poland is – under the system of the ECHR – free to choose the means by which it will discharge its obligations arising from the execution of the Court's judgments, as long as those means themselves are compatible with the ECHR and the overall requirements of the rule of law.¹³ The Venice Commission and DGI will therefore try to identify these rule of law requirements to offer further guidance to the authorities.

V. Urgent Joint Opinion of the Venice Commission and DGI on the draft law amending the Law on the National Council of the Judiciary of Poland (hereafter "the 2024 Urgent Opinion")

13. According to the 2024 Urgent Opinion, the concerns regarding the independence and impartiality of the deficiently appointed judges stem solely from procedural flaws in their appointment or promotion and therefore "*the wholesale blanket exclusion of such a large cohort of judges lacks individual assessment, and thus raises questions of proportionality*".¹⁴ Furthermore, the Commission and DGI called for a careful approach in this matter because it could have tremendous implications as regards the validity of judicial decisions that have been taken by those judges.¹⁵

14. The Commission and DGI recalled in the 2024 Urgent Opinion that they have accepted exceptions to the principle of irremovability in the case of a significant improvement of the overall system in order not to paralyse the necessary reform efforts. They have thus promoted a case-by-case assessment of the purpose, effects and circumstances of an early ending of the mandate. Referring to ECtHR case-law, they stressed that exceptions may be required as "*upholding those principles at all costs ... may in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary. ... a balance must therefore be struck in such instances to determine whether there is a pressing need – of a substantial and compelling character – justifying a departure from the principle of legal certainty ... and from the principle of irremovability of judges, as relevant, in the particular circumstances of a case*".¹⁶

15. The Commission and DGI stated that "*the requirement of security of tenure can only apply when the relevant appointment, nomination or election was made in compliance with the Constitution and with European standards. To hold otherwise would mean that it would be possible for a government to disregard or circumvent the constitutional provisions on appointment and subsequently invoke the constitutional principle of security of tenure to make such appointment irreversible, a situation which would defeat the rule of law*".¹⁷

16. As the 2024 Urgent Opinion concerned the NCJ which was at the heart of many other (consequential) flaws in the rule of law in Poland, it did not favour any 'gradual corrections of the

to elect judicial members of the NCJ; (ii) address the status of all judges appointed in the deficient procedure involving the NCJ as constituted under the 2017 Amending Act and of decisions adopted with their participation; and (iii) ensure effective judicial review of the NCJ's resolutions proposing judicial appointments to the President of Poland, including the Supreme Court".

¹¹ ECtHR [Advance Pharma sp. z o.o v. Poland](#) op.cit, para. 365.

¹² See also para. 332 of the Wałęsa judgment in this respect.

¹³ [CDL-AD\(2024\)018](#) op.cit., para. 31.

¹⁴ Ibid, para. 43.

¹⁵ Ibid, para. 45.

¹⁶ Ibid, para. 57.

¹⁷ Ibid, para. 60.

flawed system'.¹⁸ With regard to the NCJ, it was understood that the 'phasing out' of inappropriate elements in the system would lead to a continued and aggravated rule of law crisis in the country.

VI. Preliminary remarks

17. The Venice Commission and DGI note that there seems to have been no comparable situations in the past. They wish to stress that the restoration of the rule of law should not itself cause a breakdown of the system and should not itself infringe the principles of the rule of law.

18. While acknowledging that there is no international obligation to choose a *particular* solution, the Venice Commission and DGI are of the opinion that any arrangement would need to comply with the following parameters:

- (a) it needs to address the status of "all" judges appointed in the deficient procedure (as required by the jurisprudence of the ECtHR);¹⁹
- (b) an assessment of the effects of the deficient procedure in respect of the office holder concerned should not be conducted by a government-controlled body (and if it is not conducted by a judicial body, some form of judicial review should be available);²⁰
- (c) the assessment needs to be conducted on the basis of pre-established criteria and procedures (including fair trial elements);²¹
- (d) the assessment and the consequences following that assessment should always be strictly in line with the principle of proportionality requiring at least some form of individual assessment;²² and
- (e) the mechanism needs to be suitable for a fairly rapid settlement of the issue.

19. In the view of the Ministry of Justice, "a form of individual assessment is not necessary to determine the status of a judge, as all appointments suffer from the same defect related to the conduct of the nomination process despite the absence of a proposal coming from a body provided for in the Constitution of the Republic of Poland. The individual assessment is referred to the legal situation in which the individual candidates seeking appointment to the office of judge found themselves. The analysis of the situation of these persons justifies their grouping into several categories."

20. The Venice Commission and DGI consider that some form of assessment by reference to cohorts of appointments including, where necessary, individual circumstances of appointment or promotion, would be needed (hereafter "some form of individual assessment"). Such an approach would also help avoiding a long-lasting paralysis of the judicial system.

¹⁸ Ibid, para. 61.

¹⁹ See para. 11 in relation to ECtHR [GC], *Wałęsa v. Poland* op. cit.

²⁰ ECtHR [GC], *Ramos Nunes de Carvalho e Sá v. Portugal*, 6 November 2018, appl. nos. 55391/13, 57728/13 and 74041/13), para. 132. Venice Commission, [CDL-AD\(2019\)024](#), Armenia – Joint Opinion of the Venice Commission and DGI, on the amendments to the Judicial Code and some other Laws, para. 34 et seq.

²¹ Venice Commission, [CDL-AD\(2021\)018](#), Ukraine – Urgent Joint Opinion of the Venice Commission and the DGI on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068), paras. 37 and 61.

²² Venice Commission, [CDL-AD\(2021\)046](#), Republic of Moldova – Joint Opinion of the Venice Commission and the DGI on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts, para. 29.

VII. Analysis

A. **1st question: Can resolutions of the National Council of the Judiciary regarding the appointment of judges be invalidated *ex tunc*, thereby implying that the appointee was never legally appointed? Would it align with the principle of the rule of law to require judges and other legal professionals to return to their previous positions following the invalidation of such resolutions?**

1. Principle of separation of powers

21. The Venice Commission and DGI wish to stress that to declare a judicial appointment as non-valid equates/amounts to a decision to dismiss a judge. Such decisions are in the jurisdiction of the judiciary, as part of judicial independence. The potential invalidation of a judicial appointment therefore raises questions of principle regarding the balance of state powers between the legislature and the judiciary.²³ The Venice Commission and DGI note that Article 180 of the Polish Constitution includes the requirement of a court judgement to dismiss a judge on legal grounds as an exception from the principle that judges should not be removable.

22. The Venice Commission and DGI consider that it cannot be declared through a law that all the relevant appointments made by the NCJ in the particular timeframe are null and void, as this would represent an undue interference with the competence of the judiciary. In the view of the Commission and DGI, depriving the status of a judge through law would prevent the appointees from the right to seek judicial review against the invalidation of their nomination (see question 2). Parliament could in principle, on the basis of an acknowledged or declared constitutional invalidity of these appointments by a judicial body, legislate to deal with the consequences of this invalidity. However, a law could not constitute the act of invalidation itself, as that would be tantamount to a dismissal of the judges, which is not in the competence of parliament.

2. Existing judgments of European and domestic courts

23. In the opinion of the Venice Commission and DGI, it is important to clarify whether or not the resolutions of the NCJ regarding the appointment of judges were actually invalidated with an *ex tunc* effect, by either the judgments of the ECtHR or the CJEU, or by judgments of the Polish apex courts.

24. As concerns the judgments of the ECtHR in the cases of *Reczkowicz*, *Dolińska-Ficek* and *Ozimek*, *Advance Pharma Sp. z o.o.* and the pilot judgment in the case of *Wałęsa*,²⁴ the Commission and DGI note that the ECtHR found violations of the right to “a tribunal established by law” under Article 6 of the ECHR, due to the fact that the judges that dealt with the applicants’ cases had been appointed “*in an inherently deficient procedure*”, on the motion of the NCJ which, after March 2018, lacked independence from the legislature and the executive as a result of the 2017 reform. Yet, the judgments of the ECtHR do not have a direct effect within the legal system of the member States. They are binding under Article 46 of the ECHR and must be implemented by the respondent State, but through a procedure which is to be decided by that State. The same is true for the decisions of the Committee of Ministers: they have no direct effect within the member State’s legal system. On the contrary, there is always a leeway for the State on how to implement the Court’s judgments.

25. The Venice Commission and DGI also stress that the judgments of the CJEU do not have an automatically invalidating effect within the Polish national legal system.

²³ Venice Commission, [CDL-AD\(2016\)007](#) - Rule of Law Checklist.

²⁴ Op.cit.

26. As concerns the rulings of the Polish Supreme Court and the Polish Supreme Administrative Court, the Commission and DGI note the following. The judgment of the Supreme Court passed on 5 December 2019²⁵ ruled that the NCJ had not been an authority that was impartial and independent from the legislative and executive powers. While this judgment might be interpreted as an invalidation of the resolutions on appointments taken by the NCJ, it should be noted that the 2019 ruling did not explicitly name individual resolutions of the NCJ, nor did it explicitly state that these resolutions were invalidated.

27. Similarly, the joint resolution of the Supreme Court on 23 January 2020²⁶ in the composition of three joined Chambers does not claim effect on the validity of a concrete appointment. This also applies *mutatis mutandis* to the judgments of the Supreme Administrative Court. Therefore, there do not seem to exist sufficiently solid arguments to conclude that the resolutions of the NCJ concerning the appointment of judges were invalidated *ex tunc*.

28. The Venice Commission and DGI are therefore of the opinion that neither the judgments of the ECtHR and of the CJEU, nor the decisions of the Polish apex courts have invalidated *ex tunc* the decisions on appointment taken by the NCJ.

3. Principle of proportionality

29. The Venice Commission and DGI wish to reiterate, as they stated in the 2024 Urgent Opinion,²⁷ that “any measure taken with the view to ‘restoring’ the rule of law has to meet the overall requirements of the rule of law”. On the other hand, while there is a systemic problem in Poland, it is necessary to take account of the very high number of judges incorrectly appointed in proportion to the overall number of judges. Whatever reform is implemented, it must not jeopardize the functioning of the judicial system as such. Therefore, as explained above, “some form of individual assessment” based on a grouping of similar cases may be acceptable. At the same time, it is necessary to equally focus on the issue of legal certainty, which is another important element of the rule of law.²⁸

30. The Venice Commission and DGI indeed consider that in defining the status of these judges, other considerations than the deficient procedure must also be taken into account. As already stated by the Venice Commission and DGI in their 2024 Urgent Opinion,²⁹ it can be argued that the principle of irremovability or security of tenure, which is an essential guarantee for judicial independence, does not give its full protection to office holders whose procedure of appointment shows grave deficiencies. Yet, it is not wholly irrelevant either: it warrants some form of individual assessment.

31. The invalidation of the individual resolutions should indeed be based on the specific circumstances of each particular case. The case *Polyakh and Others v Ukraine*³⁰ concerned the individualisation of cleansing measures established by a statute. In the view of the ECtHR, individualisation does not necessarily mean that a separate procedure in each individual case is needed, and it may also be acceptable to choose a more general procedure and relate it to a group of persons; however *cogent reasons* would need to be provided for taking such an approach and the quality of parliamentary and judicial review of the legislative scheme would be

²⁵ Supreme Court of Poland, Judgment in the case no. III PO 7/18.

²⁶ Supreme Court of Poland, Resolution no. BSA1-4110-1/20.

²⁷ [CDL-AD\(2024\)018](#) op.cit. para.78.

²⁸ [CDL-AD\(2024\)018](#) op. cit. para 81; The principle of legal certainty is one of the fundamental elements of the Rule of Law, “essential to the confidence in the judicial system and the rule of law”, which “requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable, Venice Commission, [CDL-AD\(2014\)021](#) Armenia - Opinion on the draft law on introducing amendments and addenda to the Judicial Code of Armenia (Term of Office of Court Presidents), paras. 18-20.

²⁹ [CDL-AD\(2024\)018](#) op.cit. para 60.

³⁰ ECtHR *Polyakh and Others v Ukraine* App no 58812/15, 17 October 2019.

a particularly important factor in that respect. Ultimately, the ECtHR held that the applicants' removal from office was too severe, and the proceedings against them should have been individualised.³¹ A subsequent case also found that the lack of individualisation in the procedure for the removal of judges constituted a violation of Article 8 of the ECHR.³²

32. Based on the above, including the parameters identified in the preliminary remarks (see paragraph 18), the Venice Commission and DGI conclude that a wholesale invalidation *ex tunc* of all the resolutions of the Polish NCJ does not fit into the rule of law concept, as it would among others fail the proportionality test.

4. Sub-question on the return to their previous positions following the invalidation of such resolutions

33. Given the negative response to the first part of the question and the unclarity of the exact specifics of a scheme in which certain "judges and other legal professionals [are required] to return to their previous positions", the Commission and DGI will reserve their position on the matter.

B. 2nd question: Do such appointees have the right to seek judicial recourse? Is allowing these appointees to participate in new judicial selection processes, subject to judicial review, sufficient to ensure their right to a fair trial?

1. Right to seek judicial recourse

34. The Venice Commission and DGI recall that Article 6 of the ECHR guarantees access to court when there is a genuine and serious dispute over a civil "right". The ECtHR has judged cases in which a judge lost his/her tenure as well as cases in which the judge was not promoted to a higher post.³³ In the case of *Grzęda v Poland*,³⁴ the ECtHR found a violation of Article 6 as there was a lack of judicial review for the shortening of office terms of the judicial members of the NCJ.³⁵

35. Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe³⁶ on independence, efficiency and responsibilities of judges states that regarding selection and career, the "unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made". The Venice Commission has previously stressed that based on the United Nations' Basic Principles on the Independence of the Judiciary, decisions in disciplinary proceedings should be subject to an independent review (principle 20), thus emphasizing the right of a judge to a fair hearing.³⁷ The Venice Commission has also consistently argued in favour of the possibility of an appeal to a court against decisions of disciplinary bodies.³⁸

³¹ ECtHR *Polyakh and Others v Ukraine* App no. 58812/15, 17 October 2019.

³² ECtHR *Samsin v Ukraine* App no 38977/19, 14 October 2021.

³³ ECtHR, *Denisov v. Ukraine*, GC, Application no. 76639/11, 25/09/2018 including further references.

³⁴ ECtHR *Grzęda v Poland* App no 43572/18, 15 March 2022.

³⁵ *Ibid.*

³⁶ Committee of Ministers [CM/Rec\(2010\)12](#), para. 48.

³⁷ Venice Commission, [CDL-AD\(2016\)009](#) Albania - Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016).

³⁸ [CDL-AD\(2007\)028](#), Report on Judicial Appointments by the Venice Commission, para. 25; See also [CDL-AD\(2018\)029](#), Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts of Georgia, para. 53; [CDL-AD\(2016\)009](#), Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 62; [CDL-AD\(2014\)008](#), Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, para. 110.

36. Based on these considerations, the Venice Commission and DGI conclude that the appointees should be given the right to seek judicial review against the invalidation of their nomination or promotion if the decision of invalidation is not taken by a judicial body. The need to quickly (re-)establish a fully functioning judiciary may justify some modifications in the application of procedural standards but not, for instance, the complete lack of some form of judicial review, which, arguably, would violate Article 6 of the ECHR. The fact of protesting against a decision would not necessarily have the effect of suspending it while judicial recourse is being sought. Otherwise, the judiciary would be dysfunctional.

2. Participation in new judicial selection processes

37. The Venice Commission and DGI stress that the right to participate in new judicial selection processes would not imply a control of an incurred human rights violation, but would only give a new right to acquire the same position as before, but within a new procedure. It does not suffice that the judge *after* the assessment procedure is allowed to participate in a new selection process. This could not be considered sufficient to ensure the right to a fair trial and is not the equivalent of a judicial remedy.

C. **3rd question: Is the system of delegating judges to the courts where they served prior to the enactment of the law, until they complete their pending cases, and for a period of two years, consistent with the principles of rule of law and legal certainty to maintain judicial efficiency during the re-evaluation period?**

38. The Venice Commission and DGI first wish to stress that the question is unclear.

39. The Venice Commission and DGI note that it is an important aspect of the rule of law and the independence of the judiciary that the position of judges is stable and judges cannot be transferred against their will. However, this is not an absolute rule as there may be circumstances in which the reassignment of a judge to another position is unavoidable in order to guarantee the functioning of the judiciary. Recommendation CM/Rec(2010)12 of the Committee of Ministers³⁹ states that “a judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.” In the same vein, the European Charter on the Status of Judges⁴⁰ stipulates that transferring a judge against his/her will is an exception permitted “in the case of a lawful alteration of the court system”. The Commission has previously pointed out that judges must not be under the threat of being transferred from one court to another, as this threat might be used to exert pressure on them and to attack their independence. Therefore, a transfer against a judge’s will may be permissible only in exceptional cases.⁴¹

40. Transitional arrangements may be needed to secure the functioning of the judiciary during the period of evaluation of the resolutions on appointments of the NCJ. The Venice Commission and DGI find it important that such a provisional measure be surrounded by adequate guarantees, i.e. that the measure is made dependent upon a time-limit; that the mechanism provides for a satisfactory solution regarding the continuation of the payment of the new or the former salary; that the mechanism looks at the geographical consequences of such a delegation; the question of how far exceptions can be made under specific circumstances; and the question of how far the criteria applied for giving back the former position after the period of two years are clear and transparent. In respect of disciplinary liability a judge is sometimes faced with a (significant) reduction in salary. In the present case, however, there is no reasonable suspicion

³⁹ Committee of Ministers CM/Rec(2010)12 op. cit., para. 52.

⁴⁰ Council of Europe, [European Charter on the Status of Judges](#), para. 3.4.

⁴¹ Venice Commission - [CDL-AD\(2012\)001](#), Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, para. 76.

that a judge has committed a disciplinary offence, the only issue being that the appointment procedure was deficient.

D. 4th question: Lastly, is it consistent with the principles of legal security and rule of law to allow parties who questioned a judge's impartiality or independence, based on their appointment by the current Council, to challenge the judgments issued by these judges?

41. The Venice Commission and DGI recall that *res judicata* is a central rule-of-law-principle,⁴² and any extra-ordinary remedy against judicial decisions is problematic from the point of view of the rule of law. *Res judicata* implies that when an appeal has been finally adjudicated, further appeals are not possible.⁴³ Final judgments must be respected, unless there are *cogent reasons* for revising them.⁴⁴ On the other hand, the case-law of the European courts indicates that the participation of judges who have been appointed in a procedure endangering judicial independence may violate the right to fair trial of a party. In addition to the jurisprudence of the ECtHR and the CJEU regarding “a court established by law”, it is quite common in procedural laws of Council of Europe’s member States that an unlawful composition of a court is a reason for a remedy. The same is the case if a party of the case claims that the judges are not impartial. The Venice Commission and DGI note that many legal systems include specific procedures in this regard. It is not for the Commission and DGI to examine the Polish system in this respect. However, they consider that it is important to ensure that certain conditions are taken into account by the authorities when regulating (the scope of) the possibility to file such an extraordinary appeal against a final judgement.

42. As in all cases where the fundamental principles of the ECHR come into conflict, a balance must indeed be struck in such instances to determine whether there is a pressing need – of a substantial and compelling character – justifying a departure from the principle of legal certainty and the force of *res judicata*. Whether such a violation justifies exemption from *res judicata* must be assessed on a case-by-case basis. It should be noted that some judgments might not be eligible for reopening. The Commission and DGI consider that an extra-ordinary judicial remedy should be established which facilitates the case-by-case weighing of diverse rule-of-law and human-rights considerations and which does not endanger legal certainty or cause blockage in the respective court(s).

43. In the view of the Venice Commission and DGI, a general rule that the irregularities in the appointment procedure regarding the involvement of the NCJ since 2018 can be raised at any time would destroy legal certainty. In order not to jeopardize the well-functioning of the Polish judicial system, the right to reconsider cases because of the lack of a “tribunal established by law” may be given only during a certain period of time and considered to be forfeited thereafter.

44. In addition, the Venice Commission and DGI stress that such a right has to be limited to cases where the argument that the appointment was on the basis of a motion of the NCJ after March 2018 is accompanied by a claim of an impact on the concrete procedure, and where this argument was already put forward in the proceedings. The Commission and DGI nevertheless consider that the obligation to have pleaded ‘in time’ the improper involvement of a judge who was appointed in a procedure jeopardising judicial independence should only be enforceable as from the date of the first ECtHR judgment with regard to Poland in this regard, namely *Reczkowicz v. Poland*.⁴⁵

⁴² ECtHR [GC] *Nejdet Şahin and Perihan Şahin v. Turkey*, no. 13279/05, para. 56, 20 October 2011; see also Rule of Law Checklist op.cit., where legal certainty is identified as one of the benchmarks of the rule of law.

⁴³ See, for instance, ECtHR [GC] *Brumărescu v. Romania*, no. 28342/95, para. 61, ECHR 1999-VII.

⁴⁴ See Rule of Law Checklist op. cit., chapter II.B Legal certainty, paras 37, 57, 58, 59, 60, 61, 62, 63.

⁴⁵ Op. cit.

45. The Venice Commission and DGI thus consider that, depending on the domestic procedure applicable to such remedies, (some of) the following safeguards should be put in place to guarantee an adequate balance between the principles of court established by law as element of fair trial and *res judicata* as element of legal certainty. The Venice Commission and DGI recommend making it conditional for parties to the proceedings to invoke the invalidity of a judicial decision as follows:

- only in respect of judicial decisions against which no ordinary appeal can be lodged anymore;
- time-limits, i.e. parties have to invoke the invalidity within a given timeframe (also in view of the demands of legal certainty);
- only when it is accompanied by a claim of an impact on the concrete procedure;
- possibly only in respect of proceedings in which the parties *at the time* complained about the participation of a judge who was appointed in a procedure endangering judicial independence, at least as from the ECtHR judgment in the case *Reczkowicz v. Poland*.

VIII. Conclusion

46. On 10 July 2024, the Minister of Justice of Poland posed four questions to the Venice Commission. Before answering the questions, the Venice Commission and DGI have examined the parameters that should be applicable to any solution chosen to address the issue of the status of the judges who were appointed in a procedure involving the NCJ as constituted under the 2017 Amending Act and the validity of the decisions adopted with their participation, so as to comply with the European standards. The Venice Commission and DGI stand ready to provide an opinion once a draft law is elaborated, if it is so requested.

47. The Venice Commission and DGI consider that the issue of how to deal with judges who have been appointed via a deficient procedure has to be seen first and foremost against the background of the obligation by Poland to execute the judgments of the ECtHR. Poland is – under the system of the ECHR – free to choose the means by which it will discharge its obligations arising from the execution of the Court’s judgments, as long as those means themselves are compatible with the ECHR and the overall requirements of the rule of law.

48. The Venice Commission and DGI consider that while there is no international obligation to choose a particular solution, any arrangement chosen in the Polish case would need to comply with the following parameters:

- (a) it needs to address the status of “all” judges appointed in the deficient procedure;
- (b) an assessment of the effects of the deficient procedure in respect of the office holder concerned should not be conducted by a government-controlled body (and if it is not conducted by a judicial body, some form of judicial review should be available);
- (c) the assessment needs to be conducted on the basis of pre-established criteria and procedures (including the elements of fair trial);
- (d) the assessment and the consequences following that assessment should always be strictly in line with the principle of proportionality requiring some form of individual assessment. The Venice Commission considers that some form of assessment by reference to cohorts of appointments including, where necessary, individual circumstances of appointment or promotion, would be needed; and
- (e) the mechanism needs to be suitable for a fairly rapid settlement of the issue.

- Question 1: Can resolutions of the National Council of the Judiciary regarding the appointment of judges be invalidated *ex tunc*, thereby implying that the appointee was never legally appointed? Would it align with the principle of the rule of law to require judges and other legal professionals to return to their previous positions following the invalidation of such resolutions?

49. Based on the principle of separation of powers, the Venice Commission and DGI considers that it cannot be declared through a law that all the appointments made by the NCJ in a particular timeframe are null and void. The Venice Commission and DGI note that neither the existing judgments of the ECtHR and of the CJEU, nor the decisions of the Polish Supreme Court and of the Supreme Administrative Court have produced *ex tunc* invalidation of the appointment decisions taken by the NCJ. The Venice Commission and DGI furthermore consider that a wholesale invalidation *ex tunc* of all the resolutions of the Polish NCJ does not fit into the rule of law concept, as it would among others fail the proportionality test.

50. Concerning the second part of the question, given the negative response to the first part, the Commission and DGI will reserve their position on the matter.

- Question 2: Do such appointees have the right to seek judicial recourse? Is allowing these appointees to participate in new judicial selection processes, subject to judicial review, sufficient to ensure their right to a fair trial?

51. The Venice Commission and DGI consider that the appointees should be given the right to seek judicial review against the invalidation of their nomination or promotion in case the decisions on invalidation are not taken by a judicial body. The procedure would not necessarily have a suspensive effect.

52. It does not suffice that the judge *after* the assessment procedure is allowed to participate in a new selection process. This could not be considered sufficient to ensure the right to a fair trial and is not the equivalent of a judicial remedy.

- Question 3: Is the system of delegating judges to the courts where they served prior to the enactment of the law, until they complete their pending cases, and for a period of two years, consistent with the principles of rule of law and legal certainty to maintain judicial efficiency during the re-evaluation period?

53. While it is an important aspect of the rule of law and the independence of the judiciary that the position of judges is stable, there may be circumstances in which the reassignment of a judge to another position is unavoidable. Yet transitional arrangements that may be needed to secure the functioning of the judiciary during the period of evaluation of the resolutions on appointments of the NCJ need to be surrounded by adequate guarantees.

- Question 4: Lastly, is it consistent with the principles of legal certainty and rule of law to allow parties who questioned a judge's impartiality or independence, based on their appointment by the current Council, to challenge the judgments issued by these judges?

54. The Venice Commission and DGI consider that, depending on the domestic procedure applicable to such remedies, (some of) the following safeguards should be put in place to guarantee an adequate balance between the principles of court established by law as element of fair trial and *res judicata* as element of legal certainty. The Venice Commission and DGI recommend making it conditional for parties to the proceedings to invoke the invalidity of a judicial decision as follows:

- only in respect of judicial decisions against which no ordinary appeal can be lodged anymore;

- parties have to invoke the invalidity within a given timeframe;
- only when it is accompanied by a claim of an impact on the concrete procedure;
- possibly only in respect of proceedings in which the parties *at the time* complained about the participation of a judge who was appointed in a procedure endangering judicial independence, at least as from the ECtHR judgment in the case *Reczkowicz v. Poland*.

55. The Venice Commission and DGI remain at the disposal of the authorities of Poland for further assistance in this matter.