

May 14, 2024

STATEMENT OF CIVIL SOCIETY ORGANISATIONS
on the Senate's amendments to the Law amending the Law
on the National Council of the Judiciary (Bill No. 378)

Restoring the National Council of the Judiciary to a composition in line with constitutional and international standards is crucial for rebuilding the rule of law in Poland. Without this, full implementation of judgments of European courts will not be possible. The functioning of the NCJ in its current form perpetuates the unlawful situation, as it allows for the appointment of judges whose independence and impartiality are questioned, and whose adjudication does not guarantee the right to a fair trial. This leads to questioning the judgments they issue, both at the national and European levels.

For this reason, we welcomed the decision of the current government to undertake legal changes aimed at restoring the constitutionality of selecting the judicial part of the NCJ, thereby ensuring its independence from politicians. The proposed measures were not without flaws, as reflected in numerous opinions submitted during the legislative process. Nevertheless, their main rationale, which provides for a return to a model where fifteen members of the NCJ are elected by judges, is fully endorsed and meets the requirements stemming from the Constitution.

In our opinion, the main purpose of this law is not undermined by the amendments proposed by the Senate during the legislative process. The amendment deleted the provision under which judges appointed with the participation of the NCJ in its current composition will not be able to stand for election to the Council that will be held for the first time after the adoption of the law. The changes adopted by the Senate met with harsh criticism from some members of the public, including judicial associations, who point out the flaws in the functioning of the NCJ established in such a way. We cannot share this assessment.

The Senate's amendment aimed to align the law with the recommendations of the Venice Commission, reflected in its opinion of 8 May 2024 (CDL-PI(2024)009), issued at the request of the Council of Europe bodies, which were also endorsed by the authors of the amendment and the representative of the Ministry of Justice present at the Senate's sitting. In this opinion, the Venice Commission stated that the wholesale blanket exclusion of all individuals appointed with the participation of the NCJ in its current membership to stand for the election raises questions of proportionality as no individual assessment of these appointees was foreseen.

Although the Venice Commission pointed out the particular situation of individuals appointed as first-time judges after judicial training, it is not true that its remarks related only to this group. According to the Venice Commission, potential threats to the impartiality of the NCJ in the process of re-evaluating the appointment of judges, in which the NCJ could participate in the future, cannot in themselves justify the automatic exclusion of all judges from this group to stand for election. To ensure proper and impartial functioning of the Council, less burdensome measures could be used, such as the recusal of a member of the NCJ from dealing with a specific case. The Venice

Commission also emphasised that depriving the right to stand for election could negatively affect the discussion on the status of individuals appointed in this way and the judgments they issue.

It is true that the Venice Commission did highlight the possibility of introducing into the law eligibility criteria based on the length of judicial experience for membership in the NCJ. However, this does not mean that it is allowed to effectively deprive all individuals appointed with the participation of the Council in its current membership of their right to stand for elections. Such an approach would constitute a flagrant misuse of the law and an attempt to circumvent the standard highlighted by the Commission. Therefore, the criterion of judicial experience should be formulated in such a way that it indeed remains directly related to the accepted goal (e.g., ensuring that NCJ consists of judges with an appropriate level of experience) and does not exceed what is necessary for its achievement.

With this in mind, we do not regard the Senate's amendments as a kind of "rotten compromise" or political bargain that jeopardises the process of rebuilding the rule of law in Poland. These changes are grounded in European standards upon which the opinion of the Venice Commission was based.

Additionally, we do not see any grounds for questioning the status and legality of the actions of the NCJ, whose members would be selected in a procedure regulated in such a way. The Constitution and European standards require that judicial members of the NCJ are elected by their peers. The law, even in the form including the Senate's amendments, fulfills this standard, as it allows every judge to apply for membership in the NCJ and to vote in these elections. Granting the right to stand for the election to individuals appointed with the participation of the Council in its current composition does not necessarily mean that any of them will indeed be elected to the NCJ. For this to happen, such a candidate will have to obtain the support of a significant part of the judicial community. However, even if such endorsement is gained, the potential negative verification of their status in the future and their removal from office will also lead to the expiration of their mandate in the Council, as provided for in Article 14(1)(5) of the Law on the NCJ. In other words, the fact that European courts have determined that the participation of individuals appointed on the recommendation of the NCJ in its current form in judicial panels may lead to a violation of the right to a fair trial does not automatically mean that these individuals are not allowed to be members of the NCJ, and that the status of such Council will be questionable .

The implementation of the reform of the NCJ without postponing it for another year would enable the appointment of hundreds of judges whose status would not be questioned, which would positively impact the efficiency of the judiciary engulfed in crisis. At the same time, we are aware that this law represents only the first step towards the thorough restoration of the rule of law in Poland. It will also be necessary to adopt comprehensive regulations regarding the status of individuals appointed with the participation of the NCJ in its current composition and the judgments they issue. Therefore, it is extremely important for conceptual work on this reform to begin as soon as possible and to also consider international standards, including those presented in the opinions of the Venice Commission.

Helsinki Foundation for Human Rights

Civil Development Forum

Amnesty International Poland

Court Watch Poland Foundation

Citizens Network Watchdog Poland

Law Society