

Position

Position of the
“Iustitia” Association of Polish Judges and
“THEMIS” Association of Judges and the Cooperation Forum of Judges
on the new National Council of the Judiciary

The “Iustitia” Association of Polish Judges with the “THEMIS” Association of Judges and the Cooperation Forum of Judges, convinced about the common responsibility for the system of justice in Poland, hereby presents their position about the organ presently holding the function of the National Council of the Judiciary (hereinafter NCJ).

The position encompasses three issues:

- the election procedure of the new members of the NCJ;
- the politicisation of the NCJ;
- the execution of constitutional tasks of the NCJ;

The aim of the comments below is, first and foremost, to present the most important problems related to the establishment and functioning of the new NCJ. The systemic issues related to the changes in the NCJ have been broadly presented in the response of “Iustitia” to the White Book on the reform of the Polish system of justice presented by the Polish government to the European Commission¹.

I. The election procedure of the new members of the NCJ

There is no doubt that the election procedure of judges to the NCJ, introduced by means of the act of 8 December 2017 on the amendments to the National Council of the Judiciary and some other acts, is in violation of the Constitution of the Republic of Poland. This is the opinion that has been voiced by association of judges, self-government authorities of judges nationwide, the NCJ in its previous composition, as well as the most prominent figures in the legal profession in Poland.

1. The termination of the term in office of the members of the NCJ

¹ https://www.iustitia.pl/images/pliki/odpowiedz_na_biala_ksiege_pl.pdf;
https://www.iustitia.pl/images/pliki/kompedium_pl.pdf;
<https://twojsad.pl/wp-content/uploads/2018/04/WP-response.pdf>

Pursuant to Art 187(3) of the Constitution of the Republic of Poland, the term in office of elected members of the NCJ is four years. The act of 8 December 2017, by means of regulation contained in Art 6, has shortened the term in office of members of the NCJ elected from among judges.

Based on this regulation, on 6 March 2018, the Sejm elected 15 judges to the NCJ. The actual election was in the hands of the governing party, i.e. Law and Justice (9 recommended members), as well as the Kukiz 15 parliamentary club (6 recommended members).

The terms in office of judges – members of the NCJ, elected by the self-government organs of judges pursuant to the law in force at a time of their election, were to end on the following dates:

- 28.01.2018 r. - 1 judge (Piotr Raczkowski)
- 21.03.2018 r. - 5 judges (Andrzej Adamczuk, Maria Motylska-Kucharczyk, Sławomir Pałka, Janusz Zimny, Waldemar Żurek)
- 22.03.2018 r. - 2 judges (Andrzej Niedużak, Gabriela Ott)
- 24.03.2018 r. - 2 judges (Katarzyna Gonera, Dariusz Zawistowski)
- 16.05.2018 r. - 1 judge (Janusz Drachal)
- 29.06.2018 r. - 1 (Jan Kremer)
- 11.01.2020 r. - 1 (Jan Grzęda)
- 20.03.2020 r. - 1 (Krzysztof Wojtaszek)

The first session of the new NCJ took place on 27 April 2018. Judge Leszek Mazur was elected President of the NCJ. Before (on 6 March 2018), the First President of the Supreme Court, judge Małgorzata Gersdorf, resigned from the function of the President of NCJ.

The term in office of at least 4 members of the NCJ was, therefore, terminated before the due date (Janusz Drachal, Jan Kremer, Jan Grzęda, Krzysztof Wojtaszek).

The assessment is not changed by the ruling of the Constitutional Court of 20 June 2017, K 5/17. In response to the ruling, the Presidium of the NCJ noted, with satisfaction, that the composition of the Court shared the view of the NCJ about the constitutionality of the previously binding model of electing NCJ members from among judges and by judges themselves. The composition of the Constitutional Court only questioned the limitation of the passive electoral right of some of the judges of common courts, the limitation of active electoral rights of judges of

regional administrative courts (these problems, therefore, do not refer to the judges of the Supreme Court of military courts), as well as the mutual relations of the tenures of the elected NCJ members. The NCJ Presidium also noted that the adjudicating panel who issued the ruling, was composed of persons elected to the Constitutional Court by the Sejm of the present term, to positions which had already been occupied by elected Constitutional Court judges, as was established in the Court's decision of 3 December 2015, K 34/15 (the so called "judges – doubles").

It should be underlined that the problem of there being no proper representation of the different tiers and divisions of the judiciary has intensified. Whilst previously the NCJ suffered from the deficit of judges adjudicating in district courts (in the years 2014 – 2018 there was only one such judge in the Council), in the present NCJ there is not a single judge representing a court of appeals of the Supreme Court (elected), there is one judge from a regional court and thirteen from district courts.

2. Non-transparency of the procedure of submitting candidatures to the NCJ

The mode of proposing candidatures from among judges to the position of NCJ members was completely non-transparent. In line with the initial version of the presidential draft bill (finally adopted on 8 December 2017), the Speaker of the Sejm was obliged to immediately present to the members of the parliament and inform the public opinion of all the documents submitted by judges seeking membership in the NCJ, including letters of recommendation. Each candidate was to obtain the recommendation of at least either 25 judges or 2000 citizens. However, in the last moment during the session of the parliamentary Commission for Justice and Human Rights, an amendment was introduced that the Speaker of the Sejm was to publish the document attached to the applications of the candidates but "with the exclusion of attachments". In effect, when the Civic Development Forum, pursuant to the law on the access to public information, approached the Minister of Justice for these letters of support, it received a Xerox copy of a document with empty spaces instead of names of the persons who had recommended candidates.

The public opinion was deprived of the possibility to verify whether the candidates had met the formal conditions at all. It is impossible to check whether the candidates have actually – as the new NCJ claims – received support in their courts, or whether they did not recommend each other or did get support from the judges seconded to work at the Ministry of Justice, of whom there are now approximately 160 and who hold there administrative positions, thus being subordinate to the Minister of Justice.

On 12 July 2018, the Regional Administrative Court in Warsaw repealed the decision of the Chancellery of the Sejm in which it refused to present the attachment to the applications of the judge candidates to the NCJ. Among these attachments were lists of judges recommending the candidates to the NCJ. The judgement is not binding, the Chancellery of the Sejm has the right of appeal to the Supreme Administrative Court². It is not hard to imagine a future situation where the new NCJ issues a recommendation to a position in a court of higher instance for a judge whose only “virtue” will be the fact that in the past this judge supported the candidates for the NCJ; in such a situation the public will not be able to know the real motives behind the NCJ’s decision.

Interestingly, the new NCJ has voiced a negative opinion about making the lists of names in support of the candidates to the NCJ public on grounds that the judges, whose names are on these lists, may be met with repressions³.

Apart from the absolute lack of transparency of the electoral procedure to the new NCJ, there are also other doubts as to the correctness of how it has been performed:

- in the case of Maciej Nawacki, some of the judges who had recommended him withdrew their support before the candidature was submitted to the Speaker of the Sejm; Maciej Nawacki presented a list with 28 signatures from judges, a number of whom have, in the meantime, withdrawn their recommendation. It is, therefore, doubtful, whether in this situation the candidature was submitted correctly;

- the claim that 90% of candidates received support in their court district is non-verifiable and has generated very serious doubts, if only in light of the resolutions of the organs of the self-governing bodies of judges (e.g. resolutions of judges of the Regional Court and Court of Appeals in Krakow about Paweł Styrna and Dagmara Pawełczyk-Woicka, in whose cases it was indicated that the two were not representatives of the community of judges⁴; as well as resolution of the Assembly of the Representatives of Judges of the Regional Court in Warsaw, which expressed

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<http://bip.warszawa.wsa.gov.pl/661/783/komunikat-w-sprawie-skargi-na-decyzje-szefa-kancelarii-sejmu-r-p-odmawiajaca-udostepnienia-zalacznikow-do-zgloszen-kandydatow-na-czlonkow-krs.html>

³ See opinion of the NCJ of 11.05.2018 r., No. WO 020-28/18, druk sejmowy nr 2355.

⁴ The last paragraph of the Resolution No. 1 of the Meeting of Judges of the Regional Court in Kraków, of 24 May 2018.

no acceptance for the candidates to the NCJ, and in particular in reference to judges running for the position from the Warsaw region, i.e. Dariusz Drajewicz, Jędrzej Kondek and Maciej Mitera⁵);

- Dagmara Pawełczyk-Woicka, when holding the office of president of the Regional Court in Krakow, sought support during a meeting in her office with a number of presidents of departments in that Court; such practice can be seen as abuse of her professional position;

- there have been many resolutions of the self-government bodies of judges and judge associations appealing to judges to resign from running to the NCJ according to the rules specified in the act of 8.12.2017;

- all the judges elected to the NCJ by the Sejm who had been members of judge associations have either been excluded from those associations or have renounced their membership themselves. .

II. The politicisation of the NCJ

1. Connections between the judges elected to the NCJ and the political power

The main symptom of the politicisation of the NCJ is the fact that, currently, its 15 judge-members are not elected by other judges, as is required by Art. 187 of the Constitution (and consistent with CCJE recommendations), but by members of the lower chamber of the parliament, where Law and Justice hold the absolute majority.

From among some 10 000 judges, only 18 candidates came forward to the new NCJ. Below we present information about them and about their sponsors.

1) Dariusz Drajewicz, judge with the District Court in Warsaw-Mokotów, appointed in 2017 to the position of vice-president of the Regional Court in Warsaw and delegated to the Regional Court in Warsaw; presently seconded to the Court of Appeals in Warsaw,

- candidature submitted by Łukasz Kluska, judge at the District Court in Pruszków, appointed in 2017 the president of the District Court in Pruszków which is subordinate to the President of the Regional Court in Warsaw. He is also one of the newly-appointed elections commissars.

2) Grzegorz Furmankiewicz, judge of the District Court in Jasło,

- candidature to the NCJ submitted by Marcin Romanowski, Director of the Institute of the System of Justice at the Ministry of Justice

3) Jędrzej Kondek, judge of the District Court for the capital city of Warsaw, appointed in 2017 the deputy-president of the Department,

- candidature to the NCJ submitted by Marcin Romanowski, Director of the Institute of the System of Justice at the Ministry of Justice

4) Teresa Kurcysz-Furmanik, judge of the Regional Administrative Court in Gliwice,

- candidature to the NCJ submitted by Szczepan Prax, judge of the Supreme Administrative Court and Ryszarda Orzeł, representative of a group of citizens

5) Ewa Łapińska, judge of the District Court in Jaworzno,

- candidature to the NCJ submitted by Patrycja Potejko, daughter of Mieczysław Potejko, from July 2017 the vice president of the Regional Court in Krakow

6) Leszek Mazur, judge of the District Court in Częstochowa, brother of Witold Mazur, appointed in 2017 to the position of president of the Court of Appeals in Katowice,

- candidature to the NCJ submitted by Iwona Łyszczarz-Witecka, judge of the District Court in Częstochowa

7) Maciej Mitera, judge of the District Court in Warsaw-Wola, until 2018 seconded to the Ministry of Justice, appointed in 2018 to the position of president of the District Court for Warsaw-Śródmieście, which is subordinate to the president of Regional Court in Warsaw

- candidature to the NCJ submitted by Dariusz Drajewicz

8) Dagmara Pawełczyk-Woicka, judge of the District Court for Kraków-Podgórze, from 2017 recommended by the Minister of Justice, member of the Programme Council of the National School of Judiciary and Prosecution, until 2018 delegated to the Ministry of Justice, appointed in 2018 to the position of the Regional Court in Krakow; remains in conflict with the self-government bodies of judges in Krakow; introduced restrictions for media in access to the Regional Court in

Krakow and for judges in giving interviews in the premises of the Court⁶; recently, information appeared about judge Waldemar Żurek, the former member and spokesperson of the NCJ to be transferred to a different department which is perceived by the community of judges as harassment,

- candidature to the NCJ submitted by Dariusz Pawłyszczce, Director of the Department of HR and Organisation of Common and Military Courts in the Ministry of Justice

9) Rafał Puchalski, judge of the District Court in Jarosław, until 2018 seconded to the Ministry of Justice, appointed in 2018 president of the Regional Court in Rzeszów and delegated for that time to the Court of Appeals in Rzeszów,

- candidature to the NCJ submitted by Michał Bukiewicz, judge of District Court for Warsaw- Praga Południe, appointed in September 2017 to the position of president of the District court for Warsaw-Praga Południe and, at the same time, seconded to the Regional Court in Warsaw.

10) Jarosław Dudzicz, judge of the District Court in Słubice, appointed in November 2017 to the position of the president of the Regional Court in Gorzów Wielkopolski and delegated to the Regional Court in Gorzów Wielkopolski;

- candidature to the NCJ submitted by Anna Kuśnierz-Milczarek, judge of the District Court in Gorzów Wielkopolski, appointed in November 2017 to the position of president of the District Court in Gorzów Wielkopolski.

11) Marek Jaskulski, judge of the District Court for Poznań-Stare Miasto,

- candidature to the NCJ submitted by Daniel Jurkiewicz, judge of the District Court for Nowe Miasto and Wilda in Poznań

12) Joanna Kołodziej-Michałowicz, judge of the District Court in Słupsk,

- candidature to the NCJ submitted by Andrzej Michałowicz (her husband), judge of the District Court in Słupsk, appointed in December 2017 to the position of president of the Regional Court in Słupsk

13) Zbigniew Stanisław Łupina, judge of the District Court in Biłgoraj,

⁶ Resolution No. 1 of the Meeting of Judges of the Regional Court in Kraków, of 24 May 2018. <http://themis-sedziowie.eu/wp-content/uploads/2018/05/Resolutions-of-24-May-2018-ENG..pdf>

- candidature to the NCJ submitted by Tadeusz Jodłowski, judge of the District Court in Biłgoraj

14) Paweł Styrna, judge of the District Court in Wieliczka, appointed in February 2018 to the position of vice-president of the regional Court in Krakow,

- candidature to the NCJ submitted by Jakuba Strynę

15) Maciej Nawacki, sędzia Sądu Rejonowego w Olsztynie, powołany w grudniu 2017 r. Prezes Sądu Rejonowego w Olsztynie,

- candidature to the NCJ submitted by Michał Lasota, judge of the district Court in Nowe Miasto Lubawskie, appointed in January 2018 to the position of president of the District Court in Nowe Miasto Lubawskie

Due to the non-constitutionality of the procedure of the election of judges to the NCJ, all opposition parties in the parliament, i.e. the Civic Platform, Nowoczesna, and the Polish People's Party, did not participate in the voting on the new members. Only Law and Justice and Kukiz15 voted.

On 6.03.2018, the following members were elected:

- on the recommendation of Law and Justice: Dariusz Drajewicz, Jarosław Dudzicz, Teresa Kurcysz-Furmanik, Ewa Łapińska, Leszek Mazur, Maciej Nawacki, Dagmara Pawełczyk-Woicka, Rafał Puchalski and Paweł K. Styrna;

- on the recommendation of Kukiz15: Grzegorz Furmankiewicz, Marek Jaskulski, Joanna Kołodziej-Michałowicz, Zbigniew Łupina, Jędrzej Kondek and Maciej Mitera⁷.

The network of connection between the new members of the NCJ and the Minister of Justice is illustrated in the diagram created by the Civic Development Forum⁸.

As the above description clearly shows, 5 judge-members of the current NCJ (Dariusz Drajewicz, Jarosław Dudzicz, Maciej Mitera, Maciej Nawacki, Paweł Styrna and Dagmara Pawełczyk-Woicka) shortly before they became NCJ members, had been appointed to positions of

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https://www.iustitia.pl/images/english/Judges_elected_to_the_new_National_Council_of_the_Judiciary.pdf

⁸ <https://www.iustitia.pl/nowa-krs/2115-minister-ziobro-nowa-krs-mapa-powiazan>

presidents of common courts by the Minister of Justice, Zbigniew Ziobro. Whereas 4 judge-members of the NCJ (Maciej Mitera, Dagmara Pawełczyk-Woicka, Rafał Puchalski and Paweł Styrna) during the rule of the Law and Justice party have been seconded to work at the Ministry of Justice while one judge (Jędrzej Kondek) is employed at the Instytut Wymiaru Sprawiedliwości [Institute of Justice] directly linked to the Ministry of Justice. Thus 8 judge-members of the current NCJ listed above, owe their career development, in the period shortly before their appointment to the NCJ, to the Ministry of justice headed by Zbigniew Ziobro.

The strict subordination of persons holding administrative functions in the judiciary (presidents and vice-presidents of courts and, indirectly, heads of departments) to the Minister of Justice who oversees courts, should be made a note of. The Minister has very broad entitlements which are practically unlimited by the self-government of judges in terms of appointing and recalling court presidents. Taking advantage of an extraordinary regulation in the area, it took half a year for the Minister to recall some 150 court presidents and vice-presidents without any formal reasons for doing so. Such circumstances create a tangible pressure. This is topped with discretionary appointments of judges as representatives of the Minister of Justice to different examination panels, which also means additional remuneration or its loss in case of losing the position. Seconding judges to courts of higher tiers and to the Ministry of Justice also takes place via a decision of the Minister of Justice without any reason for it being given, thus a person so seconded can be recalled at any time. Judges seconded to the Ministry cannot adjudicate and receive substantial financial bonuses. Presidents of courts, on the other hand, usually have to limit their adjudicating activity and for that reason also receive substantial financial compensation. The amounts have not been revealed despite our requests. Almost all members of the new NCJ or their representatives have received such additional “rewards” from the Minister of Justice.

2. Members of the NCJ not elected from among judges, connected to the political power

Pursuant to Art. 187.1 of the Constitution, the NCJ is composed of, apart from judges, 10 additional persons, including 4 members of parliament elected by the lower chamber of the parliament (Stanisław Piotrowicz – MP of Law and Justice, Krystyna Pawłowicz – MP of Law and Justice, Tomasz Rzymkowski – MP of Kukiz 15, and Borys Budka – MP of Civic Platform), 2 senators elected by the higher chamber of the parliament (Stanisław Gogacz – member of Law and Justice and Rafał Ambrozik – member of Law and Justice), Minister of Justice (Zbigniew Ziobro), representative of the President of the Republic of Poland (Wiesław Johann), President of the Supreme Administrative Court (Marek Zirk-Sadowski), the First President of the Supreme Court (Małgorzata Gersdorf).

Persons connected with the governing power have become quite active in the Council and have set the tone of the debates within this body in recent months:

- Krystyna Pawłowicz – MP representing Law and Justice, famous for her words during a meeting of the Parliamentary Commission for Justice and Human Rights in May 2017 when the bill on the NCJ was proceeded; she then said that Polish judges should “undergo re-education, like in Korea in camps where democracy is taught”⁹ (!)

- Stanisław Piotrowicz – MP representing Law and Justice, from 1978 member of Poland’s United Workers Party, prosecutor during the marital law in Poland, author of an indictment against a member of the political opposition at the time, Antoni Pikul; presently Chairperson of the Parliamentary Commission for Justice and Human Rights, responsible, on behalf of Law and Justice for the legislative path of the acts of law on the NCJ, Supreme Court and the common courts, which have undermined the independence of the Polish judiciary; he once said in the Sejm that there was a need for a change in the mentality of judges that would be subordinate to the state and the nation;

- Wiesław Johann – representative of the President; he began his legal career in the late 1960s as a prosecutor during the communist regime; he was then a barrister and currently he is a retired judge of the Constitutional Court; in 2010 he was a member of the committee for the support of the president of Law and Justice, Jarosław Kaczyński, in presidential elections;

- Zbigniew Ziobro – Minister of Justice and, at the same time, Prosecutor General; he was not active in the NCJ until March 2018; he recently announced that he would participate in the sessions of the Council.

Whereas Borys Budka – an MP of the opposition party Civic Platform, is not currently taking part in the work of the NCJ considering the newly appointed NCJ unconstitutional.

The First President of the Supreme Court is currently not taking part in the NCJ work, either. This position is held by Professor Małgorzata Gersdorf, whose 6-year term in office expires in April 2020, however, on the official NCJ website there is a blank space instead of her name, in accordance with the official line of the governing power, that the First President of the Supreme Court has retired on turning 65, pursuant to the new act on the Supreme Court.

Concluding the description of the composition of the National Council of the Judiciary, it is worth stating that currently, out of its 25 members, as many as 21 (15 judges, 4 MPs and 2 senators) are elected by the parliament, in which Law and Justice holds an absolute majority of votes. If one added to this number the Minister of Justice and the representative of the President, it turns out that

as many as 23 members of the NCJ, that is, all of them except the President of the Supreme Court and the President of the Administrative Supreme Court, are politically affiliated. What is even more telling, the party currently in power, Law and Justice, has a clear majority of votes in the NCJ as it is “represented” by 9 judge-members who have been elected with the support of this party (Dariusz Drajewicz, Jarosław Dudzicz, Teresa Kurcysz-Furmanik, Ewa Łapińska, Leszek Mazur, Maciej Nawacki, Dagmara Pawełczyk-Woicka, Rafał Puchalski and Paweł K. Styrna), 2 MPs who are Law and Justice party members (Krystyna Pawłowicz and Stanisław Piotrowicz) and 2 senators - Law and Justice party members (Stanisław Gogacz and Rafał Ambrozik), as well as the Minister of Justice, Zbigniew Ziobro, who is a member of the party which is Law and Justice’s coalition partner. This amounts to 14 votes in the 25-member Council, which adopts resolutions with absolute majority of votes. In the light of the above, it can be stated that, because of its composition, the Polish National Council of the Judiciary is currently a body that is fully politicised and the number of its members with links to the ruling party guarantees that Law and Justice has full control over its decisions. However, members of the NCJ participating in the meetings usually vote en bloc.

III. The execution of the constitutional tasks of the NCJ.

Apart from the composition of the new NCJ described above, also the action taken so far by this body clearly shows the politicisation of the Council and its subservience to the ruling party.

Already at the first working session of the NCJ, Krystyna Pawłowicz, the Law and Justice MP noted that the NCJ should take care of the activity of associations of judges in the media; she claimed that this activity was of a political nature. The need to assess the statement of the former spokesperson of the NCJ, judge Waldemar Żurek, was also discussed, from the viewpoint of the alleged violation of ethical rules and possible disciplinary measures against him. Also judges Igor Tuleya and Wojciech Łączewski were mentioned in reference to the rulings they passed and the reasons for them which the politicians of the ruling party found unacceptable.

Disciplinary proceedings against judges from the Regional Court in Krakow, Waldemar Żurek, Beata Morawiec and Dariusz Mazur were also announced as a result of the negative evaluation of their activities by member of the NCJ, president of the Regional court in Krakow, Dagmara Pawełczyk-Woicka. These persons were to be heard in order to clarify a number of charges formulated by the Krakow judges against Dagmara Pawełczyk-Woickiej, however the hearing never took place.

At a next session of the NCJ, in course of evaluating the judges who submitted their application for promotion to a different court, the Law and Justice MP, Krystyna Pawłowicz, followed a list of names of judges who, as she put it, “told on Poland” in Brussels, participated in protests in defence of courts which, in her view, was a “political activity” and, as a result of that, should not be promoted. In response to a request by Jarosław Dudziacz, the president of the NCJ, Leszek Mazur, made a xerox copy of this “black list” to be delivered to all members of the NCJ. Not a single member of the NCJ protested against either the words of Krystyna Pawłowicz nor the list she had submitted¹⁰.

The candidates were also asked about their views on Prof Małgorzata Gersdorf holding the office of First President of the Supreme Court.

With the successive sessions of the NCJ, the meetings are often declared *in camera* and the online streaming is turned off. This is done on the pretext of the protection of the privacy of people whose cases are being considered. The same happened during deliberations on the further right to adjudicate by judges of the Supreme Court whose retirement age was reduced from 70 to 65. As a result, the parts of the NCJ’s deliberations that are the most important from the point of view of judicial independence are hidden from the public.

Pursuant to the act on the Supreme Court which entered into force on 3.04.2018, judges of the Supreme Court who turned 65 had to retire by the power of the law. It was possible, however, for them to continue to hold their function if, within a period of one month upon the enforcement of the new law, they presented an appropriate declaration with a medical statement, and the President of the Republic issued a consent for their remaining in the position of a Supreme Court judge. Before issuing such a consent, the President seeks advice from the NCJ.

The NCJ issued negative opinions (meeting the formal requirements) about the following prominent judges of the Supreme Court: Maria Szulc, Anna Owczarek, Jacek Gudowski and Prof Wojciech J. Katner. These opinions bear no substantive content, only repeated quotations from the provision of the law.

Negative opinions were also formulated about judges: president of the Supreme Court Józef Iwulski, president of the Supreme Court Stanisław Zabłocki and Jerzy Kuźniar (who, in their statements, invoked not the new law on the Supreme Court but the Constitution).

Judges Anna Owczarek, Maria Szulc and Józef Iwulski appealed against the opinion of the NCJ and submitted their appeals to the Council, but the President of the NCJ decided to refrain

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<https://www.iustitia.pl/en/new-krs/2431-meeting-of-the-members-of-the-national-council-of-judiciary-in-pol-and-12th-of-july-2018>; https://www.youtube.com/watch?time_continue=15&v=wo02RwIzJs

from dealing with them without giving any legal basis for the decision. For that reason, the legal representatives of the judges lodged the same appeals with the Supreme Court. Over a week later, the spokesperson of the NCJ informed that the NCJ will, after all, present the appeals to the Supreme Court.

In connection with the recruitment to the newly established chambers of the Supreme Court (the Disciplinary Chamber, Chamber for Extraordinary Control and Public Affairs), the NCJ published a position on its website, in which it indicated criteria for its evaluation of candidates to positions of Supreme Court judges. This evaluation is to be based on the experience of the candidates and, in case of judges, on the basis of their work results and the analysis of the specific number of case files that they have conducted. Several days later the above position was modified and the experience of the candidate was no longer to be examined, leaving only the examination of the applications. Thus, in fact, merit-based assessment of the candidates has been eliminated. This coincided with the urgent amendment to the act on the NCJ introduced by the Parliament and the President, which basically eliminated the effectiveness of an appeals remedy by a candidate to the position of a judge of the Supreme Court. Presently, an appeal against an unfavourable resolution by the NCJ to the Supreme Administrative Court in no way influences the situation of a candidate who had been evaluated positively. Such a person can be nominated by the President to the position of judge of the Supreme Court, and the person whose appeal is considered by the Supreme Administrative Court can participate in the competition for the next vacancy in the Supreme Court¹¹. Announcing the competition by the President of the Republic is invalid, if only for the lack of a counter-signature by the Prime Minister (Art 144(2) of the Constitution of the Republic of Poland). Still, the NCJ continues the appointment process.¹²

On 13.07.2018, the NCJ published a position on the changes in the organisation of the Supreme Court. It expressed its concern in relation to “the new cases of some of the judges propagating false information about the systemic changes in the judiciary”. In its position, the NCJ has quoted a fragment of the reasons for judgment of the Constitutional Court of 24 June 1998, in which it confirms the possibility of reducing the retirement age of a judge, which remains

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<http://www.krs.pl/pl/aktualnosci/d,2018,6/5398,komunikat-w-zwiazku-z-obwieszczeniem-o-wolnych-stanowiskach-sedziego-w-sadzie-najwyzszym-i-naczelnym-sadzie-administracyjnym>

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<https://www.iustitia.pl/en/118-information/2437-statement-of-the-association-of-polish-judges-iustitia-of-14-july-2018>

unquestioned. The judges mentioned in the above position, however, as well as all the associations of judges and legal corporations argue that the reduction of a judge's retirement age is aimed at eliminating almost half of the composition of the Supreme Court and depriving Prof Małgorzata Gersdorf of her office as First President of the Supreme Court, which she should hold until the end of her tenure of 6 years as specified in the Constitution. The NCJ has thus presented arguments which are identical to those of the government and the Minister of Justice-Prosecutor General¹³.

On 27.07.2018, the NCJ published another position on the situation in the Supreme Court. It was claimed therein that Prof Małgorzata Gersdorf had retired. The decision of the President, respect for the State and the authority of the Head of the State were invoked there. At the same time, it was indicated that extending the debate beyond the national borders does not act to the benefit of the authority of the judicial power. Again, the argument presented in the said statement are identical to those expressed by the government and the Minister of Justice -Prosecutor General¹⁴.

When the deadline for submitting candidates for the position of judges of the Supreme Court was passed, the media wanted to learn their names. Maciej Miteraz, the spokesperson of the NCJ, when asked about them replied that for reason of the new RODO regulation, the names cannot be made public and that the list of candidates would be presented in 7 or 14 days before the session of the NCJ at which the candidates are to be assessed. After a wave of criticism in reaction to the above statement, the NCJ informed as soon as the following day that the lists would be made public and the is indeed what happened¹⁵.

The competition procedure regarding the Supreme Court as conducted by the NCJ is still very far from standards of transparency. The vice-president of the Council and the representative of the President in the NCJ, Wiesław Johann, states that the candidates would be interviewed in four teams. The course of these interview will neither be streamlined nor made public, performed as “an internal procedure” of the NCJ.

The NCJ does not react to statements of the representatives of the executive branch questioning the adjudicating activities of courts and suggesting the possibility of ignoring the rulings of the Supreme Court (regarding, *inter alia*, the resolution of 2.08.2018 on suspending the

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<http://www.krs.pl/pl/aktualnosci/d,2018,7/5417,stanowisko-krajowej-rady-sadownictwa-z-dnia-13-lipca-2018-r-w-przedmiocie-zmian-ustrojowych-w-sadzie-najwyzszym>

¹⁴

<http://www.krs.pl/pl/aktualnosci/d,2018,7/5452,stanowisko-krajowej-rady-sadownictwa-z-dnia-27-lipca-2018-r-w-przedmiocie-sytuacji-w-sadzie-najwyzszym>

¹⁵

<http://www.krs.pl/pl/aktualnosci/d,2018,8/5454,lista-kandydatow-do-sadu-najwyzszego-ktorych-zgloszenia-wplynely-do-krajowej-rady-sadownictwa>

application of provision of the act on the Supreme Court specifying the rules of Supreme Court judges leaving on retirement in connection with the prejudicial questions to the Court of Justice of the European Union), and announcing the removal of specific judges from profession. The Board of the “Iustitia” Association of Polish Judges¹⁶ and the Intervention Team of the Forum of the Cooperation of Judges¹⁷ have expressed their expectation of an immediate reaction to the words by the NCJ.

In a resolution No 5/2018 of 24 July 2018, the Intervention Team of the Forum of the Cooperation of Judges, convened under the auspices of the formed NCJ, in order to collect information and monitor cases of the impartiality of judges and independence of courts being threatened, expressed a very strong disapproval of the actions seemingly executing the constitutional duties of the NCJ, statements of the members-judges undermining the holding of office by the First President of the Supreme Court, Prof Małgorzata Gersdorf and, most of all, for the absence of any actions for the good of the system of justice in general – in particular about the draft bills which clearly violate the constitutional principle of the independence of the judiciary as one of the three powers. In the opinion of the Intervention Team, it is impossible to see this body as standing guard of the independence of courts and impartiality of judges, and a being entitled to issue opinion about candidates to the positions of assistant judges and judges in common and administrative courts, as well as in the Supreme Court¹⁸.

The declarations of self-government bodies of judges are similar in tone¹⁹.

On the other hand, the NCJ deals with cases which are not directly in connection with the impartiality of judges and independence of courts. On 15.06.2018, the Council passed a resolution on the parliamentary proposals of a draft bill on civil partnership and on the act – Provision introducing the law on civil partnership. The NCJ issued a negative opinion and indicated that, *inter alia*, an ordinary legislator is bound by the preferential treatment of a heterosexual marriage and

¹⁶ Resolution of the “Iustitia” Board of 1.08.2018, <https://www.iustitia.pl/dzialalnosc/informacje-oswiadczenia/informacje/2453-uchwala-z-dnia-1-sierpnia-2018-r-w-sprawie-zapowiedzi-rzecznika-rzadu-o-usunieciu-sedziego-wojciecha-laczewskiego-z-urzedu>

¹⁷ Resolution of the Intervention Team of the Forum of the Cooperation of Judges No 6/2018 of 10.08.2018

¹⁸ <https://fws.iustitia.pl/viewtopic.php?p=3240#unread>

¹⁹

<https://www.iustitia.pl/en/118-information/2352-katowice-appeal-court-district-judges-condemn-unconstitutional-reforms-of-judiciary-in-poland> ;

<https://www.iustitia.pl/en/118-information/2351-resolution-of-warsaw-region-judges-regarding-elections-to-national-council-of-judiciary> ;

<https://www.iustitia.pl/2268-uchwaly-zgromadzenia-przedstawicieli-sedziow-okregu-sadu-okregowego-w-warszawie-z-dnia-14-06-2018-r-2>;

<https://www.iustitia.pl/en/118-information/2356-resolutions-of-judges-from-krakow-district>;

<https://www.iustitia.pl/en/118-information/2355-resolution-of-the-judges-of-lublin-appelation-circuit>;

<https://www.iustitia.pl/en/118-information/2350-lodz-judges-do-not-recognize-constitutionality-of-new-ncj>

thus does not have the right to treat unions of persons (of the same or different gender) who have not been married, on an equal footing. Creating an institution which would be different in name but, from the point of view of its legal status, would be identical to a marriage, evokes, in the assessment of the Council, justified constitutional doubts²⁰.

IV. Summary

The above comments on the mode of appointing new members of the National Council of the Judiciary, their connections with the political power (in particular with the Minister of Justice who has now a huge influence on the judiciary), as well as the different activities undertaken by the NCJ, result in the conclusion that in its present shape, this body does not perform its basic constitutional duties as specified in Art 186 (1) of the Constitution of the Republic of Poland. Due to the systemic flaws, it is unable to guard the independence of courts or the impartiality of judges.

Instead of seeing the NCJ as a protector against the ambitions of the executive branch, judges are ever more often fearful of repressions by the Council, in particular those who are active in the public sphere are involved in the defence of the rule of law. It is particularly important due to the change in the position of the NCJ vis-à-vis judges, e.g. as a result of the extended competence of the Council with regard to the colleges of regional courts (the examination of appeals by judges against the changes in the remits of their competences).

The above leads to an increased domination of the executive and legislative branches over the judiciary – the critical point has already been passed, contributing to the destruction of the separation of powers. The activities thus far, or the omissions of the new NCJ, confirm the previous concerns about its independence and authority. Not only does it lead to the deterioration of respect for this constitutional body, but also to the judiciary and judges as a whole.

The most recent public opinion poll (June 2018) indicates that Poles do see the growing politicisation of courts and their deteriorating functioning. They believe that the situation is worse than in the times of the previous government. 44% of Poles believe that the reforms introduced by Law and Justice rather increase or definitely increase in the influence of politicians on courts, only 14,2% of respondents think otherwise²¹. The opinion

²⁰

<http://krs.pl/pl/dzialalnosc/posiedzenia-rady/f,204,posiedzenia-w-2018-r/739,13-15-czerwca/5393,opinia-krajowej-rady-sadownictwa-z-dnia-15-czerwca-2018-r-nr-wo-020-6118>

²¹

of judges about the activities of the NCJ is much worse – over 90% believe that the NCJ is politicised and does not fulfil its constitutional tasks.²²

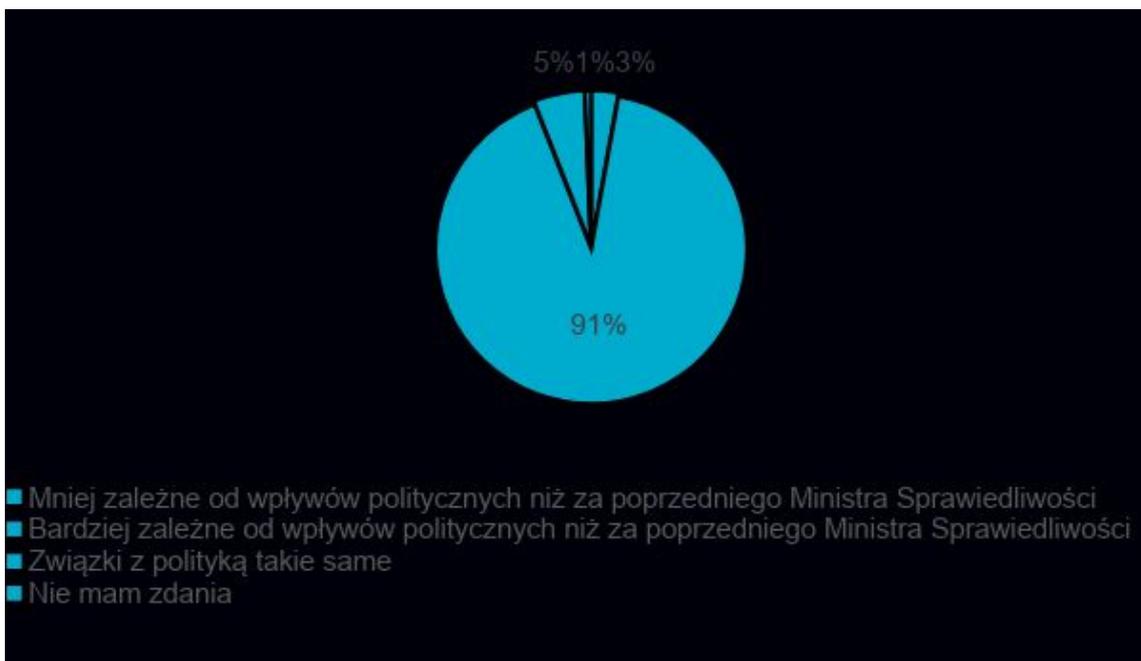
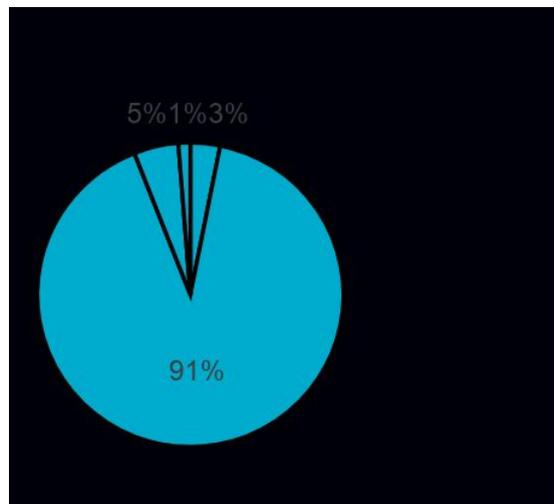
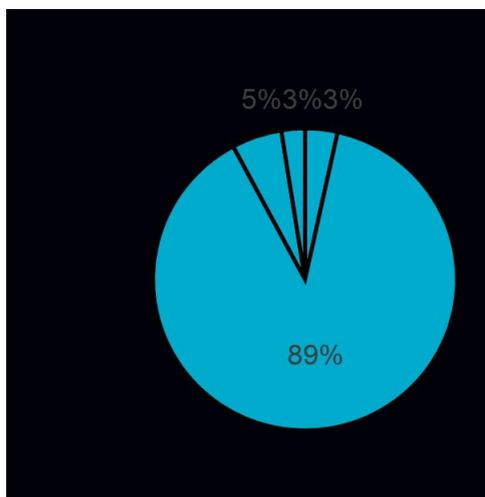
We have carried out a survey among representatives of Polish judges, who state directly that more than 90% of them hold the view that politicians have greater influence over this system. This is the opinion of Polish judges who felt some influence may have been exerted upon them (67% of the respondents have heard about this influence). The newly created NCJ, when asked by judges about the politicisation of this institution, 91% hold an opinion that the Council is more open to the influence of the Ministry of Justice.

ASSESSMENT OF THE SELECTED JUDICIAL INSTITUTIONS IN POLAND WITH REGARD TO POLITICAL INFLUENCE

Common Courts

Constitutional Court

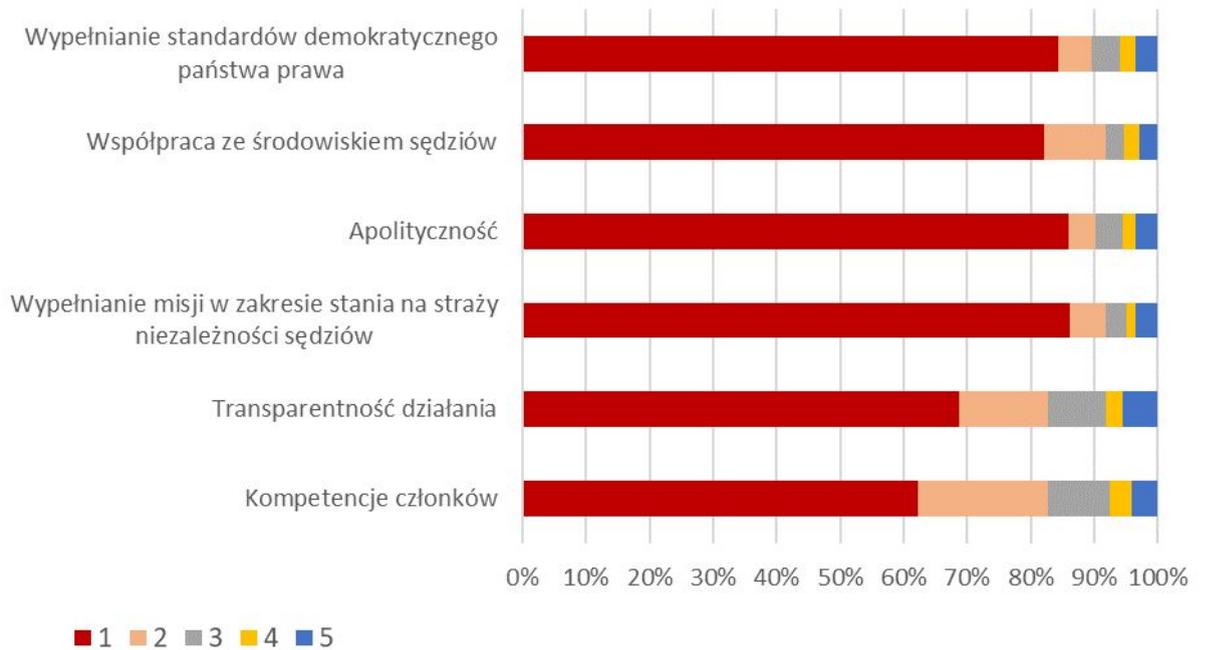
National Council of the Judiciary



- Mniej zależne od wpływów politycznych niż za poprzedniego Ministra Sprawiedliwości
- Bardziej zależne od wpływów politycznych niż za poprzedniego Ministra Sprawiedliwości
- Związki z polityką takie same
- Nie mam zdania

**ASSESSMENT OF THE CURRENT NATIONAL COUNCIL OF THE JUDICIARY WITH REGARD
TO ITS INDIVIDUAL ASPECTS**

1 – very low assessment, 5 – very high assessment



Unfortunately, the present NCJ also has its shameful share in this image of the Polish judiciary.