



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

Opinion of the ENCJ Executive Board on the request of the Krajowa Rada Sądownictwa of Poland

The ENCJ has received a request for cooperation from the National Judicial Council of Poland (Krajowa Rada Sądownictwa - KRS). The KRS has turned to the Executive Board of ENCJ to be advised on two new legislative proposals from the Polish government.

The ENCJ, in principle, does not give opinions on draft legislation, but it will set out the generally applicable ENCJ principles. Taking this into account the Executive Board (hereon after, the Board) of the ENCJ wishes to put forward the following observations and comments.

1. The involvement of the judiciary in Judicial Reform

The proposals were made available to KRS on 25th January 2017 and the KRS has been given a time to react till January 31st.

The Board reiterates what the ENCJ has stated in its Warsaw Declaration of June 3rd 2016:

“In relation to the developing situation in Poland, the ENCJ emphasises the importance of the executive respecting the independence of the judiciary, and only undertaking reforms to the justice system after meaningful consultation with the Council for the Judiciary and the judges themselves.”

A reaction time of less than a week to react to a large scale reform of the National Judicial Council and the organization of the judiciary does not qualify in anyway as a meaningful consultation.

According to the ENCJ-standards the Judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation. This is to ensure the independence of the judiciary, that reforms are effective and instill confidence¹.

Judges and Councils should not be hostile to modernization and reform of the justice system, provided always that the contemplated reforms are aimed at improving the quality of the justice system for the benefit of those that it serves. Judicial involvement in the reform process should provide the balance between the wishes of the elected government and need to maintain judicial impartiality and the rule of law.

¹ [ENCJ Report on Judicial Reform in Europe \(2012\)](#)

2. Termination of mandate of Council Members

KRS is an independent Constitutional Body according to article 186 of the Constitution of the Republic of Poland. The current proposals imply that the mandates of the current judicial members, elected by their peers in accordance with the law, will be ended.

The Board recalls the opinion of the Venice Commission on Georgia ([CDL-AD\(2013\)007-e](#)):

“69 –The Commission recalls that an important function of judicial councils is to shield judges from political influence. For this reason, it would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections.

70. The Organic Law provides for a four-year term of office. This term does not appear to have a constitutional basis. Both the law in force and the draft amendments establish an exhaustive list of the grounds for pre-term termination of the mandate of the members of the High Council of Justice. Neither of them includes norms which expressly provide or can be interpreted in the way that the mandate of the members of the High Council of Justice can be terminated when the procedure for appointment is changed.

71. The Venice Commission is of the opinion that when using its legislative power to design the future organization and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council.

72. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. While the Commission was informed that there are no cases pending in Georgia, any such change must be regarded with concern.”

In the view of the Board the current proposal would effectively jeopardise the continuity of the National Judicial Council and raise concern that the government wishes to take control of the Council.

3. Appointment of judicial members by the Parliament

Another part of the proposal would change the way the judicial members of the Council will be appointed. The proposal of the Minister of Justice envisages that the 15 judges members of the Council will be selected by the Parliament.

The ENCJ has a clear standards in this field which reads:

“..... the mechanism for appointing judicial members of a Council must be a system which excludes any executive or legislative interference and the election of judges should be solely by their peers and be on the basis of a wide representation of the relevant sectors of the judiciary².”

The ENCJ standards also states that at least 50% of the members of the Council should be judges, elected by their peers.

Other European and International Standards point in the same direction. See for instance the Venice Commission in 2015 on Bulgaria ([CDL-AD\(2015\)022-e](#)).

² [ENCJ Councils for the Judiciary Report 2010-2011](#), page 5

“The Commission however favours systems where a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.”

[And opinion number 10 of the CCJE](#) (Consultative Council of European Judges of the Council of Europe):

“...27. Without imposing a specific election method, the CCJE considers that judges sitting on the Council for the Judiciary should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels.”

And Recommendation 2010/12 of the Committee of Ministers of the Council of Europe: [CM/Rec \(2010\)12](#) on Judges, Independence, Efficiency and Responsibilities.

“27. Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary.”

It is obvious that the selection of the judge-members of the KRS directly by Parliament is not in accordance with these standards.

4. Selection and appointment of judges

The Board notices that the role of the Minister of Justice in the appointment procedure for assistant-judges will be substantial and the role of the Council will be minimal. The proposal foresees that there will be two Assemblies in the National Council for the Judiciary. The First Assembly will consist of ten members (First President of the Supreme Court, President of the Supreme Administrative Court, Minister of Justice, a person appointed by the President of the Republic of Poland, four members selected by the Sejm and two members selected by the Senate), while the Second Assembly of the National Council of the Judiciary will consist of fifteen members selected from among the judges of the Supreme Court, courts of law, administrative courts and military courts. The proposal assumes that for the resolution to be adopted by the Council, it will be required to have it adopted by both Assemblies sitting separately.

The ENCJ standards in this field are very clear:

“... in order to avoid political influence, the procedures for the recruitment, selection or (where relevant) promotion of members of the judiciary ought to be placed in the hands of a body or bodies independent of government in which a relevant number of members of the judiciary are directly involved.”

“The body in charge of judicial appointments should comprise a substantial participation of legal professionals or experts (including experienced judges, academics, lawyers, prosecutors and other professionals) and could also include independent lay members representing civil society, appointed from among well-known persons of high moral standing on account of their skill and experience in matters such as human resources.

*The body in charge of judicial selection and appointment could be the appropriate national Council for the Judiciary (or a specific committee or department within the Council for the Judiciary) or an independent national judicial appointments board or committee. In those systems where the compulsory period of induction training is part of the recruitment and selection process, the relevant Academy, College or School of the Judiciary could play a major role by making recommendations in relation to the candidates which it considers should be appointed on the basis of their performance during the induction training."*³

Concluding remarks

The Board of the ENCJ feels that the draft laws could harm the independence of the judiciary in Poland. The ENCJ standards are not met in several fields. These standards are not developed to serve the interests of the judiciary. The standards simply reflect the shared principles and values of the EU Member States which guarantee a proper functioning of a democratic systems based on the Rule of Law.

Done in Brussels 30th January 2017
ENCJ Executive Board

³ [Minimum Standards for the Selection and appointment of judges 2011-2012](#)