



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

On 3rd October 2017 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 the compatibility of the Presidential draft Act on the National Council of the Judiciary of Poland with European standards including, in particular, the independence of the judiciary and the status of councils for the judiciary.

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 (the 'Board') puts forward the following observations and comments.

1. Appointment of judicial members by the Parliament

Like the Minister's proposal, the Presidential draft Act envisages that the 15 judicial members of the KRS will be selected by Parliament. The main difference between the two proposals is the majority with which Parliament should decide on the appointment of the judicial members. The Minister's proposal envisaged a simple majority whereas the Presidential draft Act foresees a 3/5 majority, even though this majority is not always guaranteed, especially if the Parliament fails to select 15 members in which case members can be elected on a roll call vote by the highest number of votes.

The Board reiterates the ENCJ standards in this field:

"..... 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 judiciary¹."

The ENCJ standards also state 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 report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission in 2010².

¹ [ENCJ Councils for the Judiciary Report 2010-2011](#), page 5

² [CDL-AD\(2010\)004-e](#) - Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010)

To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.

[See also 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."

Similarly, this is stated in 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 judicial members of the KRS directly by Parliament, whether it be by simple or qualified majority and so under both proposals being considered, is not in accordance with these standards.

2. Termination of mandate of Council Members

The Board notes that the Presidential draft Act, like the legislation proposed by the Minister, would end the mandates of current judicial members of the KRS who have been elected by their peers in accordance with the law. In addition, for the first election after the entering into force of the law, all deadlines are drastically shortened and this makes the termination of the mandate of the current members imminent.

This is troubling. The Board reiterates what it has stated in its previous opinion and refers also to 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.”

Concluding remarks

For these reasons, the Board feels that the Presidential draft Act does not alleviate the concerns which it has previously expressed concerning planned judicial reforms in Poland.

Done in Brussels, 13 October 2017
ENCJ Executive Board