



## Opinion of the ENCJ Executive Board on the adoption of the amendments to the law on the Krajowa Rada Sądownictwa of Poland

The ENCJ Executive Board is greatly dismayed to learn that the Polish Parliamentary Justice Committee has adopted a number of far-reaching amendments to the law on the National Judicial Council of Poland (Krajowa Rada Sądownictwa – the ‘KRS’) and has done so, as before, without any meaningful consultation with the KRS. These amendments are expected to be adopted by the Parliament and the Senate within the next days.

Specifically, the amendments entail the election of the 15 judicial members of the KRS by Parliament on the proposal of 2.000 citizens or on the proposal of 25 acting or retired judges or 25 legal advisers, lawyers, notaries or prosecutors. From this list, each caucus will be able to select nine candidates and an appropriate Sejm Committee will decide on candidates to form a 25-member list, with at least one candidate for each caucus. This list will be submitted for a Sejm vote, where a 3/5<sup>th</sup> majority will be required, although, in case this majority is not reached, the list will be voted by absolute majority. The draft legislation will enter into force within 14 days, so meaning that the current judicial members of the Council will see their mandate come to an end imminently.

The ENCJ Executive Board has previously expressed its grave concerns about the planned amendments to the law on the KRS in its Opinions of 31 January 2017, 17 July 2017 and 13 October 2017.

Serious concerns remain in the light of the new amendments since it is clear beyond doubt that they are not in line with the ENCJ’s standards - standards which reflect the shared principles and values of the European Union Member States and which, crucially, guarantee proper functioning of a democratic system based on the Rule of law.

### 1. The absence of participation of the judiciary in judicial reform

The ENCJ Executive Board repeats that throughout the process that has led to the amendments (the present amendments and those which preceded them), there has been no meaningful consultation with the KRS or the judges themselves. According to 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, and also to ensure that reforms are effective in that they instill confidence<sup>1</sup>.

Judges and judicial councils should not be hostile to modernization and reform, provided always that the contemplated reforms are aimed at improving the quality of the justice system for the benefit of those that it serves. It is for this reason that judicial involvement in the reform process is essential: it

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<sup>1</sup> [ENCJ Report on Judicial Reform in Europe \(2012\)](#)

provides the balance between the wishes of the elected government and the need to maintain judicial impartiality and the Rule of Law.

## **2. Appointment of judicial members by the Parliament**

The amended law envisages that the 15 judicial members of the KRS will be selected by Parliament.

The ENCJ Executive 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 judiciary<sup>2</sup>. ”*

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

It is obvious that the selection of the judicial members of the KRS by Parliament, whether it be by simple or qualified majority, is not in accordance with the ENCJ standards. Other European and international standards point firmly and unanimously in the same direction.

## **3. Termination of mandate of Council Members**

The new legislation will 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, so making the termination of current members' mandates imminent.

This is extremely troubling. The ENCJ Executive Board reiterates what it has previously stated, namely that such a change, on such short notice, must be regarded with concern and suspicion.

### **Additional remarks**

The amendments to the law on the KRS should not be seen as an isolated issue, but rather in conjunction with the amendments to the Act on the Ordinary Courts and the Act on the Supreme Court.

Taken together, the recent amendments to the laws governing the judiciary seem to the ENCJ Executive Board to entail the Executive and the Legislature trying to control the third power of the State, the judiciary. This is alarming and will potentially affect the position of and trust in the Polish judiciary in the European legal community.

The Rule of Law is at the core of the European Union and is central to any democratic system. Respect for the Rule of Law is a prerequisite for the protection of all fundamental values listed in the Treaties, including democracy and fundamental rights.

To uphold and protect the Rule of Law is a responsibility for both the Judiciary and the other State powers. For the effective preservation of the Rule of Law, independent and accountable justice systems, are needed with fair and impartial courts as the key institutions.

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

The ENCJ Executive Board emphasizes that fair and impartial courts are the key institutions of an independent judiciary. The ENCJ Executive Board repeats that a key requirement for maintaining and enhancing mutual trust between judicial authorities in the EU, as a basis for mutual recognition of judicial decisions, is the independence, quality and efficiency of the judicial systems and respect for the Rule of Law.

Lastly, the ENCJ Executive Board has learned of accusations by politicians against judges in Poland who have expressed their concern about the planned judicial reform by taking part in candlelight protests or speaking out publicly. There can be no justification for such attacks since, like any citizen, a judge should be permitted to express such concerns when democracy and fundamental freedoms are in peril, subject to the constraints linked to a judge's function. A judge's reserve may yield to the duty to speak out<sup>3</sup>.

Done in Brussels, 5 December 2017  
ENCJ Executive Board

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<sup>3</sup> [ENCJ Judicial Ethics Report 2009-2010](#), pages 5 and 6