



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

Position Paper of the Board of the ENCJ on the membership of the KRS of Poland

1. Introduction

Since October 2015 the governing Law and Justice Party has been engaged in the reform of the justice system in Poland. A series of laws have been enacted, including as from January 2018 a law concerning the Polish Council for the Judiciary (KRS). The enactment of this law, together with other justice reforms, raises the question whether the KRS is still in compliance with the ENCJ statutory rule that a member of the network should be independent of the executive.

In this position paper the Board of the ENCJ will seek to answer the above mentioned question.

But first the Board wants to emphasize that it regrets very much that this question has to be raised. The KRS is one of the founding fathers of the network and their representatives to the network were very much respected and contributed highly to the work of the network, both in the Board and in the various ENCJ projects over many years.

2. Relevant rules and standards of the ENCJ

Article 6.1 of the Statutes of the ENCJ provides:

“Membership is open to all national institutions of Member States of the European Union which are independent of the executive and legislature, or which are autonomous, and which ensure the final responsibility for the support of the judiciary in the independent delivery of justice”.

The ENCJ has adopted a number of standards since its establishment in 2004.

The most relevant standards to be taken into account in this position paper are the following:

On the role of Councils for the Judiciary

Each Council for the Judiciary has its origin in the development of its own legal system which is deeply rooted in a historical, cultural and social context but nevertheless all Councils for the Judiciary share common experiences and challenges and are governed by the same general principles. The fundamental role of the Council is to safeguard the independence of the judiciary and the Council has a distinctive position vis-à-vis other democratic institutions as it has the legitimacy to defend the judiciary, as well as individual judges, in a manner

consistent with its role as guarantor, in the face of any measures which threaten to compromise core values of independence and autonomy¹

On the election of the judicial members of Councils for the Judiciary

The ENCJ, and other relevant international bodies, have adopted a standard that 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

On judicial reform

Judges and the Council for the Judiciary should be closely involved in the formation and implementation of all plans for the reform of the judiciary and the judicial system³

3.Procedural aspects of the position paper

From 2016 onwards, the General Assembly and the Board of the ENCJ time and again made statements about the then draft law concerning the KRS and expressed its concerns about the independence of the then future KRS ([link to statements](#)).

After the enactment of the law concerning the KRS, the Board sent a letter to the KRS raising the question of KRS' membership of the ENCJ. The KRS sent an invitation to the Board in return, which was accepted by the Board. In preparation for the meeting with the KRS, the Board sent questions to the KRS as to their independence.

On 21st June 2018 a delegation of the Board visited Poland. The delegation consisted of the President, Kees Sterk, the Italian member of the Board Luca Forteleoni, and the Lithuanian member of the Board Nerijus Meilutis, supported by the director of the network Monique van der Goes.

The [questions asked](#) were the subject of a lengthy meeting with the KRS.

The delegation also spoke with the First President and other Presidents of the Supreme Court, with a delegation from the judges' associations Justitia and Themis, with members of the Forum of the Cooperation of Judges, and with the Ombudsman as statutory defender of human rights in Poland.

The KRS subsequently submitted [written answers](#) to the questions.

The associations of judges subsequently submitted [additional information](#).

4.The overall reform of the justice system

The law on the KRS is part of an overall reform of the justice system in Poland. In order to assess the law concerning the KRS correctly the Board finds it necessary to give a brief sketch of this overall reform.

4.1 The government's reasons for the justice reform

The Polish government has stated on numerous occasions that it wants to bring the justice system in their country under 'democratic control'. In their view this is necessary because

¹ [ENCJ report on Councils for the Judiciary 2010-2011](#)

² Idem

³ [ENCJ report on Judicial Reform in Europe 2011-2012](#)

the judges in their country are a state within a state, and an important part of them are corrupt, lazy or (former) communists.

The Board considers these to be very grave accusations. Because of the nature of the accusations, however, the Board would only be satisfied that what is suggested is right if there were strong and convincing evidence supporting the accusations.

No substantial evidence of the systemic wrongs the government says it wants to put right has been brought to the attention of the Board, and it is significant in this regard: no reports by independent and/or authoritative researchers. Nor does the evidence which the Polish government has brought forward in the dialogue with the European Commission support what has been alleged. For instance, no research has been presented about the number of (former) communists in the judiciary and how they influence the work of the judiciary. The outcomes of such research would be very relevant given the fact that the average age of judges in Poland is between 40 and 45, while Poland left the communist system in 1989. The same goes for research on corruption: only incidental examples came to the attention of the Board with no evidence of systemic corruption.

In conclusion: the Board finds that the reasons provided for the Polish government's judicial reforms are not convincing enough to justify them.

4.2 Procedural aspects of the reforms

One of the ENCJ's standards is that the judiciary should be closely involved in the formation and implementation for the reform of the judiciary and the judicial system.

This standard has not been met. Rather, the reforms have been imposed upon the judiciary without the required involvement of the judiciary.

4.3 Content of the reforms

The Board mentions a few of the enacted reforms:

- a. A law under which the Minister of Justice is appointed also as the head of the Public Prosecutors Office and under which he has ordered criminal investigations against judges who pass judgements of which he does not approve, and against judges who are critical of the reforms.
- b. A series of procedural laws concerning appointments in the Constitutional Court securing the loyalty of the Court to the government in important matters, with the consequence that the Supreme Court, the associations of judges and a large proportion of the 10,000 Polish judges do not regard the Constitutional Court as the guardian of the Constitution any longer.
- c. A law concerning the KRS in which the judicial members of the KRS are appointed by Parliament and no longer by their peers.
- d. A law allowing the Minister of Justice to dismiss and to appoint (vice)presidents of courts without the previously required binding proposal of the KRS: within a period of six months, he dismissed more than 150 (vice)presidents, including 10 out of 11 presidents of Courts of Appeal. No reasons were given for these dismissals.
- e. A law giving the Minister of Justice the power to second judges to courts of higher tiers.

- f. A law concerning the Supreme Court which has meant that 40% of the present judges of the Court have been made to retire, with mandatory retirement only being avoided with the consent of the President of Poland. The law also aims to effect the position of the First President of the Supreme Court: it aims to shorten her constitutional term of office.
- g. A law concerning the Supreme Court establishing a special chamber with the power to quash judgements which have been unassailable for the last twenty years, whenever this chamber sees fit.
- h. Another effect of the laws concerning the Supreme Court is that the newly appointed judges will have a majority in the Supreme Court.

4.4 The Board considers that the essence of these reforms entails a very considerable power shift from the judicial power to the executive. This shift infringes very seriously the independence of the judiciary and the separation of powers.

5.The law concerning the KRS

The present law concerning the KRS came into effect in January 2018. The essence of the reform is that the judicial members of the KRS are no longer elected by their peers but are instead appointed by Parliament. Judges may be appointed by Parliament if they are supported by 25 judges or a group of 2000 citizens.

The Board considers that this is a departure from the ENCJ standard that judges in a council should be elected by their peers. Although, non-compliance with this standard does not automatically imply that a council is not independent from the executive, in the case of the Polish Council the Board finds so many additional circumstances that it has reached the conclusion that the KRS is no longer independent from the executive. These circumstances include the following:

- The law on the KRS is part of an overall reform to strengthen the position of the executive, infringing very seriously the independence of the judiciary;
- The reasons given for these reforms are not convincing to the Board;
- It is not clear to the Board whether, and if so, in what way the reforms should and will contribute to the official goals of the government on the subject of the alleged corruption, inefficiency and communist influence;
- The reforms are not the fruit of the required involvement of the judiciary in the formation and implementation of plans for reform;
- The term of office of four of the sitting KRS-members has been shortened;
- In the selection process of a judicial member of the KRS the lists of supportive judges are not made public, and so it cannot be checked whether the list consists primarily of judges seconded to the Ministry of Justice, or of the same 25 judges for every candidate; The judicial members of the KRS have not published the list of supporting judges themselves, but they have instead provided the ENCJ only with a list showing the number of judges they were supported by;
- The associations of judges informed the Board that four of the present judicial members were until shortly before their election as member of the KRS seconded to the Ministry of Justice;

- They also informed the Board that five of the members of the KRS were appointed president of a court by the Minister of Justice shortly before their election as members of the KRS, using a law mentioned in paragraph 4.3;
- Thirdly, they informed the Board that a majority of the members of the KRS (14 out of 25) are either a member of the Law and Justice Party, a member of the government or are chosen by Parliament on the recommendation of the Law and Justice Party. The KRS decides by simple majority;
- The judicial members of the KRS support all the justice reforms from the government, although they admit that the majority of the judges are of the opinion that the reforms are in violation of the Constitution and are infringing the independence of the judiciary;
- Several members of the KRS expressed the opinion that judges who publicly speak out against the reforms and/or speak out in defence of the independence of the judiciary should be disciplined because of unlawful political activity;
- The KRS does not speak out on behalf of the judges who defend the independence of the judiciary. For example: the judges in Krakow were publicly called criminals by the Prime Minister of Poland, and the KRS did not object to it. The same goes for the KRS's attitude concerning the position of the First President of the Supreme Court;
- A large portion of the 10,000 Polish judges believe that the KRS is politicised

In short: The Board considers that the KRS is no longer the guardian of the independence of the judiciary in Poland. It seems instead to be an instrument of the executive.

6. Conclusion

The Board considers that the KRS does not comply with the statutory rule of the ENCJ that a member should be independent from the executive.

The Board believes that the KRS is no longer an institution which is independent of the executive and, accordingly, which guarantees the final responsibility for the support of the judiciary in the independent delivery of justice.

Moreover, the Board feels that actions of the KRS or the lack thereof, as set out in paragraph 5, are constituting a breach of the aims and objectives of the network, in particular the aim of improvement of cooperation between and good mutual understanding amongst Councils for the Judiciary of the EU and Candidate Member States in accordance with article 3 of the Statutes.

7. Proposal of the Board

In the circumstances, the Board proposes to the General Assembly, convening in Bucharest on the 17th September 2018, that the membership of the KRS be suspended.

With this measure, the ENCJ sends a clear message to the Polish government and the Polish judges that the ENCJ considers that the KRS is no longer independent from the executive.

By suspension – and not expulsion - the ENCJ also intends to express an open mind for the possibility for improvement on the topic of judicial independence in Poland. In this way it can continue to monitor the situation concerning the Rule of Law in Poland, for instance as to the disciplinary actions against judges who oppose the reforms.

The Board sincerely hopes that the time will come when the suspension can be lifted, but that will only be when the principle of judicial independence is properly respected in Poland.

8.Procedural rules

The ENCJ statutes state in article 6, paragraph 4 that:

The Executive Board may propose the expulsion of a member of the Association if it has committed serious breaches of the aims and objectives of the Association as set out in Articles 3 and 4 above. The Executive Board must first of all give the member in question the opportunity to state its position. Any expulsion must be decided upon by the General Assembly by a three quarters majority of the members present at that meeting.

Article 9 of the Statutes gives the General Assembly all the powers necessary to achieve the aims and objectives of the Association.

The ENCJ statutes provide an explicit rule for the expulsion of a member (Article 6.4), but does not contain a provision for the suspension of a member.

The Board believes that if the Statutes create a right to expulse a member, which is the most far-reaching competence, that should be taken as including the lesser ability to suspend a member, as has previously been done in relation to an observer.

The Board feels that a specific mention is not necessary to create the right to suspend a member because the Rules of Procedure (article 9) state that if any difference of opinion arises over the interpretation of the Statutes or of these Rules of Procedure, the General Assembly shall decide the proper meaning upon a proposal from the Executive Board. In all cases not provided for by the Statutes or the Rules of Procedure, the General Assembly will act as it deems fit upon a proposal of the Executive Board.

This position paper was unanimously adopted by the Board on 16th August 2018.

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