



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 (expulsion)

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 of January 2018 a law concerning the Polish Council for the Judiciary (KRS).

On 17 September 2018, an Extraordinary General Assembly of the ENCJ decided to suspend the membership of the KRS because it no longer met the requirements of the ENCJ that it is independent of the Executive and Legislature in a manner which ensured the independence of the Polish Judiciary ([link to position paper](#)). Only the KRS voted against its own suspension.

Since then, the Executive Board sent delegations of three board members to Poland in March and November 2019 assessing the situation. They spoke with the Supreme Court, the judges associations, the Ombudsman, and the KRS. The latter only met the delegation in November, because, according to the KRS, it was inopportune to talk to the ENCJ whilst a preliminary reference procedure concerning aspects of the judicial reforms in Poland was pending before the CJEU. The delegations reported back to the Executive Board (reports attached).

On 14 February 2020, the situation regarding the independence of the Polish judiciary deteriorated still further with the commencement of a new law which has grave implications for the rule of law in Poland. For the first time judges may be held to account and disciplined on the basis of the merits of their decisions, for applying European Union Law and if they send a request for a preliminary ruling to the CJEU under article 267 TFEU. The KRS has not opposed this development, it has expressed strong support for the new law.

The developments since 2015, and the active role of the KRS in support of them, have led the Executive Board to question whether the KRS has committed serious breaches of the aims and objectives of the Association as set out in Articles 3 and 4 of the Statutes of the ENCJ, and thus whether it should propose the expulsion of the KRS as a member of the ENCJ.

In this position paper the Board of the ENCJ sets out its position.

2. International responses to the situation of the independence of the Polish judiciary and the role of the KRS

Since 2015 the international interest in the reforms of the Judiciary in Poland has been enormous. The Executive Board just mentions the United Nations (ODIHR), the Council of Europe (Greco, the Venice Commission and the Parliamentary Assembly), the European Union (the Commission, the Parliament and the CJEU) and the networks of the Judiciary and advocates in Europe (the network of presidents of Supreme Courts in Europe, the association of the Councils of States and Supreme Administrative Jurisdictions of the EU, the European Association of Judges, The European Bar Association), and many more. All these organizations are very critical of the reforms of the Judiciary in Poland and the role of the KRS.

At this point the Executive Board refers to a few of the recent positions of some of these organizations.

In its report of 6 January, 2020 the Monitoring Committee of the Parliamentary Assembly of the Council of Europe considered: *“The reform of the National Council of the Judiciary had brought this institution under the control of the executive, which is incompatible with the principle of independence.”* (133, page 30)

The Venice Commission issued an urgent Opinion on 16 January, 2020 recommending among other things *“to restore the powers of the judicial community in the questions of appointments, promotions and dismissals of judges”*, implying that the KRS is under the control of the Executive.

On 19 November, 2019 the CJEU delivered a judgement holding, inter alia, that the test for the independence of the KRS is in the circumstances in which its members are appointed and the way the KRS actually exercises its role of ensuring the independence of the Judiciary (Case C-585/18; C-624/18 and C-625/18). Applying this test, the Polish Supreme Court (Grande Chambre of all the judges of three divisions) held in a resolution of 23 January, 2020 that the KRS is not independent from the Executive.

On 25 October, 2019 the Commission brought an action before the CJEU claiming, inter alia, that the independence of the new Disciplinary Chamber in Poland is not guaranteed because its judges are selected by the KRS, while the judge-members of the KRS are selected by the lower house of the Polish Parliament. On 23 January, 2020 the Commission requested interim measures in this case. In its judgement of 8 April, 2020 the CJEU granted the request, holding, inter alia, that the arguments concerning the lack of a guarantee as to the independence and impartiality of the Disciplinary Chamber are prima facie not unfounded (case C791/19).

On 29 April, 2020 the Commission launched an infringement procedure, the fourth, against part of the Polish judicial reforms, considering that several elements of the Polish Law of 20 December, 2019 violate EU law, in particular:

- The content of judicial decisions can be considered to be a disciplinary offence;

- The law prevents Polish courts from fulfilling their obligation to apply EU law or request preliminary rulings;
- The law prevents Polish courts from assessing, in the context of cases pending before them, the power to adjudicate cases by other judges;

On 4 May, 2020 the president of the European Association of Judges, the Portuguese judge Jose Igreja Matos, sent a letter to the president of the ENCJ. The European Association of Judges represents the majority of judges in Europe. He stated in the letter:

“Therefore, considering the KRS does not comply with the fundamental requirement for a Judicial Council of being independent from the executive and bluntly fails to uphold the independence of the judiciary, the EAJ board wants to publicly express its support to the proposal to expel KRS from ENCJ.”

Furthermore:

(..) EAJ is determined to continue the defence of our Polish Colleagues in their combat for an Independent Judiciary; we are absolutely confident that the same level of commitment will be equally ensured by your institution.” (letter added)

On 13 May, 2020 the LIBE Committee of the European Parliament published a draft interim report in the article 7 procedure against Poland. The rapporteur is MEP for Spain Juan Fernando Lopez Aguilar. Regarding the impact of the Polish Law of 20 December, 2019 on the independence of the KRS, this report holds the following:

“23. (..)this measure led to a far-reaching politicisation of the NCJ [KRS]; (..) 26. Calls on the Commission to start infringement proceedings against the Act (..) on the NCJ [KRS] and to ask the CJEU to suspend the activities of the new NCJ [KRS] by way of interim measures.”

On 19 May, 2020 the ENCJ received a joint letter of the presidents of the Polish Judges’ Association Iustitia, of Themis Association of Judges, of the Association of Family Court Judges in Poland, of the Association of Family Court Judges Pro Familia, of the Polish Association of Administrative Court Judges and of the Permanent Presidium of the Judges’ Cooperation Forum. These judicial organisations represent the opinion of a large majority of the approximately ten thousand Polish judges. They state:

“Given the above, it is with deep sadness and full conviction that we express the view that the only rational decision that can be made is to remove the Polish National Council of the Judiciary from the group of members of the ENCJ.”

Furthermore:

“We also declare the further cooperation of Polish judicial associations and the Permanent Presidium of the Judges’ Cooperation Forum with the ENCJ in the fight for the independence of the European Judiciary.” (letter attached)

3. Relevant rules and standards of the ENCJ

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 (..). 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 3.1 of the Statutes of the ENCJ provides:

“ The Association has as its aim the improvement of cooperation between and good mutual understanding amongst, the Councils for the Judiciary and the members of the judiciary of both the European Union Member States and of any European Union candidate Member State.”

Article 4 of the Statutes of the ENCJ provides:

“Within the framework of the creation of the European Area of freedom, security and justice, the objectives of the Association are cooperation between members on the following:

- *Analysis of and information on the structures and competencies of members, and exchanges between the members;*
- *Exchange of experiences in relation to how the judiciary is organised and how it functions;*
- *Provision of expertise, experience and proposals to European union institutions and other national and international organizations. (..)”*

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 autonomy”¹

On the duty of judges to speak out when democracy and fundamental freedoms are in peril
“In politics, a judge, like any other citizen, has the right to have a political opinion. His task, by showing this reserve, is to ensure that individuals can have every confidence in justice, without worrying about the opinions of the judge.

(..)

At the same time, the obligation of reserve cannot provide a judge with an excuse for inactivity. While he should not speak on cases with which he deals personally, the judge is nonetheless ideally placed to explain the legal rules and their application. The judge has an educational role to play in support of the law, together with other institutions which have the same mission.

When democracy and fundamental freedoms are in peril, a judge’s reserve may yield to the duty to speak out.”

In the Budapest Declaration of the General Assembly of the ENCJ (2008) the following standard was adopted:

“4. As to the composition of the Councils for the Judiciary: (..) c. in any case (..) the judicial members of the Council (however appointed) must act as the representatives of the entire judiciary”

4. Procedural aspects of the position paper

At its meeting of 10 February 2020 the Executive Board decided to start an inquiry into the question whether the KRS should be expelled.

On 21 February 2020 the President of the ENCJ wrote a letter to the President of the KRS asking nine questions concerning the ENCJ membership of the KRS (letter attached).

On 13 March 2020 the President of the KRS responded to the nine questions (letter attached).

On 22 April 2020 the Executive Board adopted the draft position paper.

On 22 April 2020 the President of the ENCJ sent the draft position paper to the President of the KRS asking for the reaction of the KRS to the draft position paper (letter attached).

On 20 May 2020 the President of the KRS responded to the draft position paper (letter attached).

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

5. Is the KRS independent of the Executive and Legislature?

On 17 September, 2018 the General Assembly adopted the reasons of the Executive Board to suspend the KRS, as put forward in the position paper of 16 August, 2018:

“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.”

The delegations of the Executive Board, as mentioned in the introduction, reported to the Executive Board. On the basis of these reports the Executive Board is of the opinion that the situation has not improved from 17 September 2018 until now, but has deteriorated on several issues.

First. The relations between the KRS and the Minister of Justice are even closer than suspected in the position paper of 16 August, 2018. At the meeting of November 2019 the KRS did not criticize the government at all. After enormous pressure, the lists of judges who supported the present members of the KRS as candidates (a minimum of 25 supporting judges was required to be appointed), show support by a narrow group of judges associated with the Minister of Justice, including 50 judges seconded to the ministry. One candidate was appointed without the required minimum of 25 signatures from judges.

Secondly. The KRS openly supports the Executive and Legislature in its attacks on the independence of the Judiciary, especially by means of disciplinary actions (See below under 6, 7 and 8).

The answers of the KRS in the letter of 13 March 2020 on these points strengthen the Executive Board in its opinion.

In the answer to question 1, the KRS acknowledges that 49 judges supporting the appointment of members of the KRS were seconded to the Ministry of Justice, and thus cannot be viewed as independent from the ministry for the purposes of the ENCJ.

In the answer to question 2, the KRS acknowledges that many signatures of judges supporting the candidacy of member Nawicki had been withdrawn before the election, thus casting doubt on the validity of his election, yet he continues to fulfil the role of a validly elected member of the council.

In the answer to question 3, the KRS only reiterates that it is not its task to monitor the declarations of the Minister of Justice and does not deny that the Minister of Justice has said

in the Senate that he proposed judges to be appointed in the KRS who, in his opinion, were ready to cooperate in the reform of the Judiciary. This amounts to a failure to promote the independence of the council and its members from the executive.

In the answer to question 4, the KRS argues that the members of the KRS are not the representatives of judges, which is incompatible with the ENCJ Budapest Declaration 2008 that judicial members of a council must act as the representatives of the entire judiciary.

The letter of 20 May, 2020 makes no convincing argument against the conclusion that the KRS does not fulfil the requirement of being independent of the executive.

On the basis of both its actions and its responses the Executive Board concludes that the KRS is still not independent of the Executive and the Legislature.

6. Does the KRS fulfil its ENCJ duty to defend the Judiciary as it turns against judges who protest against attacks on the independence of the judiciary?

According to an ENCJ rule a judge must refrain from politics. This rule is subject to an important exemption when the independence of the judiciary is threatened. In that case a judge has not only the right, but also the duty to speak out.

The KRS has ignored this rule by stating that any protest by judges against the reforms of the justice system constitutes a disciplinary tort. Furthermore, it actively supported the disciplinary prosecution of the protesting judges. For example, the decision that enables judges to be disciplined for wearing T-shirts with the inscription "Constitution". Both issues were reported by the delegations of the Executive Board on the basis of the meeting with the KRS and the meetings with the Supreme Court and the judges organisations. In its letter of 20 May, 2020 the KRS now says it has no competences in relation to these issues, but both statements were made in the meeting with the KRS.

Thus, it attacks and tries to destroy the independence of the judiciary, while an ENCJ Council for the Judiciary has as its most important duty to safeguard and protect the independence of the judiciary. It is its prime *raison d'être*.

The letter of 20 May 2020 makes no convincing argument against the conclusion that the KRS has violated its duty to defend the judges who protested against attacks on the independence of the Judiciary.

7. Does the KRS fulfil its ENCJ duty to defend the Judiciary when actively supporting the disciplining of judges for referring preliminary questions to the CJEU?

It is a rule of European Union Law that every national judge in a European Member State is also a European Union judge, and that European Union judges are entitled and sometimes obliged to refer questions to the CJEU for the uniform application of EU Law.

The KRS undermines these rules by actively supporting the disciplinary prosecution of judges who decided in a judgement to ask preliminary questions to the ECJ. In the letter of 20 May,

2020 the KRS denies this, but the ENCJ delegation remembers that it was said by the KRS in the meeting. Thus, the KRS is in violation of the ENCJ duty to defend the Judiciary.

The letter of 20 May, 2020 makes no convincing argument against the conclusion that the KRS has violated its duty to defend judges disciplined for referring preliminary questions to the CJEU.

8. Does the KRS fulfil its ENCJ duty to defend the Judiciary by actively supporting the disciplining of judges for the content of judgements in which a judge applies EU Law?

In a judgment delivered on 19 November, 2019 the CJEU established a test to enable the Polish courts to decide whether the newly established Disciplinary Chamber in the Supreme Court of Poland is an independent tribunal according to EU Law (Case C-585/18; C-624/18 and C-625/18).

In a resolution of 23 January, 2020 the Polish Supreme Court (Grande Chambre of all the judges of three divisions) applied the test and concluded that the Disciplinary Chamber did not satisfy the test and was not an independent tribunal. It also decided that the KRS is not independent from the Executive.

In direct response to this judgement, the KRS actively supports the disciplinary prosecution of judges who apply the CJEU-test (see also the answer to question 9 in the letter of 13 March, 2020). The first judgement in such a case has been delivered: judge (Pawel Juszczyszyn) has been suspended indefinitely of judicial duties.

On 14 February, 2020 further legislation was enacted in Poland. Under Article 107 of this law judges are liable to disciplinary procedures if they are adjudged to have engaged in political activity, such as protesting against the reforms, applying European Law as to the independence of judges and tribunals, and referring questions to the CJEU. The KRS is very much in favour of this law, and openly supports it. The answers to the questions 6, 7, 8 and 9 in the letter of 13 March, 2020 affirms this support.

Thus, the KRS is in violation of the ENCJ duty to defend the Judiciary.

The letter of 20 May 2020 makes no convincing argument against the conclusion that the KRS has violated its duty to defend judges disciplined for the content of decisions applying European Union Law.

9. The defence of the KRS

The most important defence of the KRS in its presidents' letter of 20 May, 2020 is that the ENCJ allegations "constitute an accusation against the legislative authority – for issuing specific legal acts, and with respect to the national Council of the Judiciary – for obedience to these acts of law." And: "The allegations directed at the National Council of the Judiciary seem to pertain the fact that it exercises its competences and observes the law in force in Poland, (..)."

The Board's view of these arguments is as follows:
The stand of the KRS is not correct.

According to many European institutions and organisations, and national Polish institutions and judicial organisations alike, some of them are cited in par 2, the Polish government is attacking the independence of the Polish Judiciary on a large scale. The CJEU already now has condemned Poland on several occasions for not upholding the European Union Rule of Law as to the independence of the Judiciary, and more cases are pending. See par 2, 7 and 8. From a European Law point of view, the stand of the KRS that it just obeys "the law" is therefore not correct: European Union Law is also the law of Poland and has primacy above acts of the Polish Legislature and/or Executive.

The stand of the KRS is incompatible with the ENCJ standard on the role of councils. In ordinary circumstances the stand of the KRS might be correct, but not so "*in the face of any measures which threaten to compromise core values of independence and autonomy*" of the Judiciary. See the ENCJ-standard on the role of judicial Councils as cited in par 3. According to this standard the duty of the KRS in the circumstances should have been to safeguard the independence of the Judiciary against the attacks of the Polish Executive and/or the Polish Legislature. And the defence of the KRS makes it absolutely clear that it does not live up to this duty, and does not want to live up to this duty, saying it is legally not able to live up to the duty. The latter: Quod non. In the circumstances, the obedience of the KRS to "the law" is apparently limited to the acts of the Polish national Legislature and does not extend to European Union Law. This constitutes a breach of the ENCJ standard to safeguard the independence of the judiciary.

Furthermore, the Board does not believe that the stand of the KRS that it is just obeying "the law" and not actively supporting the attacks on the independence of the Judiciary is truthful: The reports of the delegations of the Board to Poland clearly show otherwise.

The Board concludes that the defence of the KRS is not satisfying or convincing.

10. Conclusion of the Executive Board

First. 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.

Second. The Board considers that the KRS is in blatant violation of the ENCJ rule to safeguard the independence of the Judiciary, 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 the core values of independence and autonomy.

Third. The Board considers that the KRS undermines the application of EU Law as to the independence of judges and tribunals, and thus its effectiveness. In doing so, it acts against the interests of the European Area of freedom, security and justice, and the values it stands for.

On the basis of the above mentioned considerations, the Executive Board concludes that the KRS has committed serious breaches of the aims and objectives of the Association as set out in Articles 3 and 4 of the Statutes, and is not willing to remedy these serious breaches.

11. Proposal of the Executive Board

In the circumstances, the Board proposes to the General Assembly, convening as soon as possible as the Covid-19 pandemic allows it, that the KRS be expelled as a member of the network.

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 a member of the European family of Members and Observers who believe in, and support the European Area of freedom, security and justice, and the values it stands for.

The ENCJ wants to make absolutely clear that it remains very much committed to the independence of the Polish Judiciary, our Colleague European Union Judges, and that it will continue to cooperate with all the judicial associations in order to defend and restore the independence of the Polish judiciary as soon as possible. Once a Council of the Judiciary in Poland again believes in and acts in support of the values of the ENCJ, the ENCJ will be happy to welcome any such Council back as a member.

This position paper was adopted by the Executive Board on 27 May 2020.



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Report of an ENCJ Delegation visit to Poland – 15th of March, 2019

The delegation consisted of:

1. Kees Sterk, President of the ENCJ
2. Nerijus Meilutis, member of the Executive Board
3. Monique van der Goes, ENCJ Office

9:30 - 11:00 meeting with representatives of the Judges' Associations

Iustitia / Themis Association / Forum of Cooperation of Judges / Committee of Defense of Justice and Free Courts initiative

The ENCJ President explains that the ENCJ intends to visit Poland every 6 months to monitor developments within the framework of the relations of the ENCJ with the KRS.

The Forum of Cooperation of Judges organised a survey among judges on the support for KRS. A third of the judges participated (around 3.690 judges). More than 90 % of the judges believes that the KRS is not performing its duties properly in accordance with article 186.1 of the Constitution. Almost 87 % of the judges believes that the judges on KRS should resign.

For the Polish judges the preliminary questions C585/18 C 624/18 C625/18 are the most relevant cases currently pending in Luxembourg. They are wondering how CJEU will judge KRS as not all EU Member States have a judicial Council. What would be the standard the KRS would be judged against?

Recent developments in relation to KRS

As for the KRS it was explained that the chairman of the KRS had said in public that they would have to consult the Minister of Justice on whether the KRS should obey the decision of the CJEU.

Some member of the KRS would have had a meeting with MP's of Kukiz 15 (coalition partner PiS) in which they promised to follow the political programme of the party.

The KRS also appoints judges that have had a negative opinion by the local judge supervisor in the courts. The KRS ignores the negative opinion because they are sure that these candidates are good.

One of the KRS members of member of an Association close to Kaczynski (leader PiS party)

The lists of supporters of KRS members are still not public, for one of the members, it now turns out that he did not have the support of 25 judges as 4 judges withdrew their support just before appointment. This case will be presented in Luxembourg next week (hearing on 19 March).

The KRS has asked the Constitutional Court to confirm that they are a body in compliance with the Constitution. The Constitutional Court is now in competition with the CJEU about the position of KRS. As it was not clear if KRS could file such a motion about itself, a group of PiS MP's filed the same motion.

On disciplinary procedures against judges

lustitia explains that every court is adopting resolutions that they do not accept the current KRS. As a result some disciplinary proceedings have been initiated against judges taking part in these.

Every judge can face problems when he or she says anything about Rule of Law issues or takes a decision unfavourable for the government. A judge acquitted someone who was in an anti-government protest. However the judge was found wearing a T-shirt once with the text Constitution. Disciplinary proceedings were started because the judge was biased and should have recused herself.

One of the Board members of lustita was on a rock festival where they provided information about the justice system to visitors. Disciplinary proceedings were started against her for disgracing the honour of the position of the judge. Even though the case was dropped, during the investigation they found that she was late with 172 judgements and she now faces disciplinary charges for this.

Against a judge in Poznan a procedure was started for things he had said during the hearing in another disciplinary case.

Other examples of reasons for disciplinary proceedings are: A judge who accepted an equality award; a funny tweet about Kaczynski.

New disciplinary proceedings are being launched against the judges, but they are still ongoing and final decisions that can be appealed to the Supreme Court have not been taken yet. As is shown from some cases, disciplinary proceedings are started for a specific alleged offense (e.g. explaining Justice at a rock-festival) and then completely different things are being investigated – for example the length of the proceedings or backlog.

The question was raised if this has a chilling effect among judges? There is a certain effect, some judges would be afraid to be under scrutiny for their decisions or their actions. Also because the

procedures appear not be aimed at investigating whether or not there was an infringement, but simply an unlawful intimidation of the judge. However, in general the society of judges is very brave.

The link between these procedures and KRS is that the KRS is confirming in the media that the judges that are being charged are really lazy.

It was explained that one judge has been particularly harassed by the authorities. First he was followed by the anti-corruption agency and so was his wife who is not even a judge. Then his taxes were checked. Disciplinary procedures were started by the president of his court (who is a member KRS). He was transferred to another civil chamber in the same court and now has to deal with cases that are already delayed and for which he now is blamed. He was not given an assistant and he protested, then he got one who was without experience. He trained this person and now found out that this person was promoted to another function.

Disciplinary officers in the courts are appointed by the Minister of Justice. They have to decide within 30 days but these terms are never followed. All judges of the disciplinary courts and the clerks are appointed by the Minister of Justice

The case of the judge went to the new chamber at the Supreme Court. He challenged all newly appointed judges in the chamber. The chamber appointed a new judge who ignored the recusal request and took a decision on the case without the file. The file had been sent to another chamber of the Supreme Court to be reviewed for the recusal request.

11:00 - 13:00: Meeting with the Supreme Court

The President of the Supreme Court said that she was extremely grateful for the support of the ENCJ. She regretted that the KRS was not willing to meet the ENCJ delegation.

The ENCJ President explained that since the suspension of the KRS in September the ENCJ is striving to keep all stakeholders up to date. He has spoken at a hearing of the European Committee of the Dutch parliament and he informs the Minister of Justice. The ENCJ also has had informal contacts with the CJEU and the ECHR, as well as with the EP and the EC.

The developments in Poland, according to the judges of the Supreme Court, are not positive. The leading party, PiS, is still attacking the institutions. The neo-KRS (name used for the KRS within the judiciary) is not independent at all. The members are under complete control of the Minister of Justice. Step by step the power of the Minister of Justice over the courts is increasing. He transfers people and he nominates his own people. A very good example of his methods is the case of Zurek.

The disciplinary proceedings of judges of the common courts are extremely worrying. These proceedings are under the absolute control of the Minister of Justice. The Bar association is of great help to the judges, they are defending the judges in the courts for free.

The Supreme Court should function in the service of the people. The newly set up chamber for disciplinary cases against judges and the chamber for extraordinary appeal are not approved of by the other chambers of the court. There is no office space for the judges of these chambers. The opposition parties are putting pressure on the Supreme Court to resist these chambers. The new judges who have been appointed to the traditional chambers of the Supreme Court are filing cases against the President of the Court demanding that she would be enabled to adjudicate. These cases are being judged by the new disciplinary chamber which is not in accordance with the law. The President is losing all these cases. The new judges, who are not bad lawyers, take strange decisions not respecting the law.

The judges of the Supreme Court that are resisting the reform are not getting younger. Many of them are retiring soon and they will be replaced by judges appointed by the new KRS. An international reaction is needed.

As regards the KRS the judges feel that the neo KRS speaks government language. The members are copying the words of the legislature and executive. Not a single action has been taken by the KRS in the defense of the independence of the judiciary or the judges. Judges are being attacked for the way they administer justice; in their duties.

The President of the KRS has, they found, 112 delayed cases. The neo KRS is starting cases against judges with even 10 delayed cases.

There is a particular case of a Poznan judge, the KRS found that he violated the honour of the position of a judge in his reasoning of a judgement. The judge explained his case in a disciplinary hearing and was then again charged with a procedure for what he said in his own defense.

The Labour Law and Social Security Chamber of the Supreme court started the case in the CJEU. There are two cases of the Supreme Court pending:

1. Prejudicial question on the retirement of judges.
2. 3 joint questions on the status of the judges that are nominated to the Supreme Court by the new KRS and if the Supreme Court can still be seen as an independent tribunal in accordance with art 47 of the Charter of Fundamental Rights. The judges feel that a decision can be expected by the CJEU that the appointment of new judges by the KRS render the Supreme Court not being in compliance with article 47. The Iceland case of the ECHR could be helpful here. The Polish government will probably claim that because of the change of the law the cases are not relevant anymore. The Supreme Court has set out its position on demand of the CJEU. The hearing of the case will be on 19 March. The government position is that the procedures were not followed by the Supreme Court. The Constitutional Court had planned to publish its decision on the constitutionality of the KRS on 14 March, but it announced that the decision will be postponed. This is probably linked to the hearing of 19th March.

On 14th March the spokesperson of the KRS said that he did not care about being an ENCJ Member. He announced another vote on the membership.

After the decision of the CJEU on the retirement of the judges of the Supreme Court and the subsequent amendment of the Law, 20 Supreme Court judges returned to work. Only one judge decided not to return. The Supreme Court is now deeply divided. The newly appointed judges are both member of the disciplinary and extraordinary appeal chambers as well as of the civil and criminal chambers. The old judges do not accept them because of the way they were selected. They were selected by KRS with a shortened procedure. The Supreme Court was not asked to give an opinion on the candidates. The presidents of the civil and criminal chambers are trying not to have the procedures being influenced by the newly appointed judges. The President of the Republic amended the rules for the organisation of the work of the Supreme Court by which the new judges had to be accepted. From April 2019 the President will have additional powers to change any of the rules of the internal functioning of the Supreme Court without asking the opinion of the Supreme Court. The President recently held a speech in which he said that the old judges were humiliating the new judges and that they have no moral qualifications and that it would all be solved when they retire. The President and the Prime Minister repeatedly stated the judges of the Supreme Court are communists. When the judges of the Supreme Court initiate case on hate speech to the Prosecution, the cases are dismissed.

After the general elections later in 2019, the new Public Affairs Chamber will deal with the results of the elections. Both this chamber and the disciplinary chamber are autonomous of the President of the Supreme Court for their budget and their Human Resources. These chambers will have their own spokesperson and the judges earn 40% more than the other judges.

The ENCJ president concluded the meeting and stated that the situation is deteriorating, especially the relation between the government and the judiciary.

The President of the Supreme Court closed the meeting saying that we have to hope that the situation will improve. Not the whole nation is supporting the so called “good change” in the judiciary.

13:30-14:30: Meeting at the Office of the Ombudsman

Plans have been leaked to the press that the government might completely change the judicial map. New courts would be created on the regional level, which according to the Constitution, would allow the transfer of judges. Justices of the Peace would be introduced who would be lay persons elected by different kind of stakeholders on the level of the local communities or regions. Behind this reform is the election of loyal justice of the peace. These justices of the peace would apply the will of the people rather than the law.

This would be a very dangerous reform and would give even more power to the Minister of Justice. It would be a demolition of all appeal, regional and district courts as all judges will become common court judges. The KRS would get a crucial position as they would have to evaluate all

judges to decide on the transfer or appointment to a new court. It is unclear what is really behind this proposal, but probably they need loyal judges to serve the government. A Council / advisory body would be created consisting of local communities, prosecutors and legal experts which task would be to assess the functioning of the judiciary.

The Office of the Ombudsman is monitoring the disciplinary proceedings against judges, especially the case of the judge who sent a preliminary question to CJEU. Unfortunately the Ombudsman does not have any real instruments in relation to this.

Recently a big corruption case was discovered involving an Austrian construction company that wanted to build two towers in a piece of land owned by a company with strong links with the PiS. Tapes were found of Kaczynski making promises about payments. The company a filed fraud case against the owner of the land. The media who reported on the case, are being prosecuted.

The Office of the Ombudsman organises courts in cooperation with FRA for young lawyers in which they teach them how ask preliminary questions



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

Report of the ENCJ visit to Poland – 7-8 November 2019

The delegation consisted of:

Kees Sterk, President of the ENCJ

Filippo Donati, member of the Executive Board

Viktor Vadasz, member of the Executive Board

Monique van der Goes, Director ENCJ Office

Thursday 7 November

9:00 – 10:30 hrs, Supreme Court (Sad Najwyższy)

The President of the Supreme Court warmly welcomed the delegation. She was very happy to see the ENCJ delegation.

The President of the ENCJ expressed the intention of the ENCJ to keep on supporting the independent judiciary of Poland.

The President of the Supreme Court is very grateful for the strong support of the Dutch representatives especially Mr Timmermans, first vice-president of the European Commission.

The President of the ENCJ explained that the visit is part of the monitoring cycle of the situation in Poland. The delegation would like to know what the Supreme Court thinks the impact of the elections will be. The delegation also heard about the smear campaign scandal and would like to know what the consequences will be.

The President of the Supreme Court explained the situation as follows: It is still unclear what will happen next. There are rumours, that clashes and differences of opinions exist within the ruling party, the PiS. The PiS is probably disappointed about the size of the victory and it needs to rethink their plans. The Supreme Court hopes that the CJEU decision of 19 November will be of assistance.

The power of PiS is based on a populist agenda in which they give out money to the citizens and destroy the pillars of the liberal democracy. The state finances are not in a good place and there is talk about increasing the pension age and decreasing the pensions. When Donald Tusk was the Prime Minister, he proposed increasing the pension age to 67. When PiS took over they reversed this rule.

Even though the PiS won the parliamentary elections, they lost the majority in the Senate. The first speaker of the Sejm (the Marshall) is going to be another PiS representative. It means that the chance of the lists of supporters for the KRS members ever being published is extremely small.

Kaczynski, the leader of PiS, has stated that he thinks that the reform of the Supreme Court has failed. There is a fear that the government is planning an overall judicial reform and that they might use the constitutional provision that transfer of judges is possible if there is a general court or judicial map reform, to legitimize what in effect could be a lustration of the judiciary.

Recently three new candidates have been proposed to the Constitutional Tribunal. Two of them are currently member of the KRS (representing the Sejm-Parliament). They are very outspoken and strong supporters of the "Good Change "in the Judiciary. It is a very worrying development.

The Presidential elections will take place in May 2020 (to start the mandate 1 September 2020). The President of the Supreme Court will retire on 30 April 2020. The current President of the Republic needs to nominate the new President of the Supreme Court. The election of the new President of the republic will be a key moment in the history of Poland. The great example for Kaczynski is Viktor Orban. Poland is bigger and PiS does not have the constitutional majority, therefore the reforms take longer in Poland.

Turning back to the Judiciary, Iustitia, the Judges Association, is doing a very good job. They are very important for the protection of the judiciary. As is the Ombudsman, Adam Bodnar. His mandate will expire in the summer of 2020, though.

The biggest threat for the judiciary is the KRS. The disciplinary proceedings that were initiated against the chairperson of the KRS, Mr Mazur, could either be a warning sign for him or a pretense to show that the system is impartial.

The Supreme Courts believes that there are various scenarios for the future. The most radical one is that the current court system might be abolished and a new court system would be set up. This would consist of having only two levels of judges and early retirement of all appeal Court judges, the appointment of new court presidents, and replacement of all current court presidents.

The other scenario would be that in the end the PiS draws up the balance and the damage to the image on the European level and the financial costs of such a reform would not make it worth it. The new government is expected to make a statement with its plans within two weeks. It could be that the judicial reform is included. They might also postpone the plan until after the presidential elections.

A worrying development is the increased activity of the disciplinary judges. The latest development is that they go after judges for the content of the case.

The new electoral chamber of the Supreme Court (with judges appointed by the new KRS) is handling the objections against the results of the elections from the PiS and the opposition side.

The new chamber rejected six PiS cases against the results of the Senate election. It is difficult how to understand these decisions. Maybe the complaints were lodged with poor quality on purpose so they had to be rejected to give credibility to the chamber.

The KRS is in the process of selecting a number of new judges for the Supreme Court. They might want to finalise these nominations before the CJEU decision of 19 November 2019.

The discussion turned to the new European Commission.

The ENCJ President explained that a letter was sent to the President-elect of the European Commission. The Judiciary needs to explain the Rule of Law to politicians. As it is in a very good position to explain the practical aspects of the Rule of Law. There seems to be a Rule of law fatigue, also in Brussels. It is important that we keep on making the point that without an independent judiciary the EU is lost.

An ENCJ Board member explained that also corruption and not prosecuted crimes can cause public discontent and might lead to political changes. The Polish society seems very resilient. In addition, the institutions in Poland, from the beginning, spoke out in favour of the Rule of Law.

The ENCJ President informed the Supreme Court the ENCJ is organizing a seminar in Brussels on 12 December to study the 19 November 2019 CJEU decision. It could be interesting to have a reaction of the Supreme Court on the decision that could be presented to the participants or that could be presented by someone of the Supreme Court.

After the decision of the CJEU is made public, the President of the Supreme Court will immediately give a reaction. If questions of the press will be directed to the ENCJ, the ENCJ reaction will be coordinated with the Supreme Court.

The ENCJ President thanked the Supreme Court presidents for their time and announced that the delegation will be back in April before the end of the mandate of President Gersdorf.

13:00 – 14:30 hrs, Ombudsman

The Deputy-Ombudsman sees some positive developments, especially the result of the elections in the senate. The opposition in the Sejm has stronger people and new energy.

The next big test is the election of the President of the Republic. It will be a very harsh campaign.

The ombudsman has gone to courts to talk to judges. They focused on the centers for people with social behavior. The judges were very frank about the difficulties they encounter. They were shocked by the smear campaign organised in the Ministry of Justice. After the deputy MoJ and some other seconded judges stepped down they had to return to their courts. However, the local judges did not want to sit in a panel with them. Those judges now face disciplinary proceedings.

There are some legal – data protection- aspects to the smear campaign, as information was disclosed to journalists about judges (GDPR).

The impact of the 19 November is very important. If the CJEU declares KRS and all the judges that, they appointed in the two chambers (disciplinary and electoral chamber) invalid, that will have a tremendous impact.

The Ombudsman office has created a taskforce for the Rule of Law. The Ombudsman is going to submit a 3rd party intervention in Strasbourg in the cases [Grzeda](#) (premature termination of mandate of member of KRS) and [Xero Flor](#) (is the constitutional court still a tribunal under ECHR)

As for the disciplinary procedures, the procedures are very long. The aim is more to warn the judges not to do anything that could cause a procedure. It is very positive that there is a strong support of the judges by the lawyers. The network of judges, prosecutors and lawyers is very important one. The Ombudsman support these networks by providing meeting venues.

The Ombudsman is writing to MoJ, as this is one of the instruments they have, the MoJ is not replying. They are also writing letters to the head of the disciplinary procedures against judges.

The Ombudsman expects that the government will want to take tough measures. The media is an issue. They will want to have more control over the media and over the judiciary. A reform is expected.

15:00 hrs – 17:00 hrs meeting with Krajowa Rada Sadownictwa

Mr. Leszek Mazur, Chairperson of Council;

Mr. Wieslaw Johann, Vice-chairman of the Council;

Mr. Maciej Mitera, judicial member and spokesperson of the Council;

Mr. Jędrzej Kondek, judicial member of the Council;

Ms. Dagmara Pawelczyk-Woicka, judicial member of the Council

Mr. Marek Jaskulski, judicial member of the Council

The delegation was welcomed by the chairperson Mr Mazur. He explained that this visit does not interfere with the decision of 19 November.

The ENCJ president explained that he and president Mazur briefly met in Luxembourg in May. He further explained that he is from the Dutch town of Breda that was liberated 75 years ago by the Polish army. It is important that we meet, because we do not agree. Then there is even more reason for dialogue. Grateful that we could have this meeting. We are not here to judge, but to understand the position of KRS in particular issues.

The upcoming decision of the CJEU is an important issue, how does the KRS see the opinion of the AG Tanchev?

The legal representative of KRS in Luxembourg Dagmara Pawelczyk-Woicka explained that judicial appointments are not part of any EU regulations. The Independence of judges is not influenced by how they are appointed. It starts after they take service.

The ENCJ President pointed out that there are several options, KRS could be right, the CJEU follows Tanchev or they find a solution in between.

Member of the Council, Johann expressed that he was happy to be at this meeting. He added that the thought that the discussion on the decision of 19 November was premature. In his view, the nation exercised its powers over the judiciary through the representatives, the Sejm, the Sejm voted this law. They are the lawmakers. He implied to have insiders knowledge on the ruling, but that it would not be loyal if he would discuss this. He then said that he would like to discuss the relations between ENCJ and KRS. How could KRS can become a full member of the ENCJ again? How could the ENCJ assist KRS in this?

The President of the ENCJ said that it would make no sense to speculate. However, the ENCJ still thinks that the EU standards prevail. Will the KRS implement the decision of the CJEU of 19 November?

Member of the Council, Dagmara Pawelczyk-Woicka explained that there is also a ruling of the Constitutional Tribunal to take into account before she added that it is not the KRS that should implement. If the ruling is negative the competent bodies need to implement.

Member of the Council Jędrzej Kondek said that he agreed with his colleagues. It is not the place of the KRS to speculate, KRS is a non-political body. The political bodies would have to act, not KRS.

Viktor Vadasz asked if KRS could give opinion on any draft law. The KRS responded positively.

Member of the Council Marek Jaskulski stated that the KRS would be bound by the opinion of CJEU. It is good to hear that all people in the room share that we are all European and we feel Europeans. Even though Sejm appoints KRS members, the members are not under any political pressure. He also said that he still did not understand the suspension. There is no such option in the rules and regulations of the ENCJ Statutes. KRS knows that ENCJ receives many papers from the Judges Associations. The KRS wanted to provide ENCJ with such papers as well m but they did not have time.

The KRS is keeping a close eye on the disciplinary proceedings against judges. 35 proceedings finished with a court ruling. There were no rulings that had any relation with political reasons. The rulings related to drunk driving, wife beating and not working properly.

The KRS has not found any cases that were related to the freedom of speech. Basic principles are being respected. Any comparison with the courts not being independence is not justified. Judges make mistakes and it is part of the system that these can be corrected. The stories about disciplinary proceedings are exaggerated.

There is a discussion on what shape the judicial system should have. It is not easy to work when there is an attitude shift. Some institutions need to be reformed. New institutions were created such as a random case allocation system. This used to be a responsibility of the President. This is the good change.

The KRS needs closer contacts with ENCJ, we do not want this to be a last chance visit.

Viktor Vadasz explained that on 6 November in Hungary it became known that a judge was facing disciplinary proceedings because of him asking a preliminary question to CJEU. The papers picked it up and said it was scandalous. What is the position of the KRS as regards the setting of ethical standards, which is a competence of the Council.

Dagmara Pawelczyk-Woicka explained that during the electorate campaign, there was an incident. There was a 3-judge panel, during the proceedings of which, the chairing judge did not want to sit with the other judge on the panel, because this judge was part of the smear campaign. The judge did not want to continue the proceedings and sent a preliminary question to the CJEU and the judge appeared on a TV show. Judges have the right to ask a preliminary request to CJEU, but there are red lines that cannot be crossed.

The KRS will respect any decision of the CJEU when implemented by the competent Polish body. This is out of respect for the law. EU law does not state that a body consisting of judges elected by other judges should appoint the judges.

Viktor Vadasz explained that he was not referring to all disciplinary proceedings. There have to be procedures, but it is about particular cases which could cause a chilling effect.

Chairperson Mazur confirmed that there is no doubt on that an abuse of disciplinary proceedings is never good.

Member of the Council Maciej Mitera, shared the concern of Viktor Vadasz. Preliminary references are an important part of being a judge. It is a right and sometimes even an obligation. No judge should ever be afraid to send a question to CJEU. There is a thin red line, asking a question just to extend a procedure would not be right. A recent AG opinion advised that two questions of Polish should be declared inadmissible. It is clear that we belong to the European family.

Jedrzej Kondek added that the KRS is not a disciplinary court, nor does it nominate the disciplinary judges. The start of a procedure does not mean that the judge has broken the law. KRS has almost no competences in this field. A judge was disciplined for her decision. We supported the judge. Since the new KRS took office, there was no increase in the number of disciplinary proceedings.

The ENCJ President asked if there is something in the code of ethics, for which KRS is responsible, about preliminary questions and about speaking out against the reforms.

The members of CRS explained that there are no changes since the new KRS took office as regards putting forward preliminary questions to the CJEU. In relation to judges speaking out, there was also no change. Some judges called for the Minister of Justice to step down or the PiS government to collapse. These comments do not contribute to the image of justice, but no disciplinary proceedings were started against them.

Filippo Donati asked how to interpret the remark of the KRS that the organisation of justice is not within the scope of EU law. Poland is member of the EU, and KRS wants ENCJ to consider lifting the suspension. The ENCJ members share common values, which is Rule of Law, independence, and the appearance of independence. The KRS is not responsible for legislation, but it is responsible for the governance of the judiciary. There is an issue with the appearance of the independence of judges in Poland. What can the KRS do to improve and guarantee the independence and the perception thereof?

The various members of KRS replied that it is not about perceptions. If a judge would contact KRS because he would not be free to decide then the KRS would immediately ensure that the judge would be free to work. Maybe KRS should hire a PR company. Judges should be free in their work including no media pressure. The image of KRS should sustain that it is an independent body.

There are several issues with the courts. The legal system of Poland is the object of a political discussion. The KRS never had a chance to defend itself. It was always perceived as not being independent.

The ENCJ President then put forward the question whether the KRS knows more about the possible further judicial reforms.

KRS members explained that they heard that there might be a system of only two levels and all judges would be paid equally. In the current system, there are three levels (excluding the Supreme Court) and each level has a different remuneration. The new system would strengthen the position of judges.

KRS normally decides about promotions. In the new system, the KRS would be less involved in the career of judges. The new law would also imply that judges could change between the levels.

Viktor Vadasz commented that this would be a big change. Would KRS get the opinions of the judges on this big reform?

The KRS replied that this idea was originally developed by the Judges Association Iustitia.

The ENCJ President said that the ENCJ was very interested in this topic and that there were more definite concepts, the ENCJ would like to be updated.

Dagmara Pawelczyk-Woicka said that the KRS would like to know more about European Standards especially about how the Dutch Council for the Judiciary applies them.

Chairperson Mazur pointed out that the ENCJ interest in the future reform is fully justified. The KRS would also like to hear about any suggestions for the operation of KRS and how it can improve the image of being an independent body serving the judiciary.

The ENCJ President thanked the KRS members for their time and the dialogue. The Board wants to welcome back the KRS as a member of the network. The Board will scrutinise the situation and is looking forward to the time the suspension can be lifted. This will also depend on the decision of 19 November.

Chairperson Mazur confirmed that the decision of 19 November is important. He thanked the participants for the meeting and the active contributions.

Friday 8 November

12:30 – 14:30 hrs Iustitia, Themis and Free Courts representatives

The ENCJ President expressed that the delegation was very happy that the judges took time for this meeting. The delegation was interested to hear what is happening in the courts and to individual judges. ENCJ tries to speak to the political leaders in other countries to help them see the situation. It is good to give them real life examples of what is happening. Issues that the delegation would like to hear about are the disciplinary proceedings against judges. What is the behavior of the presidents elected by the MoJ/neo KRS? And what about judges that were recently elected by KRS. Lastly, the delegation would like to hear the judges' views on the elections and the plans.

Iustitia said that they were very happy to talk to the delegation and provide it with information. Disciplinary proceedings have been started against judges with the suspicion that it is because of the context of the decision. There is a famous case in the court of Gdansk, where a judge was asked to provide an explanation about the context of the case. The case that needed explanation was actually a decision to repeal a disciplinary proceeding against another judge. Against the judge that repealed the case a disciplinary procedure was started.

There is a disciplinary judge of whom all judgements, his judicial decisions, have been repealed because of low quality. Still this person is in charge of the disciplinary proceedings against judges. The prosecutors are treated in the same way as the judges.

Almost all disciplinary decisions are pending, not many have ended or published. It is as if, they do not want the procedures to end. It is about causing a chilling effect.

Disciplinary proceedings are initiated under any pretext. Mr Waldemar Zurek has been accused because he was harassing a judge of the new disciplinary chamber of the Supreme Court. In reality he was just publicly discussing what would happen to the new judges of the Supreme Court and members of neo KRS after the decision of 19 November.

The KRS decided that there was not enough proof of a smear campaign. Iustitia has initiated criminal and civil proceedings against the judges that were involved.

Kastawatch is a twitter account that does a lot of damage to the judges. There is a wider harassment campaign against judges consisting of tax scrutiny and financial statements and involving the central anti-corruption agency. Public television is attacking judges as well, calling them traitors of the country. The 27 judges that went to Brussels in the spring of 2018 are still being attacked and they will not be promoted by the KRS. Judges that also work as teachers in the universities are not being given permission to do so anymore.

The government is preparing the public opinion for the decision of 19 November and a further judicial reform.

Europe is our only hope at the moment.

For the future, there is a fear that judges will be reallocated to the other side of Poland. We think this will happen after May (Presidential elections). Some other think that the reform may take place before Christmas 2019.

The Impact of the decision of 19 November 2019?

The judicial association does not want communication chaos. There should be one clear message. The implementation of the decisions will involve the government but also the judiciary.

Expert opinions have been prepared in advance. The effect could be that from 19 November the judges will ask the KRS to cease all activities. The KRS was nominated in violation of the constitution, EU laws and standards. The Polish law on the KRS should be abolished or deleted. The KRS could be seen as null and void.

All nominations done by them such as almost 500 judges should be seen as invalid. These judges should not be seen as judges. The decisions that they took, should be seen as still binding, but can be appealed. It is important that we look at the consequences and position of the judges that are nominated by neo KRS. Leaving these judges in the legal system would be really bad.

There is a concern is about the chamber that deals with the results of the elections. Society could perceive it as an attack on the democracy. The competence could be shifted back to the competent chamber in the Supreme Court before the reform. Alternatively, because the judges in this chamber are not judges in the EU sense, and the chamber would stay empty, the President of the Supreme Court could second judges to this chamber.

The message on 19 November is very important, the Committee for the defense of justice, is preparing one single message.

Free courts spoke to European Commissioners Jourova and Timmermans about the future policy. They were given the assurance that the Rule of Law policy would stay the same. Jourova said that she needed strong statements such as from the ENCJ that could help her continuing the policy. She would especially need that after 19 November 2019. The new President of the European Commission seems to believe in dialogue with the Prime Minister. It is important that the ENCJ provides correct and relevant information to the European Commission.

The ENCJ President said that the ENCJ shares the concerns and that ENCJ will do what it can to change it.

Iustitia asked what will happen to the position of KRS after 19 November. The ENCJ President stated that the ENCJ would study this issue after 19 November 2019. The suspension of the KRS provides the ENCJ with the opportunity to monitor the situation in Poland.

The meeting was closed thanking everyone for the active involvement.



Honourable President of the European Network of Councils for the Judiciary

Mr. Kees Sterk

Rome, May 4 2020

Esteemed President,

Dear Colleague,

On 22 April 2020, the ENCJ Board has sent a draft Position Paper to the Polish Judicial Council (KRS) setting out the expulsion of the (already suspended) KRS from the ENCJ.

The European Association of Judges, the biggest organization of judges of Europe assembling 44 national associations, has repeatedly condemned the so called “judicial reforms” put forward by the Polish Government.

At its meeting in Copenhagen on 10 May 2019 the General Assembly of the European Association of Judges (“EAJ”) approved a resolution condemning the foregoing provisions of the Act of 26 April 2019 amending the Act on the National Council of the Judiciary and called upon the executive and legislative authorities of the Republic of Poland to recognise the incompatibility of those provisions with international and European Union standards.

At its meeting in Nur Sultan, Kazakhstan, on 15 September 2019, the General Assembly of EAJ adopted another resolution concerning the situation of the judiciary in Poland alerting to the politicisation of the National Council of the Judiciary and again urging Polish authorities to amend the legislation on the National Council of Judiciary to ensure that its judicial members are elected by the judges.

In several other occasions the same concerns were expressed by EAJ, for example, in its resolutions on Poland of 25th May 2018, 17th October 2018, its open letter of July 2017 and also in the Statements of the President of EAJ of February 2020 and November 2019.

Regardless of these public statements conveyed by many other similar declarations by international institutions, the Polish authorities insisted on the infringement of basic principles of Rule of Law and on the violation of accepted rules enshrined in EU treaties.

Therefore, considering that KRS does not comply with the fundamental requirement for a Judicial Council of being independent from the executive and bluntly fails to uphold the independence of the judiciary, the EAJ board wants to publicly express its support to the proposal to expel KRS from ENCJ.

Expecting that this brave example of ENCJ will be followed by other international organizations, EAJ is determined to continue the defence of our Polish Colleagues in their combat for an Independent Judiciary; we are absolutely confident that the same level of commitment will be equally ensured by your institution.

Yours sincerely,

A handwritten signature in black ink, reading "José Igreja Matos". The signature is written in a cursive, slightly slanted style.

José Igreja Matos

(President of the European Association of Judges)



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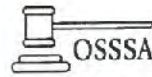
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Pro Familia

Stowarzyszenie Sędziów Rodziny



Ogólnopolskie
Stowarzyszenie Sędziów
Sądów Administracyjnych



Dear Sirs,
Honourable Members of the Board
of the European Network of Councils for the Judiciary

Further to the letters sent by the President of the ENCJ, Judge Kees Sterk, to the Chairman of the Polish National Council of the Judiciary, Judge Leszek Mazur, on 21 February 2020, as well as 22 April 2020, we are hereby presenting the position of Polish judicial associations and the Permanent Presidium of the Judges' Cooperation Forum regarding the procedure for excluding the Polish National Council of the Judiciary from membership of Your organization.

The Polish NCJ was one of the founders of the ENCJ and, for a number of years of its existence performed the task entrusted to it in the Constitution to safeguard the independence of the courts and the independence of judges, thereby satisfying the criteria arising from the ENCJ statutes, in particular Article 6.1, according to which ENCJ membership is open to those institutions 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".

Unfortunately, in Poland, a progressive process of dismantling the rule of law and weakening the separation of powers has been in progress since 2015, which is manifested in subordinating successive institutions to the ruling camp, such as the Public Prosecutor's Office, the Constitutional Tribunal, and the newly formed chambers of the Supreme Court, which, by definition, should remain apolitical to ensure an adequate level of protection of civil rights and freedoms. As judges, we are watching this process with great concern.

It is with great sadness that we must admit that the continuity of operation of the Polish National Council of the Judiciary in accordance with the constitutional order was interrupted in March 2018. A new body was appointed in its place after the premature termination of the previous members of the Council, the membership of which does not comply with the Constitution and European standards, because its 15 judge members were not elected by the judicial self-government but by the lower house of Parliament (the Sejm). As transpires from the letters of

support for the candidates to the National Council of the Judiciary disclosed on 14 February 2020, this body was even elected in a manner which was inconsistent with the current, unconstitutional provisions, as one of its members did not collect the required number of signatures. Moreover, the disclosure of a letter of support indicated that as many as 11 out of 15 judge members of the National Council of the Judiciary received various benefits from the Minister of Justice in the form of promotions or financial benefits, while 10 of them would not have become members of this body if not for the support of judges seconded to the Ministry of Justice. These circumstances clearly indicate that the judicial part of the neo-NCJ does not constitute a democratic representation of Polish judges, while the active politician from the ruling camp, namely the Minister of Justice – the Prosecutor General, had a decisive influence on its membership. The very manner in which it was appointed and the number of personal connections between judge members of the neo-NCJ and the Ministry of Justice undermines the independence of this body from the executive.

Furthermore, the current activity of the neo-NCJ of over 2 years clearly indicates that it not only does not perform its constitutional task of guarding the impartiality of the judiciary and the independence of the courts, but, on the contrary, this body is actively participating in the dismantling of the separation of power by fulfilling the task entrusted to it by the ruling camp involving the political subordination of the judiciary, with the Council playing a key role in this process. A detailed description of the activities of the neo-NCJ, which are incompatible with its constitutional role, and the status of the ENCJ would require a great deal of space, so, at this point, we would like to draw your attention to only the most important facts.

According to the Polish Constitution, the National Council of the Judiciary plays a very important role in the process of appointing and promoting judges by assessing candidates for the office of judge and candidates for senior judicial positions and requesting the President to appoint them. The impression is that, in very many cases, the current National Council of the Judiciary does not follow professional criteria, especially when assessing candidates for senior judicial positions in ordinary courts, as it rejects the candidates with the highest scores from the judge-inspectors and the assemblies of judges and promotes people who do not guarantee an adequate level of judicial service. This suggests that the board may be applying non-substantive criteria.

Even more reservations were raised by the way the Council selected candidates for the newly established chambers of the Supreme Court, namely the Chamber of Extraordinary Control and Public Affairs and the Disciplinary Chamber. When entering the contest procedure, the neo-NCJ not only “did not notice” that the presidential announcement of the contest was invalid under the Polish Constitution, as it did not include the countersignature of the prime minister, but also abandoned the requirement that candidates submit their case files to be assessed. As a result, the entire qualification procedure was limited to an interview lasting an average of several minutes, which did not give any views about the actual qualifications of the candidates. Paradoxically, therefore, when selecting judges for the highest Polish judicial body, the neo-NCJ set the bar for the requirements at a level that was much lower than that which is set for appointing the lowest level judges. Formally, the candidates were also verified in an unreliable manner, as the Council passed two candidates through the “screening sieve” who had been

punished on disciplinary charges, while their nomination by the President was prevented by press announcements. Such a course of the contest procedure clearly indicates that candidates were selected to judicial offices in the new Supreme Court Chambers through the use of non-professional considerations, which is confirmed by the fact that as many as 5 out of the 10 originally appointed members of the Disciplinary Chamber of the Supreme Court are former prosecutors who have neither judicial experience nor a “habit” of being independent. Furthermore, they are prosecutors who were previously distinguished for their loyalty to the Minister of Justice while being directly bound by his instructions not long ago. The fact that a Disciplinary Chamber was established which is dominated by people associated with the Minister of Justice cannot come as a surprise, considering the above-mentioned influence that the Ministry of Justice had over the staff of the neo-NCJ.

It should be noted that the negative role of the neo-NCJ in the process of forming the new Chambers of the Supreme Court did not end with the appointment of members of these Chambers, because the Council did not then observe the decision of the Supreme Administrative Court of 27 September 2018, reference number II GW 28/18, which – in connection with the ongoing proceedings to repeal the neo-NCJ’s resolution – applied an interim measure by ordering it to refrain from submitting applications to the President to appoint members of the Chamber of Extraordinary Control and Public Affairs. Without respecting the enforceable court order, the neo-NCJ submitted motions to the President, thereby explicitly questioning the authority of the judiciary.

As transpires from the above, it was the activity of the neo-NCJ that enabled the appointment of the Disciplinary Chamber of the Supreme Court which is in conflict with the Polish Constitution and has failed to meet the criteria of independence and impartiality. In turn, this chamber quite recently (on 4 February 2020) “returned the favour” to the Council by suspending Judge Pawel Juszczyszyn from his duties for trying to check the correctness of the appointment of the neo-NCJ by asking the Chancellery of the Sejm for the lists of support for the candidates to this body. It should be emphasized that the executive’s control of two bodies, one of which decides who will become a judge and which judge will be promoted (the neo-NCJ) and the other, by which the judge will be disciplined, including the possibility of dismissal from the profession (Disciplinary Chamber of the Supreme Court), combined with the lack of effective control of constitutionality of the laws, means that the institutional guarantees of the independence of the Polish judiciary arising from the Constitution have become purely illusory. In the light of the above, it does not come as a surprise that, following the guidelines contained in the CJEU preliminary ruling of 19 November 2019, the Polish Supreme Court, first in the judgment of 5 December 2019 and then in the resolution of the three combined chambers of 23 January 2020, unequivocally stated that both the neo-NCJ and the Disciplinary Chamber of the Supreme Court do not satisfy the criterion of independence from the political authorities, and the Disciplinary Chamber does not constitute a court, within the meaning of either Polish law or European law.

In addition to contributing to the establishment of an institutional framework making the Polish judiciary dependent on the executive (namely participation in the establishment of new chambers of the Supreme Court), the neo-NCJ also took a number of other proactive steps

intended to depreciate the importance of the judiciary. At this point, for example, the adoption of a resolution that enables judges to be disciplined for wearing T-shirts with the inscription "Constitution", or the adoption of a resolution in very harsh words condemning the former president of the Criminal Chamber of the Supreme Court, Stanisław Zablocki for returning to work after being retired prematurely and in breach of the Constitution and European law upon the application of the CJEU's interim measure.

The list of omissions by the neo-NCJ is equally long, namely steps that should be taken in a situation of a ruthless attack on the judiciary by the executive if the Council were to fulfil its constitutional tasks. In this context, we can mention:

- no negative stance with respect to the activities of the legislative and executive authorities that clearly breach the Polish Constitution and European law, such as reducing the retirement age of Supreme Court judges, combined with the interruption of their terms of office, or the introduction of the so-called "Muzzle Act", which allows judges to be punished, including being expelled from the profession for their judicial activity, the incapacitation of the bodies of the judicial self-governing association and enabling the political subordination of the successor of Prof. Gersdorf as the First President of the Supreme Court,

- no negative stance with respect to the increasingly frequent cases of repression of judges by the newly appointed disciplinary bodies for judicial activity (including because judges refer requests for preliminary rulings to the CJEU or the Polish Supreme Court), or for the public criticism of actions breaching the separation of powers,

- no reaction to the slanderous statements of many politicians about the judiciary, including in particular Prime Minister Mateusz Morawiecki and Minister of Justice Zbigniew Ziobro,

- no real action taken to clarify the involvement of some judge-members of the National Council of the Judiciary in activities which are inconsistent with the dignity of the profession of judge, and a member of the constitutional body guarding the independence of the judiciary (in particular, numerous press reports about the involvement of as many as 4 members of the neo-NCJ in the haters' smear campaign in the Internet with regard to independent judges, as well as the case of the anti-Semitic comments in the Internet, which has been ongoing for 5 years, by one of the neo-NCJ members).

Notwithstanding the acts and omissions of the neo-NCJ described above, as a collegial body, a number of individual actions and media appearances of individual judge-members of this body cannot be reconciled with its constitutional role. In particular, many members of the neo-NCJ openly supported even the most controversial activities of the government against the independence of the judiciary in their media statements, such as the adoption of the "Muzzle Act", the shortening of the retirement age of Supreme Court judges (in this context, one of the neo-NCJ members publicly threatened the Supreme Court judges with disciplinary proceedings) or the repression of independent judges by newly appointed disciplinary commissioners. During a secret ballot when voting for candidates to the new chambers of the Supreme Court, one of the judge-members of the neo-NCJ consulted the Minister of Justice on how to vote. Also, the agenda included public statements of the neo-NCJ members in the Internet, or pro-government media challenging the authority of the First President of the SC, or

competence of the European Commission or CJEU in assessing the independence of the Polish judiciary.

We are deeply convinced that, after the way in which the judge-members were elected had changed and had become contrary to the Constitution, the facts and arguments presented above clearly indicate that the body referred to as the National Council of the Judiciary not only abdicated from the position of its guardian of the independence of the judiciary, but has been actively involved in the process subordinating the third power to politics for over two years, playing a key role in this respect. The only matter that connects it with the previous National Council of the Judiciary is the name and seat, but this is far too little to believe that it satisfies the criteria of belonging to the honourable group of members of your organization. This body does not satisfy the criterion of independence from the executive and legislative authorities in the light of the Polish Constitution, European Union law or the ENCJ statutes.

Given the above, it is with deep sadness and full conviction that we express the view that the only rational decision that can be made is to remove the Polish National Council of the Judiciary from the group of members of the ENCJ. We simultaneously express our unwavering faith that the rule of law will shortly be restored in Poland, which will require the establishment of an independent National Council of the Judiciary on new terms, which will become a worthy partner of your organization. We also declare the further cooperation of Polish judicial associations and the Permanent Presidium of the Judges' Cooperation Forum with the ENCJ in the fight for the independence of the European judiciary.

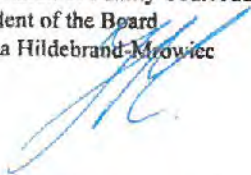
Polish Judges' Association "Iustitia"
Krystian Markiewicz
President of the Board



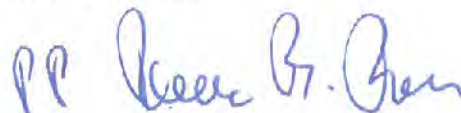
"Themis" Association of Judges
Beata Morawiec
President of the Board



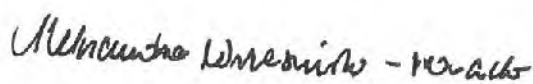
Association of Family Court Judges in Poland
President of the Board
Dorota Hildebrand-Mrowiec



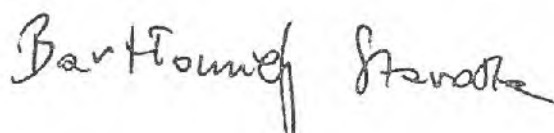
Association of Family Court Judges "Pro Familia"
President of the Board
Karolina Sosińska



Polish Association of Administrative Court Judges
President of the Board
Aleksandra Wrzesińska-Nowacka



Permanent Presidium
of the Judges' Cooperation Forum
President
Bartłomiej Starosta





European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

To: Judge Mazur, President of the KRS

From: Judge Sterk, President of the ENCJ

Subject: ENCJ membership of the KRS

Brussels, 21 February 2020

Mister President Mazur,

I write to you on an important matter.

Earlier this month the Executive Board discussed the recent developments in the judiciary in Poland, especially the role of the KRS in these developments.

These developments, and the supposed active role of the KRS in them, are reasons for the Executive Board to raise the question whether the Executive Board should propose to the General Assembly that the KRS be expelled from the ENCJ as a member.

In order to be able to take a fully informed decision on this important matter the Executive Board would like to ask some questions.

1. Is the allegation correct that the lists of supporting judges in the appointments procedure of the members of the KRS show 50 judges narrowly associated to the Minister of Justice?
2. Is it true that the KRS-member Nawicki was appointed without the legally required number of 25 signatures of judges?
3. Is it true that the Minister of Justice said in the Parliament (Senate) that he proposed judges to be appointed in the KRS who, in his opinion, were ready to cooperate in the reform of the Judiciary. If so, to what extent does the current composition of the KRS represent the Polish judges?
4. Is it true that the KRS fully supports the reforms of the government, especially the Law of 20 December 2019?

5. Is it true that the KRS never defended judges who spoke against the reforms of the government?
6. Is it true that the KRS (publicly) supports disciplinary proceedings against judges who:
 - have been speaking out against the reforms of the government in public?
 - have been asking preliminary questions to the ECJ in their judgements?
 - have been applying the criteria of the ECJ judgement of 19 November 2019 in their judgements?
7. If you answer questions 4, 5 and (parts of) question 6 positively, how does this support fit into the prime task of an ENCJ council of the judiciary to defend the independence of the judiciary as a whole and the independence of individual judges?
8. If you answer (parts of) question 6 positively, how does this relate to the ENCJ's aim to operate within the framework of the European Area of freedom, security and justice, and the rules and values it stands for?
9. What would you like to bring up yourself what you feel is of interest to the Executive Board in this matter?

The Executive Board would like to receive KRS' reasoned answers by Friday 13 March 2020.

Regards,



Judge Kees Sterk
President ENCJ



PRZEWODNICZĄCY
KRAJOWEJ RADY SĄDOWNICTWA

Nr WWM-0840-1/20

Warszawa, 13 marca 2020 r.

Pan
Sędzia Kees STERK
Przewodniczący
Europejskiej Sieci Rad Sądownictwa

W odpowiedzi na pytania zawarte w piśmie z 21 lutego 2020 r. przedstawiam stanowisko Krajowej Rady Sądownictwa, przyjęte 12 marca 2020 r:

1. Krajowa Rada Sądownictwa nie dysponuje listami poparcia, gdyż pełnomocnicy członków KRS złożyli je przed wyborem w Kancelarii Sejmu. Kancelaria Sejmu opublikowała listy na swojej stronie internetowej, gdzie wciąż są dostępne. Rada nie posiada informacji o związkach sędziów obcnych na listach poparcia z Ministerstwem Sprawiedliwości. Według komunikatu Forum Obywatelskiego Rozwoju, opublikowanego na stronie Stowarzyszenia Sędziów Polskich „Iustitia”, spośród 364 podpisów 49 zostało złożonych przez sędziów delegowanych do Ministerstwa Sprawiedliwości w chwili złożenia podpisu. Z pytania nie wynika, czy delegowanie do pełnienia czynności urzędniczych w Ministerstwie Sprawiedliwości oznacza ścisły związek z Ministrem Sprawiedliwości. Zgodnie z obowiązującym w Polsce prawem, potwierdzonym przez wyrok Trybunału Konstytucyjnego z dnia 18 lipca 2007 r. (sygn. akt K 25/07), żaden sędzia nie może zostać pozbawiony biernego ani czynnego prawa wyborczego do Krajowej Rady Sądownictwa (w tym prezes sądu – służbowo podległy Ministrowi na podobnej zasadzie jak sędzia delegowany do Ministerstwa Sprawiedliwości).

Wszyscy sędziowie, którzy udzielili poparcia kandydatom na członków Krajowej Rady Sądownictwa, zostali powołani na swoje urzędy w wyniku uwzględnienia przez

Prezydenta Rzeczypospolitej Polskiej wniosków Krajowej Rady Sądownictwa w poprzednich jej składach.

Z kolei delegowanie sędziego do Ministerstwa Sprawiedliwości spełnia standard konstytucyjny (wyrok TK z dnia 15 stycznia 2009 r., sygn. akt K 45/07). W wyroku tym Trybunał Konstytucyjny pozytywnie ocenił fakt, że czynności z zakresu nadzoru administracyjnego Ministra Sprawiedliwości nad funkcjonowaniem sądów wykonują sędziowie. Trybunał wprost stwierdził, że „mimo że w zakresie administracji sądowej podlegają oni Ministrowi Sprawiedliwości, nie zostają przez to wyłączeni z władzy sądowniczej”.

2. Pan sędzia dr Maciej Nawacki został wybrany w skład Krajowej Rady Sądownictwa uchwałą Sejmu RP z dnia 6 marca 2018 r. (M.P. poz. 276). Krajowa Rada Sądownictwa nie brała udziału w procedurze wyboru członków Rady. Przepisy regulujące tryb wyboru członków KRS (które zgodnie z art. 187 ust. 4 Konstytucji RP są zwarte w ustawie) przewidują, że kandydata na członka Rady zgłasza się Marszałkowi Sejmu. Podmiotem właściwym do kontroli formalnej zgłoszenia kandydata jest Marszałek Sejmu. Z informacji, które są dostępne publicznie wynika, że kilkoro sędziów, którzy złożyli podpisy pod kandydaturą Pana sędziego Macieja Nawackiego, złożyło następnie oświadczenie o wycofaniu udzielonego poparcia. Do Marszałka Sejmu (a w dalszej kolejności: do właściwej komisji sejmowej oraz do Sejmu *in pleno*) należała ocena skuteczności tego oświadczenia. Wskazać należy, że procedura wyłaniania kandydatów do Krajowej Rady Sądownictwa nie przewiduje wycofania raz udzielonej rekomendacji.
3. Krajowa Rada Sądownictwa nie monitoruje wypowiedzi swoich członków, w tym Ministra Sprawiedliwości, poza posiedzeniami Rady. Posiedzenia Rady są nagrywane, a nagrania są dostępne na stronie KRS.
4. Krajowa Rada Sądownictwa jest organem apolitycznym: nie wypowiada się w sprawach prowadzenia polityki wewnętrznej ani zagranicznej. Krajowa Rada Sądownictwa nie jest i nigdy nie miała być reprezentacją środowiska sędziów (np. na takiej zasadzie jak samorzady zawodowe albo związki zawodowe). Członkowie KRS nie są i nigdy nie byli przedstawicielami sędziów (inaczej niż np. posłowie na Sejm, którzy są przedstawicielami Narodu – taką relację wprost określa Konstytucja), członkowie KRS

nie są związani instrukcjami osób trzecich, ich mandat jest wolny i podejmują samodzielne decyzje na własną odpowiedzialność.

Do kompetencji Krajowej Rady Sądownictwa należy m.in. opiniowanie projektów aktów normatywnych w sprawach dotyczących sądownictwa. Opinie Rady są publikowane na jej stronie internetowej, są również zwykle umieszczane w serwisach internetowych poświęconych rządowemu lub parlamentarnemu procesowi legislacyjnemu. Przykładowo, załączam stanowisko Rady dot. ustawy z dnia 20 grudnia 2019 r. W ocenie Rady wspomniana ustawa jest reakcją władzy ustawodawczej na niepokojące zjawisko kwestionowania statusu jednych sędziów przez drugich sędziów, zagrażające porządkowi prawnemu i bezpieczeństwu obrotu prawnego w UE. Wskazać należy, że wspomniana ustawa chroni status sędziego niezależnie od procedury nominacyjnej towarzyszącej jego powołaniu na urząd sędziego i daty powołania. Krajowa Rada Sądownictwa zaskarżyła do Trybunału Konstytucyjnego przyjętą w uchwale połączonych Izb Sądu Najwyższego wykładnię przepisów regulujących postępowanie odwoławcze przed sądami powszechnymi zarówno w sprawach cywilnych, jak i karnych. Przyjęta przez Sąd Najwyższy wykładnia wspomnianych przepisów zakładała przeprowadzenie weryfikacji sędziów w ramach postępowania odwoławczego, co w ocenie Rady stanowi zaprzeczenie konstytucyjnej zasady nieusuwalności sędziów, wartości chronionej w całej UE.

5. Nie było potrzeby występowania w obronie sędziów występujących przeciwko zmianom wprowadzanym przez Rząd i Sejm, ponieważ krytyka zmian nie jest przewinieniem dyscyplinarnym i do Rady nie zostały zgłoszone jakiegokolwiek działania przeciwko sędziom za samą krytykę. W Polsce zasady etyki dotyczące sędziów, uchwalone przez Krajową Radę Sądownictwa w uchwale nr 25/2017 r. z 13 stycznia 2017 r., wymagają od sędziów powściągliwości w wystąpieniach publicznych. Być może w pytaniu chodzi o naruszenie tych zasad, lecz pełna odpowiedź wymagałaby sprecyzowania, o które przypadki chodzi, a przede wszystkim złożenia do Rady skargi wskazującej potrzebę obrony sędziego. Do kompetencji Krajowej Rady Sądownictwa należy również możliwość zaskarżenia orzeczenia dyscyplinarnego wydanego w pierwszej instancji – w obecnej kadencji, Rada skorzystała z tego prawa w sprawie sędzi Aliny Czubińskiej (sygn. KRS-WP-7000-57/1-19) wnosząc odwołanie na jej korzyść (uchwała nr 483/2019 z 10 maja 2019 r.), a nadto domagając się jej uniewinnienia. Sędzia została ukarana przez Izbę Dyscyplinarną Sądu Najwyższego za błąd w stosowaniu prawa, który został

zakwalifikowany jako „rażący” i „oczywisty” najniższą karą upomnienia. W wyniku rozpoznania odwołania, Sąd Najwyższy w Izbie Dyscyplinarnej zmienił zaskarżone orzeczenie i ostatecznie odstąpiła od wymierzenia kary (sygn. II DSS 2/18).

6. Jak wskazano w odpowiedzi na pytanie 5, publiczne wypowiedzanie się przeciwko zmianom legislacyjnym nie jest deliktem dyscyplinarnym, co nie wyklucza możliwości prowadzenia postępowania dyscyplinarnego przeciwko sędziom z powodu innych zarzutów, w tym rozpowszechniania oczywistych kłamstw, czy też ocen, które noszą znamiona „mowy nienawiści”. Rada nie wydała żadnej uchwały w sprawie zasadności jakichkolwiek postępowań dyscyplinarnych, czyli także tych, które mogłyby zostać wszczęte za zadawanie pytań prejudycjalnych i „stosowanie” się do wyroku TSUE z 19 listopada 2019 r. W tej ostatniej kwestii należy zauważyć, że zadaniem sądów krajowych nie jest stosowanie wyroków TSUE, lecz stosowanie prawa, w tym prawa UE. Przy stosowaniu prawa UE sędziowie są związani wykładnią tego prawa dokonaną przez TSUE. W wyroku TSUE z 19 listopada 2019 r. Rada nie dostrzega podstaw do uznawania powołań sędziów dokonanych przez Prezydenta RP po 6 marca 2018 r. za sprzeczne z prawem UE. Sędziowie ci podlegają takim samym procedurom wyłączenia z konkretnych spraw jak inni sędziowie, a ich wyroki można podważać w postępowaniu odwoławczym lub o wznowienie na takich samych podstawach jak innych sędziów.

Rada podkreśla, że ustrój i funkcjonowanie sądownictwa w Państwach Członkowskich, w tym w Polsce, regulują akty rangi ustawowej. Sądy nie wydają takich aktów – to kompetencje pozostałych władz, które podlegają odpowiedzialności politycznej i kontroli społecznej w wyborach powszechnych.

Odpowiedź na pytania nr 7 i 8 jest bezprzedmiotowa.

9. Krajowa Rada Sądownictwa zdecydowanie będzie przeciwdziałać próbom weryfikacji sędziów, do których nawołują stowarzyszenia sędziowskie: „*Iustitia*” i „*Themis*” (zob: <https://www.senat.gov.pl/download/gfx/senat/pl/senatdruki/10670/druk/050.pdf> senatorski projekt ustawy, pozytywnie zaopiniowany przez stowarzyszenia sędziowskie). Przygotowany przy udziale stowarzyszeń sędziowskich projekt ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa i innych ustaw przewiduje m.in. obowiązek zrzeczenia się stanowiska sędziego przez wszystkich sędziów powołanych przy udziale Rady,

w skład której wchodzi sędziowie wybranej przez Sejm RP w dniu 6 marca 2018r. pod groźbą dyscyplinarnego usunięcia z urzędu (jedyna obligatoryjna kara). Takich rozwiązań w wolnej Polsce nie przewidywał ustawodawca nawet wobec sędziów i orzeczeń wydanych pod rządami totalitarnych reżymów. **Jeżeli ENCJ uważa, że kwestionowanie umocowania Krajowej Rady Sądownictwa i Prezydenta RP do powoływania sędziów w RP jest w świetle jej statusu (ENCJ) dozwolone, to KRS nie jest dłużej zainteresowana członkostwem w ENCJ. Nie może bowiem pozostawać członkiem organizacji, która wspierałaby działania zmierzające do kwestionowania zasady nieusuwalności sędziów.**

sędzia Leszek Mazur





WARSAW, 13TH MARCH 2020

CHAIRMAN OF THE
NATIONAL COUNCIL OF THE JUDICIARY
OF POLAND
No. WWM-0840-1/20

Hon Mr. Judge
Kees STERK
President
European Network
of the Councils for the Judiciary

Honourable Mr. President,

With reference to the questions comprised in your letter of 21 February 2020, I would like to forward the position of the National Council of the Judiciary of Poland adopted on 12 March 2020:

1. The National Council of the Judiciary of Poland does not have at its disposal any lists of supporting judges, as plenipotentiaries of members of the National Council of the Judiciary submitted them before their election to the Chancellery of the Sejm. The Chancellery of the Sejm has published the lists on its website, where they are still available. The National Council of the Judiciary is not in possession of information about the relations of judges present on the lists of support, with the Ministry of Justice. According to the announcement of the Civil Development Forum, published on the SSP "Iustitia" website, 49 out of 364 signatures were submitted by judges delegated to the Ministry of Justice at the time of signing. It is not clear from the question whether delegating to a clerical position in the Ministry of Justice is meant as a close relationship with the Minister of Justice. Pursuant to the law in force in Poland, confirmed by the judgment of the Constitutional Tribunal of July 18, 2007 (case ref. no. K 25/07), no judge may be deprived of passive or active voting right to the National Council of the Judiciary (including the president of the court – reporting to the Minister in a similar way as a judge delegated to the Ministry of Justice).

All judges who supported the candidacies for membership in the National Council of the Judiciary were appointed to their judicial offices as a result of the President of the Republic of Poland's endorsement of the motions of the National Council of the Judiciary in its previous configurations. In turn, the secondment of a judge to the Ministry of Justice meets the constitutional standard (judgment of the Constitutional Tribunal of 15 January 2009, case ref. no. K 45/07). In this judgment, the Constitutional Tribunal positively assessed the fact that the

activities in the field of administrative supervision of the Minister of Justice over the functioning of courts are performed by judges. The Tribunal explicitly stated that "although they are subject to the Minister of Justice in the field of court administration, they are not excluded from judicial power."

2. Judge Maciej Nawacki, Ph. D., was elected to the National Council of the Judiciary by a resolution of the Sejm of the Republic of Poland of 6 March 2018 (Official Journal "Monitor Polski" of 2018, item 276). The National Council of the Judiciary did not participate in the procedure of selecting members of the Council. The provisions governing the procedure for selecting members of the National Council of the Judiciary (which, pursuant to Article 187 (4) of the Constitution of the Republic of Poland, are contained in the act of statutory level) provide that a candidacy for a member of the Council shall be notified to the Marshal of the Sejm. The person competent for formal control of the candidate's application is the Marshal of the Sejm. Information that is publicly available shows that several judges who signed the candidacy of Mr. Maciej Nawacki, then submitted a statement of withdrawal of support. It was up to the Marshal of the Sejm (and in further turn, to the competent parliamentary committee and the Sejm *in pleno*) to assess the effectiveness of this statement. It should be noted that the procedure for selecting candidates for the National Council of the Judiciary does not provide for withdrawal of a recommendation once granted.

3. The National Council of the Judiciary does not monitor the statements of its members, including the Minister of Justice, made outside the Council meetings. Meetings of the Council are recorded and the recordings are available on the website of the National Council of the Judiciary.

4. The National Council of the Judiciary is an apolitical body: it does not speak on matters related to internal or foreign policy. The National Council of the Judiciary is not and has never been supposed to be a representation of the judicial environment (e.g. on such basis as professional self-government organisations or trade unions are). Members of the National Council of the Judiciary are not and have never been as such representatives of judges (unlike, for example, members of the Sejm who are representatives of the Nation – this relationship is explicitly specified in the Constitution), members of the National Council of the Judiciary are not bound by third party instructions, their mandate is free and they make independent decisions on their own responsibility.

The competencies of the National Council of the Judiciary include, among others, issuing opinions on draft normative acts in matters concerning the judiciary. The opinions of the Council are published on its website and are also usually posted on websites devoted to the governmental or parliamentary legislative process. For example, I attach the position of the National Council of the Judiciary regarding the Act of 20 December 2019. In the Council's

opinion, the said act is the reaction of the legislative authority to the alarming phenomenon of questioning the status of some judges by other judges, which threatens the legal order and the security of legal relations in the EU. It should be noted that the said Act protects the status of a judge regardless of the nomination procedure accompanying his appointment to the office of a judge and the date of appointment. The National Council of the Judiciary appealed the interpretation of the provisions regulating appeal proceedings before common courts in both civil and criminal cases, adopted in a resolution of the combined Chambers of the Supreme Court, to the Constitutional Tribunal. The interpretation of the aforementioned provisions adopted by the Supreme Court, assumed the verification of judges as part of the appeal procedure, which, in the Council's opinion, is a denial of the constitutional principle of the irremovability of judges, a value protected throughout the European Union.

5. There has been no need to defend judges speaking out against the changes introduced by the Government and the Sejm, as criticism of changes is not a disciplinary offense and no actions against judges for criticism were reported to the National Council of the Judiciary. In Poland, the principles of ethics regarding judges, adopted by the National Council of the Judiciary in Resolution No. 25/2017 of 13 January 2017, require judges to behave in a restraint manner in their public appearances. Perhaps the question concerns a violation of these principles, but a full answer would require clarification of which cases are concerned, and above all a complaint to the National Council of the Judiciary indicating the need to defend the judge would be needful. The competence of the National Council of the Judiciary also includes the possibility of appealing against a disciplinary decision issued in the first instance – in the current term of office, the Council exercised this right in the case of judge Alina Czubieniak (reference no. KRS-WP-7000-57 / 1-19), appealing in her favour (resolution No. 483/2019 of 10 May 2019), and demanding her acquittal. The judge was punished by the Disciplinary Chamber of the Supreme Court for an error in the application of the law, which was classified as "gross" and "obvious", with the lowest possible penalty – a warning. As a result of the examination of the appeal, the Disciplinary Chamber of the Supreme Court changed the contested decision and finally withdrew the penalty (case reference number II DSS 2/18).

6. As indicated in the answer to question 5, public speaking out against legal amendments does not constitute a disciplinary offense, which does not exclude the possibility of conducting disciplinary proceedings against such judges due to other allegations, including the dissemination of obvious lies or assessments that bear the hallmarks of "hate speech". The National Council of the Judiciary did not issue any resolution on the legitimacy of any disciplinary proceedings, i.e. also neither those which might purportedly concern referring for a preliminary ruling or 'applying' the CJEU judgment of 19 November 2019. In the latter issue it should be made clear that the task of national courts is not to apply CJEU judgments, but to

apply the law, including EU law. When applying EU law, judges are bound by the CJEU's interpretation of that law. In the judgment of the CJEU of 19 November 2019, the National Council of the Judiciary sees no grounds for recognising the appointments of judges made by the President of the Republic of Poland after 6 March 2018 as contrary to EU law. These judges are subject to the same procedures of recusal from specific cases as other judges, and their judgments can be challenged in appeal proceedings or by action aimed at reopening the proceedings, on the same grounds as other judges.

The Council underlines that the organisation and functioning of the judiciary in the Member States, including Poland, is governed by acts of statutory level. The courts do not issue such acts – this is a competence of the remaining powers, which are subject to political responsibility and public scrutiny in general elections.

Answering the questions: 7 and 8 is thus irrelevant.

9. The National Council of the Judiciary will definitely counteract attempts, embraced by the judiciary associations 'Iustitia' and 'Themis', to verify the judges (see Senate's draft act – Paper no. 50 <https://www.senat.gov.pl/prace/senat/druki>, positively assessed by judicial associations). The draft act amending the Act on the National Council of the Judiciary and other acts prepared with the participation of judicial associations provides, among others, the duty of the judge to resign from the judicial office held, applied to all judges appointed with the participation of the National Council of the Judiciary elected by the Sejm of the Republic of Poland on basis of procedure arising from the Act of 6 March 2018, under threat of disciplinary removal from office (the only and mandatory penalty). Such solutions in free Poland were not envisaged by the legislator even with regard to judges and rulings issued under the rule of totalitarian regimes. **If the ENCJ considers that questioning the authorisation of the National Council of the Judiciary and the President of the Republic of Poland to appoint judges in the Republic of Poland is allowed in the light of its (ENCJ) Statutes, then in such a case the National Council of the Judiciary would no longer be interested in the ENCJ membership. It could not remain a member of an organisation that would support activities aimed at challenging the principle of the irremovability of judges.**

Very Respectfully,

Leszek Mazur



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

Brussels, 22 April 2020

Dear Mr Mazur,

In our letter of 21 February 2020, we announced that the Executive Board was considering the position of KRS in the ENCJ. The Board raised a number of questions to which the KRS replied by letter of 13 March 2020.

Taking into account the replies of the KRS and having studied all other relevant materials, the Board considers that the KRS still does not comply with the statutory rule of the ENCJ that a member should be independent from the executive. The Executive Board finds that the KRS has committed serious breaches of the aims and objectives of the Association as set out in Articles 3 and 4 of the Statutes, and is not willing to remedy these serious breaches .

The Executive Board is therefore considering to propose to the General Assembly to expel the KRS from the ENCJ. In line with the Statutes the Board herewith gives the KRS the opportunity to state its position. Upon reception of the position of KRS the Board will decide if and when to table the expulsion of KRS at a General Assembly meeting of the Association.

The position of the Board is explained into detail in the attached paper.

We look forward to the reaction of the KRS by 22 May 2020.

Yours sincerely,

Kees Sterk
President of the ENCJ



CHAIRMAN OF THE
NATIONAL COUNCIL OF THE JUDICIARY
OF POLAND
No. WWM-0840-1/20

WARSAW, 20TH MAY 2020

Hon Mr. Judge
Kees STERK
President
European Network
of the Councils for the Judiciary

Honourable Mr. President,

It is with deep regret that I received your letter of 22 April 2020, notifying us of plans to exclude the National Council of the Judiciary of Poland from the European Network of Councils for the Judiciary. We are forced to express our regret that the allegations presented are of a very general nature; they do not indicate any specific actions in which the National Council of the Judiciary would violate the principles of its independence and in fact, they constitute an accusation: against the legislative authority – for issuing specific legal acts, and with respect to the National Council of the Judiciary – for obedience to these acts of law.

Referring to the specific allegations in your letter, we would like to point out the following:

1. It is incomprehensible to us to treat a cooperation with the Minister of Justice as a reproach. The Minister of Justice is a member of the Council under the Polish Constitution and this has not been questioned, so far. It is difficult to expect the Council not to interact in the performance of its duties with its own member. The National Council of the Judiciary as an apolitical body shall cooperate with all its members, regardless of their sympathy or (in the case of the minister, deputies and senators) political affiliation. As a side note, it should be remembered that in Poland the "principle of cooperation between authorities" is an element of the state system.
2. Similarly, we are not able to agree with the allegation regarding lists of support for candidates to the National Council of the Judiciary of Poland. The KRS does not participate in the procedure of electing Council members, nor has the right to exclude anyone from its ranks. Regardless, we would like to state that in accordance with Polish law, a judge delegated to the Ministry of Justice retains his constitutional status. The delegation of judges to the Ministry of Justice – in accordance with well-established case-law of the Polish Constitutional Tribunal –

aims to guarantee the independence of the courts by subjecting them to administrative supervision exercised by judges and not by officials. The fact that judges delegated to the Ministry of Justice, who, moreover, had been members of the National Council of the Judiciary (KRS) in its previous compositions or took part in members' election, are suddenly stigmatized and deprived of the right to exercise their rights, due to political disinclination also dividing the judicial community. Meanwhile, delegated judges remain apolitical - they do not serve politicians, but the state, in accordance with their oath and requirements of the Constitutional Tribunal. We are convinced that the National Council of the Judiciary has a duty to stay away from these tensions as far as possible and has the right to expect the same from ENCJ. Regardless of the above argumentation, the allegation that the candidates had the support of "only a small group of judges associated with the Ministry of Justice" does not correspond to the facts and was not substantiated in any way, which is surprising, all the more so because according to publicly available data, judges delegated to the Ministry constituted only a few per cent among persons who have signed the candidatures.

3. The reproach regarding the lists of support for judge Maciej Nawacki should also not be addressed to the National Council of the Judiciary. As already mentioned, the National Council of the Judiciary is not authorised by law to verify the method of appointing its members. In addition, the Polish law does not explicitly provide for the possibility of withdrawing the support given to a candidate. Finally, the fact that some judges withdrew their support for judge Nawacki may be evidence of pressure exerted on them with aim that they do not get involved in the selection of members of the National Council of the Judiciary (in a procedure provided for by law). Meanwhile, there is no doubt that the independence of the Council does not only mean independence from the political authorities, but also from all interest groups within the judicial community.

4. In the Polish legal order, the National Council of the Judiciary is not and has never been an element of judicial self-government as such, which did not prevent the National Council of the Judiciary from becoming a founding member of the ENCJ. It is probably known that the systemic position of the General Council for the Judiciary in Spain is similarly perceived, which does not prevent it from being a member of the Network. In this context, the argument that the KRS is not strictly a representation of judges is surprising, since it has never been one in its thirty-year history, and this allegation ignores the Polish constitutional conditions, which have remained unchanged since its creation, with the membership of the Polish KRS in ENCJ ongoing.

5. We regret to say that the allegation that the National Council of the Judiciary stated that any protest against judicial reform is tantamount to a disciplinary offence, is not based on any actual positions taken by the Council. The National Council of the Judiciary has never expressed such a position. We will be grateful for indicating the specific KRS documents, on the basis of which ENCJ took this belief. The Council called for moderation and abstention by judges from radical behaviour and this referred to all judges, regardless of their political sympathy or dislike – this call has its direct source in the Code of Judges' Professional Ethics. We reiterate our position that the judge should not present his overtly emotional (positive or negative) attitude to a political power, because he/she settles disputes among citizens in a pluralistic environment and cannot create the impression that he/she prefers certain views over another.

6. It is also not true that the National Council of the Judiciary has actively supported the disciplinary prosecution of protesting judges. The National Council of the Judiciary may only pursue its – insignificant – competences in this respect. The Council has no competence to institute disciplinary proceedings and does not supervise the activities of the Disciplinary Spokesman independent of it. We just want to point out that the initiation of explanatory proceedings or the summons to be heard as a witness, which takes place in accordance with applicable law, is a means to establish material truth, not a harassment.

7. The common conviction that we share with you, about the decisive role of the rule of law prevents us from commenting on the decisions of the independent Supreme Court, even in the case of judge Juszczyszyn. Similarly, the issue of the CJEU's right to adjudicate on the legality of individual authorities of a Member State (e.g. a court) or the Supreme Court's right to deprive a part of its members appointed in accordance with the law in force in Poland of the right to adjudicate, is beyond the competence of the National Council of the Judiciary.

At the same time, it is impossible not to get the impression that the accusations presented to us boil down to the content of the law – in creation of which the National Council of the Judiciary in its current composition did not participate, and which the Council in the previous composition did not consider justified to challenge before the Constitutional Tribunal. The allegations directed at the National Council of the Judiciary seem to pertain to the fact that it exercises its competences and observes the law in force in Poland, despite the fact that this law is contested by certain participants of the public debate. As the constitutional public authority, the National Council of the Judiciary has no grounds to apply only selected Polish legal acts of its choice. KRS is subject to operation on the basis and within the limits of the law, as long as the law in question is not abolished.

The current actions of the National Council of the Judiciary are fully open, transparent and subject to constant social control (which was not the case with previous Council compositions). Documents issued by the Council are publicly available. The mere fact of public discussion about the lists of support for Council members reveals the non-transparency of the election of Council members in previous configurations, which has never met any criticism of the ENCJ.

In fact, your letter did not seem to indicate any specific actions of the Council that would pursue the interest of political rather than judicial power.

It has also been entirely overlooked that the current work of the Council is taking place in an atmosphere of – sometimes – heated discussions and as a general rule, its decisions are made with a considerable number of votes against and abstentions. This contrasts with the work of the Council in previous configurations, where the decisions used to be taken, as a rule, almost unanimously and without open (if any) discussion, as if real decisions had been worked out outside the Council's plenary room. It is hard to accuse, therefore, that the Council as a whole does not criticise a specific move by the government – members of the Council express their opinions in an independent and clear way. The systemic model of the Council does not assume its permanent conflict or permanent agreement with the executive branch, it provides for the implementation of the members' mandate in an independent manner, consistent with their conscience and beliefs. Criticising the government's actions (or, on the contrary, supporting it) is not and should not be the competence or condition for the legitimacy of the Council for the Judiciary.

Referring, by virtue of example, to legislative changes recently introduced by Parliament: Article 107 of the Law on the structure of common courts (in the version which came into force since 14 February 2020) cited in this context, has only been supplemented by an indication of such actions of judges that could obstruct the operation of the judiciary and behaviours exceeding forms of public activity that can be compatible with principle of the judicial independence. In our opinion, this provision complies with the standards of the expected behaviour of judges developed by the ENCJ in 2004-2018 and during more than 120 meetings with representatives of different Councils – members of the Association and makes direct reference to them (e.g. to the standard of "showing reserve" in public activities, referred to in item 3 of the ENCJ Executive Board draft position).

Possible differences in the assessment of legal aspects or purposefulness of specific normative regulations seem rather to enrich the ENCJ, which was supposed to be a forum for pluralistic cooperation of judicial councils – they should not, however, lead to exclusion.

We would like to kindly remind you that video recordings of the Council's work as well as all of adopted resolutions, opinions and positions are publicly available on the Council's website. If the obstacle to using these materials and referring to them when formulating any allegations against the KRS was the language barrier, we are ready to provide any documents that ENCJ deems necessary along with the English translation. For example, the statement of the Minister of Justice cited in the draft position of the Executive Board of 22 April, 2020, in course of translation became distorted in a way that could suggest that it was him who nominated selected members of the Council. As a matter of fact, the statement concerned the decision not of the minister, but of his parliamentary club as part of the second stage of the election procedure, consisting in the selection (which took place with the participation of a group of opposition deputies – because the support of candidacies required a qualified majority) of 15 selected candidates from a broader group of judges, indicated by their peers. Legislative and executive authorities had no influence whatsoever on the proposed candidacies.

It also cannot remain unnoticed that the criticism of the Council (or rather the legal acts constituting it) comes mainly from the circles of those judicial associations whose members dominated in its previous configurations and which got used (contrary to the wording of the Constitution) to treat the Council not as a constitutional body safeguarding the independence of courts and judges, but as a particular body of judicial self-government. It is difficult to resist the impression that this has been one of the main motives for their contesting the Council in its current composition.

We maintain unwavering hope that the above explanations are sufficient for the ENCJ Board to refrain from plans to exclude KRS from the Network. At the same time, however, I am convinced that – united by good will and conviction about the superiority of the legal order over the particular ambitions of some representatives of both political and judicial power – we will be able to avoid this.

Finally, I would like to express once again the deepest respect for all Councils of the Judiciary associated in European Network of Councils for the Judiciary and in particular for the Hon. Mr. President and Members of the ENCJ Executive Board.

Very Respectfully,

Leszek Mazur

