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**ARTYKUŁ**

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# THE NEW NATIONAL COUNCIL OF THE JUDICIARY AND ITS IMPACT ON THE SUPREME COURT IN THE LIGHT OF THE PRINCIPLE OF JUDICIAL INDEPENDENCE

## I. Introduction

The respect for the rule of law and in particular the independence of the judiciary has in recent years become a subject of legal dispute and political conflict in some EU Member States, first in Hungary and then also in Poland. The profound systemic changes introduced in these countries have had a major impact on the organization and functioning of the judiciary. Questions have been raised whether the resulting 'new' standard of judicial independence still meets the requirements of a democratic state governed by the rule of law. They have become an issue not only from the point of view of the national constitutions, but also with regard to the participation in the European Union. The rule of law is one of the core values of the Union and the right to a fair trial before an independent court is recognized as a fundamental right in the EU legal order.

Protecting the independence of the judiciary in Poland is the essential task of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, *KRS*) whose role is directly established by the Constitution.[1] The Council is intended to be the institutional guarantor of the principle of separation of powers with regard to the judiciary. Although it is not an adjudicating body, as it does not resolve court disputes, its activities are directly related to the professional activities of judges: the nomination and admission to the profession, promotion, transfer, dismissal or early retirement. Its location in the system of separation of powers remains under discussion, in particu-

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[1] Art. 186 (1) Constitution of the Republic of Poland of 2 April 1997 (Dz. U. 1997, No 78, item 483 as amended).

lar whether it forms part of the judiciary or is a body situated between the powers.[2] While all the powers (legislative, executive, judicial) are represented in the Council, the political power cannot have a dominant position in it.[3] The KRS should hold a special position among public authorities and itself remain independent from other bodies. The legal instruments adopted by other bodies which could affect it should be limited and clearly defined by the law in force.

In December 2017, the Parliament adopted a number of important legislative changes related to the National Council of the Judiciary.[4] The most controversial were the new rules on the composition of the KRS which forced the premature termination of the four-year term of office of the hitherto judges-members and politicized the election of new members of the Council. The introduced changes can be seen – and in fact were presented – as an attempt to enhance the democratic legitimacy of the KRS by broadening the participation of the public in the election of Council members, and thus increasing the influence of the society on the functioning of the judiciary in Poland. However, these changes appear to have negative effects and prevent the proper performance of the role entrusted to the Council under the Polish basic law. For this reason, the composition of the new Council and its activities are subject to a severe criticism. The fairness or even the validity of KRS procedures is disputed and the decisions taken in individual cases are frequently questioned. In September 2018, controversies over the KRS led to the suspension of its membership in the European Network for Council of the Judiciary (ENCJ). The ENCJ, an international institution composed of representatives of EU judiciaries, concluded that its Polish member no longer meets the membership criteria, which require the independence of the national authority from the executive and legislative powers.

The article analyses how the National Council of the Judiciary has carried out its constitutional mission in 2018. Does the body continue to safeguard judicial independence properly? What role has the KRS played in the systemic changes brought into Polish judiciary and, especially, with regards to the Polish Supreme Court? The paper discusses recent developments and begins with the forced re-composition of the KRS. Next, the Council's role in the compulsory early retirement of Supreme Court judges is reviewed as well as the way in which the KRS responded to the in-

[2] See *i.a.* L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, 4th ed., Warszawa 2017, p. 496; P. Mikuli, *Krajowa Rada Sądownictwa – zakres regulacji konstytucyjnej i ustawowej a potencjał kompetencyjny organu*, [in:] M. Zubik (ed.) *Minikomentarz dla Maxiprofesora. Księga jubileuszowa profesora Leszka Garlickiego,* Warszawa 2017, p. 788 et seq., M. Masternak-Kubiak, *Komentarz do art. 186*, [in:] M. Haczkowska, *Konstytucja Rzeczypospolite Polskiej. Komentarz*, Warszawa 2014 (Lex nr 10046); N. Leśniak, J. Michalska, *Krajowa Rada Sądownictwa jako pozajudykacyjny organ władzy sądowniczej*, [in:] M. Jabłoński, S. Jarosz-Żukowska (ed.), *Konstytucyjny model władzy sądowniczej w Polsce – wybrane problemy*, Wrocław 2013; K. Zawiślak, *Pozycja ustrojowa, kompetencje i skład Krajowej Rady Sądownictwa*, Kwartalnik Stowarzyszenia Sędziów Polskich „Iustitia", 3/2012; P. Tuleja, *Konstytucyjny status Krajowej Rady Sądownictwa*, [in:] P. Tuleja (ed.), *Krajowa Rada Sądownictwa. XX lecie działalności*, Warszawa 2010.

[3] L. Garlicki, *op. cit.*, p. 496.

[4] Act of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws (Dz. U. 2018, item 3). The Law entered into force on 17 January 2018.

terim measures ordered by the Supreme Court. Much attention is paid to the manner in which the National Council of the Judiciary exercised the competence to select judges-nominees to the Supreme Court. At the end, the European reaction to the 'new' Council is covered, and esp. the suspension of the body in ENCJ.

## II. Composition of the 'new' KRS

The Constitution sets the number of KRS members at 25.[5] It expressly authorizes the Sejm (the lower chamber of the Parliament) to elect four members and the Senate (the upper chamber) to choose another two. Thus, the Constitution empowered the Parliament to appoint only 6 members of the Council. There are three *ex officio* members of the KRS: the First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice. One member is appointed by the President of the Republic. The remaining fifteen members of the KRS had been chosen beforehand from among the judges by the judges themselves. This method of appointing judges-members of the National Council of the Judiciary by the judges themselves was accepted from the very inception of this institution on the basis of the 1989 Law on the KRS.[6] It was continued under the Constitution of 1997 and subsequent laws of 2001[7] and 2011.[8] Such distribution of powers to appoint Council's members between the three branches of government, with a majority share of the judiciary, and minority participation of the legislature and the executive, pursues the constitutional principle of the separation and balance of powers.[9] It safeguarded systemic and political independence of the Council and was seen as a basic premise and guarantee of the KRS' ability to fulfill the role of the guardian of judicial independence. The election of judges by their peers was accepted in the literature as natural,[10] it is also supported by the jurisprudence of the Constitutional Tribunal.[11]

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[5] Art. 187 (1) Constitution.

[6] Art. 6 (2) Law of 20 December 1989 on the National Council of the Judiciary (Dz. U. 1989, No 73, item 435). The KRS was established as a result of the 1989 Round Table negotiations between the socialist regime of the People's Republic of Poland and the democratic opposition. It was introduced into the Constitution (Art. 60 (1) and (3)) by the April Novelization, i.e. Act of 7 April 1989 amending the Constitution of the People's Republic of Poland (Dz. U. 1989, No 19, item 101).

[7] Law of 12 May 2001 on the National Council of the Judiciary (Dz. U. 2001, No 100, item 1082).

[8] Law of 27 July 2011 on the National Council of the Judiciary (Dz. U. 2011, No 126, item 714).

[9] Art. 10 (1) Constitution.

[10] See *i.a.* K. Grajewski, *Krajowa Rada Sądownictwa w świetle przepisów ustawy z 8 grudnia 2017 r. – zagadnienia podstawowe*, Krajowa Rada Sądownictwa 1/2018, p. 19–20, and the literature cited there.

[11] Judgment of 18 July 2007 (K 25/07), para. III 4. A different view was expressed in the judgment of 20 June 2017 (K 5/17). Nonetheless, it should be borne in mind that the latter ruling was issued by the Constitutional Tribunal after the changes of 2015–2017 whose constitutionality is being questioned; the adjudicating panel was composed with the participation of unlawfully appointed persons (duplicate-judges); and the case was brought by the Prosecutor General (at the same time the Minister of Justice) during an acute political and legal dispute concerning the KRS.

The radical legislative reform enacted at the end of 2017 brought in the premature interruption of the four-year term of office of the then 15 judges-members, although their tenure was secured by the Constitution.[12] The election of new members in the place of those removed was vested in the Sejm, in excess of the powers explicitly attributed to the body by the Constitution. At present, the Parliament elects 21 out of the 25 members of the Council, two more are the representatives of the executive. Thus, in total 23 out of the 25 members are designated by politicians representing either the legislative or executive powers. Moreover, bearing in mind that the ruling party enjoys an absolute majority of votes in the Parliament, the party had *de facto* vested itself a power to control the appointment of a vast majority of the KRS composition. In this way, a single political party can staff the body at its discretion and through the body it can further influence the judges. The new appointment mechanism introduces a domination of political powers over the judiciary and is inconsistent with the principle of the separation of powers. It clearly endangers the independence of the judiciary. It violates not only the Polish constitutional standards but also the European rules, which require that at least a half of the national judicial council consists of judges who are elected by their peers.[13]

The new Council was staffed in March 2018. The election to the KRS was boycotted by the vast majority of judges following a negative position taken by judicial associations (*Iustitia*, *Themis*); out of ten thousand judges in Poland, only 18 candidates decided to run for these posts. In the end, fifteen judges were appointed by the Sejm, thirteen of them (87%) were judges of the lowest level courts (district courts). In denial of access to public information, the lists of those who had supported the individual candidates were not disclosed,[14] which induced suspicion that perhaps the same group of people could have pre-nominated more candidates.[15] If this had taken place, it would have amounted to an actual derogation from the principle of representativeness of the KRS membership. The media soon pointed out that the majority of candidates were in one way or the other linked to the executive (the Minister of Justice). They had been either delegated by the Minister to work in the ministry, or

[12] Art. 187 (3) Constitution.

[13] Although the standard for the formation of bodies such as judicial councils is not explicitly embodied in European Union law, such standards do exist in the Council of Europe's *acquis* covering all members of the Union, see i.a. Recommendation of the Committee of Ministers of the Council of Europe of 17 November 2010 on judges: independence, efficiency and responsibilities, CM/Rec(2010)12, para. 27; Magna Carta of Judges (fundamental principles) of the Consultative Council of European Judges of 17–19 November 2010, CM(2010)169-add2, para. 13; ENCJ standards 'Councils for the Judiciary' Report 2010–11, para. 2.3. For a overview of the rules for the election of judges to judicial councils in the EU Member States see G. Borkowski, R. Michalczewski, *Skład i sposób wyboru sędziów do rad sądownictwa w krajach członkowskich Unii Europejskiej*, Krajowa Rada Sądownictwa 2/2017, p. 30 et seq.

[14] See judgments of the Voivodship Administrative Court in Warsaw: of 12 July 2018 (II SA/Wa 520/18), of 26 October 2018 (II SAB/Wa 260/18).

[15] The Law on the KRS provides that candidates are to be pre-nominated by groups of 2000 citizens or groups of 25 judges – at least 25. All the candidates appointed in March 2018 were nominated by groups of judges, one of them was additionally nominated by a group of citizens.

recently promoted, or appointed as courts presidents, etc. They remained therefore in a relationship of professional dependence or personal gratitude to the Minister. They may have been tempted to keep relying on the executive for their future career, all the more if they were aware of the negative assessment of their participation in the new KRS by the overwhelming majority of the legal community. This may induce certain level of willingness to win over further appreciation of the political decision-makers, act in line with their expectations, justify and support the position of the executive, even if it may directly clash with the independence of courts and judges.

### III. Premature retirement of Supreme Court judges

The 2017 Law lowered the retirement age of Supreme Court judges from 70 to 65. It was aimed at terminating the tenure of a large group of them (it affected 27 judges, about 40% of the Supreme Court) and enabling the selection of new judges in their place. There were no transitional provisions that would limit the effects of the new retirement age to newly appointed nominees who, upon becoming judges, would already know that the retirement age for them will be shorter than before. The mechanism covered equally those appointed to the Supreme Court when the retirement age was set at 70 years. As a result, the new retirement age was applied with a retroactive effect and can therefore be categorized as contrary to the principle of irremovability of judges.

Judges aged 65 or more could have applied to the President of the Republic to extend their mandate. The President's decision was left to his discretion; he was at liberty to consent or refuse the request. There were no substantive criteria indicated for the President's decision. Moreover, the decision did not require justification and no legal remedy was provided to challenge the President's act either. Entrusting the President with the discretionary power to decide whether a judge can continue his or her function violates the principle of independence of the judiciary. It gives the executive body a specific, excessive and unjustified instrument for exerting pressure on judges and thus violates the principle of balance of powers.[16]

Originally, the President enjoyed the exclusive power to solely decide on the judge's application for an extension of his or her mandate. The amendment to the Law on the Supreme Court involved the National Council of the Judiciary in the procedure, making it compulsory for the President to consult the Council before issuing his own decision.[17] Although the same amending act of May 2018 introduced certain material criteria for the KRS when considering judges' requests,[18] the overall discretionary nature of the procedure was not substantially changed.

First, the criteria are general, very broad and value judgment, e.g. *'the interest of justice or an important public interest'*. They do not indeed restrict the discretion

[16] See also i.a. decision of the Supreme Court of 1 August 2018 (III UZP 4/18), para. 14.

[17] Art. 5 Act of 10 May 2018 amending the Law on ordinary courts, the Law on the Supreme Court and certain other acts (Dz. U. 2018, item 1045).

[18] New Art. 37 (1b) Law on the Supreme Court.

of National Council of the Judiciary to any significant extent in this area. Secondly, these criteria are envisaged only for the KRS and not for the President. Thirdly, the Council's opinion, whether positive or negative, is not binding for the President anyway. Fourthly, the application of the criteria is actually limited only to the situation when the KRS reviews the requests of judges who reach the age of 65 three months after the entry into force of the Law on the Supreme Court or later, i.e. after 4 July 2018. Hence, they do not apply to judges who previously reached the reduced retirement age. The differences in the legal regime result from the introduction in 2017 Act of separate legal bases for the retirement of both groups of judges: Art. 37 (1) for the judges who reach the age of 65 after 4 July 2018 and Art. 111 (1) for the judges aged 65 prior to that date. Although Art. 111 (1) refers to the appropriate application of the provisions for the other judges, yet the reference – by omission or intentionally, covers only paragraphs 2 to 4 of that Article (Art. 37 (2)–(4)), whereas the criteria for the KRS were introduced in Art. 37 (1b), to which Art. 111 (1) does not refer.

Of the 27 judges affected by this special retirement mechanism, fifteen did not apply for an extension of their mandate, while the remaining twelve judges either applied to the President or made other statements that they wish to continue their service and the Supreme Court. Under the new legal provisions, the President referred the twelve individual cases to the National Council of the Judiciary requesting its opinions. The KRS acted very quickly and issued five positive and seven negative opinions on 12 July 2018.

At this point, a series of unprofessional and, in part, unlawful activities of the Council began. Instantaneously, on the following day (13 July), the KRS transmitted its opinions to the President. It did so before the judges whom the Council rejected had a chance to appeal to the Supreme Court against those opinions on the basis of the Law on the KRS.[19] Furthermore, when three judges indeed challenged the opinions a week later (19–20 July), the KRS initial reaction was to ignore them. In accordance with the procedural rules the judges' appeals were to be submitted to the Supreme Court via the Chairman of the KRS. Yet the KRS Chairman, judge Mazur, announced that he would not submit the appeals to the Supreme Court.[20] The KRS Chairman did not have any authority to halt the appeals or to verify them. He was obliged to hand them over to the Supreme Court together with the case files. This behavior should be viewed as an attempt to deny a party the exercise of his or her right of access to the court and the right to an effective remedy. The three judges lodged

[19] Art. 44 (1) and (2).

[20] The information was disseminated by the KRS spokesperson. On 27 July judge Mitera said to the Polish Press Agency (PAP): *'Judge Leszek Mazur informed the whole Council that he would not run the appeals and, as the chairman of the KRS, he would leave them without consideration and would not send them to the Supreme Court.'* Only after some two weeks in an interview for *'Gazeta Polska'* judge Mazur called the information 'inaccurate', said the KRS had been waiting for a legal opinion and that no final decision on appeals had been taken. He confirmed that for the PAP (on 9 August) and added that the final decisions would be taken in about 2 months, http://www.pap.pl/aktualnosci/news,1522882,szef-krs-rada-nie-odmawia-sedziom-sn-prawa-do-sadu.html (access: 17.11.2018).

their appeals again (27 and 30 July), this time directly with the Supreme Court, bypassing the KRS Chairman and explaining the reasons for the extraordinary action. The Supreme Court decided to put on hold the three negative opinions of the KRS and resolved to ask a preliminary question to the Court of Justice of the European Union.[21] The Court thus applied individual interim measures, the 'suspensive' effect of which consisted in prohibiting to transmit the Council's opinions to the President of the Republic. The purpose of doing so was to prevent the President from taking decisions on consent or refusal to extend the judge's mandate before the EU Court of Justice gives its preliminary ruling.

In this situation again, the reaction of the National Council of the Judiciary went beyond the existing legal framework. The Council informed the Polish Press Agency (PAP) that it would not comply with the decision of the Supreme Court suspending the enforceability of the KRS resolutions by which it adopted the three negative opinions on judges.[22] It attempted to justify its non-compliance with Court's orders by prior communication of the opinions to the President of the Republic. The reason invoked for the impossibility to comply with the Supreme Court's decision may be true in terms of facts, but it does not justify the National Council of the Judiciary in terms of law. The alleged impossibility to execute the decision was supposed to result from an excessively hasty, premature transmission of the opinion to the President, in violation of the right of judges to use legal remedies. By its unlawful behavior the Council itself created the situation which it later wished to invoke as a basis for relieving itself of the obligation to comply with the Supreme Court's decision. Ergo, the failure to comply with the decision was caused by its own illegal conduct and remains the sole responsibility of the Council.[23]

The mechanism adopted by the legislature for extending the mandate of the Supreme Court judges contains a further deficiency. A judge may appeal against a non-binding opinion of the National Council of the Judiciary, which is only preparatory in nature, while there is no legal remedy available against the final decision of the President. It appears not to comply with the individual right of access to the court and the right to an effective remedy.

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[21] Decisions of 1 August 2018 (III PO 4/18, III PO 5/18, III PO 6/18), in CJEU: case *Krajowa Rada Sądownictwa*, C-537/18. On 2 August, the Supreme Court decided to ask five other preliminary questions and suspended the provisions of the 2017 Law on the Supreme Court related to the retirement of judges at the age of 65, Decision of 2 August 2018 (III UZP 4/18), in CJEU: case *Zakład Ubezpieczeń Społecznych*, C-522/18.

[22] PAP communiqué of 6 August 2018: http://www.pap.pl/aktualnosci/news,1519325,krs-radanie-wstrzyma-wykonalnosci-negatywnych-opinii-o-dalszym-orzekaniu-3-sedziow-sn.html (access: 17.11.2018)

[23] The unlawful actions by the KRS were followed by the President of the Republic. On 12 September, he informed the seven Supreme Court judges (whom the KRS issued negative opinions with regard to the prolongation of their mandate) of their retirement on that very day. The President invoked the provisions which the Supreme Court suspended in its decision of 2 August 2018. Clearly, the President disregarded the judges right of appeal as well as the binding force of the Court's decision.

Polish law neither expressly allows nor prohibits to challenge the acts of the President of the Republic. Since the mandate extension mechanism is a new one, there are no decisions of administrative courts in such a case yet. However, in somewhat similar cases, the Supreme Administrative Court took a restrictive position and dismissed complaints against President's decisions not to appoint or promote ordinary court judges.[24] The Court held that administrative courts are not authorized to adjudicate such cases since the complaints relate to the acts of the President taken within special prerogatives as the head of the state; they are not administrative acts but acts of constitutional law. Although the Supreme Administrative Court confirmed that the President is obliged to justify negative decisions, and in particular, the refusal should be motivated by important constitutional reasons. The Court nonetheless did not continue to indicate how the lack or insufficient justification could be challenged.

## IV. Mechanism for selecting Supreme Court judges

The 2017 legislation introduced significant changes to the mechanism for selecting judges of the Supreme Court. Earlier, the Supreme Court received prominent lawyers, assessed in a multi-stage process, in which their professional career, judicial achievements, as well as academic publications were analyzed in detail. Frequently, they were judges previously delegated to the Supreme Court, which helped to assess their usefulness in this position. The evaluation was thorough and meticulous, and it included fully the Supreme Court, whose General Assembly adopted resolutions on candidates. The Supreme Court had in fact a dominant influence on who would become the next judge. Only then the candidatures were submitted to the KRS, and subsequently to the President of the Republic for final appointment.

The current recruitment procedure represents a definite departure from the previous one. The Supreme Court has been completely excluded from it, candidates apply directly to the National Council of the Judiciary. The KRS conducts a formal and material assessment of the applications, selects judges-nominees and requests the President of the Republic to appoint them. The model is entirely different from the previous one. If considered in isolation from the actual political and legal context in Poland, the model adopted in the current version of the Law on the KRS could as well potentially ensure proper selection of new judges, if some essential conditions of reliability were met. The question that needs to be asked is whether this is the case in the current situation.

### 1. Legality of the President's announcement

The procedure of nominating new 44 judges to the Supreme Court was opened at the end of June 2018 when the President of the Republic had formally announced the

[24] Decision of 7 December 2017 (I OSK 857/17).

vacant positions.[25] However, the initiation of the procedure was flawed. According to the Constitution, official acts of the President require for their validity the signature of the Prime Minister (countersignature), unless they are exempted from this requirement and listed as President's prerogatives.[26] The enumerative list embraces thirty prerogatives when the President is authorized to act alone, for example: ordering parliamentary elections, submitting a legislative initiative, signing a law adopted by the Parliament or vetoing the law, etc. Some of the prerogatives relate to the judiciary, e.g. the President appoints judges as well as appoints to the highest positions in judicial institutions: the First President and the Presidents of the Supreme Court, the President and the Vice-President of the Constitutional Tribunal, the President and Vice-Presidents of the Supreme Administrative Court.

The announcement was published without the Prime Minister's signature; hence, the constitutional requirement was not met. The countersignature of President's act by the Prime Minister is not symbolic. It confirms the act, determines its validity and entails taking over the political responsibility for the President's act by the PM. The content and sequence of Art. 144 (2) and (3) make it clear that the obligation to obtain PM's countersignature is a rule; its exclusion is an exception that must be clearly provided in the Constitution. The exemption of prerogatives from the duty to countersign cannot be implied or extended by analogy.[27] In particular, the President's prerogative to appoint the judge does not embrace publication of the announcement of the vacancy for that judicial position. The meaning and legal nature of the two acts (the judge's appointment and the announcement of vacancy), their subject-matter, the personal scope (the addressees) are different. While the act of appointing a judge may be accepted as a traditional competence of the head of state, the vacancy announcement does not fall into the same category. The power to announce the vacancies was attributed to the President only recently, i.e. with the entry into force of the new Law on the Supreme Court (3 April 2018). It used to belong to the judicial branch and was entrusted to the First President of the Supreme Court before the legislature decided to pass it on to the executive.

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[25] Announcement No. 127.1.2018 of the President of the Republic of Poland of 24 May 2018 on the vacant positions of a judge in the Supreme Court (M.P. 2018, item 633).

[26] Art. 144 (2) and (3) Constitution.

[27] See i.a. B. Szczurowski, *Prezydent Rzeczypospolitej Polskiej jako organ czuwający nad przestrzeganiem konstytucji*, Warszawa 2016; R. Balicki, *Komentarz do art. 144 Konstytucji Rzeczypospolitej Polskiej*, [in:] M. Haczkowska (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LexisNexis 2014, para. 7. See also the discussion in the current context of nominations to the Supreme Court: M. Florczak-Wątor, *Spór o SN: zła procedura to nieważne wybory*, Rzeczpospolita, 18 August 2018, https://www.rp.pl/Rzecz-o-prawie/308189998-Spor-o-SN-zla-procedura-to-niewazne-wybory.html (access: 17.11.2018); A. Radwan, *Spór o konkurs w KRS. Obwieszczenia nie są najważniejsze*, „Rzeczpospolita", 21 August 2018, https://www.rp.pl/Rzecz-o-prawie/308259993-Spor-o-konkurs-w-KRS-Arkadiusz-Radwan-Obwieszczenia-nie-sa-najwazniejsze.html, (access: 17.11.2018); M. Pach, *Bądź co bądź – kontrasygnata konieczna*, http://konstytucyjny.pl/badz-co-badz-kontrasygnata-konieczna-polemika-z-polemika-kandydata-do-sn-maciej-pach/ (access: 17.11.2018).

The Constitution makes the validity of the President's act conditional on the signature of the Prime Minister. The signature therefore precedes the validity of the act. Without it, the act does not gain legal force. Consequently, the act of the President announcing vacancies in the Supreme Court did not become valid either. The procedure was impaired *ab initio*. The publication of the announcement in an official gazette (*Dziennk Ustaw*), the actual recruitment of judges by the KRS and recommending candidates to the President or the subsequent appointments by the President do not repair that. Subsequent actions taken in the course of the procedure do not heal or validate the original lack of legal force.

Since all subsequent steps taken in the process of submitting candidatures, selecting nominees and appointing judges are affected by the defect of illegality, accordingly, the persons appointed following an irregular procedure should not have become judges of the Supreme Court. Consequently, rulings issued by them or with their participation may be later questioned as rendered by unlawfully appointed persons thus flawed from the very outset. This introduces a considerable risk of chaos into the Polish legal system.

After the changes introduced in the Constitutional Tribunal, there is currently no effective procedure in the Polish legal system for verifying the legality of the legislation, which authorized the recent selection of new judges to the Supreme Court. The Tribunal no longer ensures genuine review of the constitutionality of laws adopted by the Parliament. It seems aimless to refer the Law on the Supreme Court or the Law on the KRS to the body that itself was staffed irregularly. However, it is possible that the issue of the legality of individual acts of appointment to judicial position in the Supreme Court comes under review. The issue may be decided by the Supreme Court itself, if in a future case, a party requests the exclusion of such judge(s) from the adjudicating panel. It may also happen, that the issue of legality of Supreme Court rulings may be raised in ordinary courts if the court considers whether to apply the ruling to the pending case. In such a situation, a threat of disciplinary measures may be employed to enforce compliance with defective rulings. The Minister of Justice, the promoter of the changes in the judiciary, has gained a very strong position in disciplinary proceedings. On a number of occasions, the Minister or his collaborators suggested that disciplinary cases should be brought against the judges who 'do not comply with the law', indeed the 'law as interpreted by the executive'. The judge's disciplinary responsibility may ultimately be decided by a panel of the newly created Disciplinary Chamber of the Supreme Court. It will be composed of the judges elected in the faulty nomination procedure. If a case involving a refusal to follow a ruling of the Supreme Court issued by an unauthorized person were to be considered by judges sitting in the Disciplinary Chamber, they would adjudicate *in causa sua*. They did voluntarily apply to the KRS, they were aware of the controversy. Their very participation in the procedure provide a clear indication on their position in such a case.

## 2. Standards for selecting candidates in the recent KRS practice

The Council is under a duty to act in the interest of the judiciary; not declaratively but genuinely. When recruiting, the KRS is to be guided by considerations of the merits only and ignoring political influence on the selection of candidates.[28] Given the extent and nature of the changes made to the KRS, the new Council seems not to guarantee sufficient resilience to political pressure. The negative assessment of the changes brought into the KRS and the Supreme Court, shared by the vast majority of the legal community in Poland, influenced the number of applications submitted to the KRS. They were lodged only by those who supported or at least accepted these changes for reasons of principle or opportunistic calculations. Eventually, 216 applications were filled for 44 vacancies.[29] Because of the limited number of candidates the possibility of selecting the best nominees was substantially reduced.

The KRS failed to implement appropriate standards in the recruitment procedure carried out in August 2018. The substantive assessment was actually minimized, and the selection was neither fair nor reliable. The applicants were required not more than to provide some basic information, primarily regarding the fulfillment of formal criteria: personal data, education, citizenship, age, final convictions, positions held, medical certificate, etc. They were not obliged to substantiate the candidatures: prove their legal expertise, present details of their professional carrier, indicate accomplishments, enclose academic publications.[30] In respect of the moral criterion *('impeccability of character'*) and the substantive criterion *('a high level of legal knowledge'*),[31] the KRS assessment was hurried, based on little knowledge of candidates and incomprehensive material, that was superficially analyzed. As a result, the assessment was largely discretionary.

The rate at which the National Council of the Judiciary considered applications made a thorough, in-depth examination of candidatures impossible. The deadline for submitting applications expired on 30 July 2018, for another few days they were still incoming by post. Nonetheless, four KRS teams formed to evaluate applications to four chambers of the Supreme Court scheduled and carried on interviews with candidates already on 20–22 August, and immediately after the interviews adopted

[28] The first legislation adopted to reform the Supreme Court introduced in principle the exchange of all Supreme Court judges (Law of 20 July 2017 on the Supreme Court, four days later vetoed by the President). The judges were to retire en masse, with the exception of those whom the Minister of Justice alone would allow to continue adjudicating. The Minister of Justice was also empowered to nominate the candidates for the vacated positions.

[29] 32 candidatures (15%) were later withdrawn, once the list of candidates was made public and the applicants met with public criticism and allegation that they legitimize unlawful, unconstitutional actions.

[30] Regulation of the President of the Republic of Poland of 29 March 2018 on the determination of the template for the application form for the vacant position of a judge of the Supreme Court (Dz. U. 2018, item 659, Annex).

[31] Art. 30 (1) points 4 and 6, Law on the Supreme Court.

recommendations on candidatures.[32] To illustrate the exceptional pace: alone the two KRS teams that examined the candidates for the two newly established Supreme Court chambers (the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs) planned to interview 67 candidates each, within two days: 20–21 August. Thus, only some 10–15 minutes were allocated to each candidate. It is rhetorical to ask, if there was enough time to get to know the candidates, pursue a reliable substantive evaluation and establish applicants usefulness for the positions at the Supreme Court. During the following days, 23–24 and 27–28 August, at an extraordinary session of the KRS (convened only the day before) the Council adopted resolutions on nominations for the vacancies. The voting was preceded by very short, cursory presentations of candidates by members of those KRS teams who reviewed the candidacies, usually without any additional questions asked or any discussion. The KRS members had no actual possibility to read the minutes of the interviews, analyze the applications and materials collected, or compare the candidates.

The procedure applied by the Council lacked the declared transparency. The government justified the judiciary reforms i.a. by the need for a greater transparency and democratic control. When electing the judges-nominees to the Supreme Court, the KRS had an opportunity to follow these postulates. Initially, the KRS refused to disclose the list of those who had applied for the vacancies, and for a long time the candidates application forms were not available. In fact, the National Council of the Judiciary limited itself to the minimum of openness required expressly by the legislation: the extraordinary plenary session at which the candidacies were put to vote was transmitted on-line. The earlier stages, in particular the adoption of recommendations by KRS teams, were confidential and the interviews with candidates were held in camera. It is difficult to indicate any value which needed this level of protection against the general public being able to follow the proceedings. At the Council's final session some of the candidates were openly voted on, whereas some by a secret ballot.[33] The differentiation of voting in identical matters was neither justified or rational. The motives could not have been of substantive nature.

The 'summary' procedure followed by the National Council of the Judiciary did not match the expected standards. Perfunctory evaluation of candidates done in a hurry brought the KRS to making embarrassing mistakes. The Council recommended to the Disciplinary Chamber a legal counsel who was in 2017 convicted by a final disciplinary ruling for violating the law and professional ethics (after the heavy criticism in the media, the nominee resigned herself at the beginning of September). Another recommended candidate to the Chamber, a prosecutor, was charged with several disciplinary offences, convicted by a final disciplinary ruling as well, in addition, he did not meet the criterion of 10 years' professional experience.

[32] Due to the lack of appearance of some candidates, additional team meetings to interview them were organized during the following days, the last one on 28 August 2018.

[33] The Law on the KRS provides that voting at KRS plenary sessions shall be open as a rule, admittedly allowing, as an exception, secret voting at the request of a KRS member (Art. 21 (2)).

### 3. Political influence in the process of selecting judges

The course and results of the KRS recruitment procedure backs a conclusion that the lists of nominees to the Supreme Court were determined in advance, before the KRS started to examine the applications. The impact of political considerations during the procedure was noticeable. In most cases, the candidates were either accepted or rejected by the KRS with a very clear advantage, almost unanimously, while the basis for the vote were 2-3 minute-long presentations of the applicants. Nominations were obtained by candidates who were linked to the executive, in particular, to the Minister of Justice or who have been supporting the policy of the ruling party. This was notably evident in the election of twelve nominees to the Disciplinary Chamber of the Supreme Court which of particular importance to the Minister of Justice and the ruling majority. Half of the nominees were prosecutors; they had so far been subordinated to the General Public Prosecutor – the Minister of Justice. The other nominees have been associated with the Minister or the ruling party as well. The public could have notice an incident of a direct intervention by the Minister of Justice at the KRS meeting in support of a candidate whose nomination was at risk. The candidate, a director of a department in the Ministry, thus – a person subordinated to the Minister of Justice, aroused fierce objection by a parliamentarian of the ruling party who is a KRS member at the same time. The grounds of the objection were ideological: at an academic conference a few years ago, the candidate presented an opinion on the admissibility of same-sex relationships under the Polish Constitution; an opinion with which the representative of the Sejm disagreed. The Minister, who had not previously participated in the election of the nominees, came to the meeting, strongly supported the candidacy, even presented a written statement in which the candidate changed his mind: he no longer considered same-sex unions admissible. Finally, in the second vote, the candidate obtained exactly the minimum votes required for a nomination (an absolute majority). The course of events and the distribution of votes clearly illustrated the susceptibility of current members of the new KRS to pressure exerted by politicians: a member of the Parliament and a member of the executive. The incident did also exemplify an opportunistically driven readiness of some candidates to deny their earlier views in order to become elected.

The National Council of the Judiciary was assigned a dominant role and responsibility in the current procedure for the selection of judges for the Supreme Court. The Council does not seem to be taking its role seriously enough, and have largely abdicated from it. In fact, the predominant impact on the selection process has been left to political actors. The substantive evaluation of the candidates by the KRS was seeming and not genuine.

## V. European reaction to the new KRS

The changes that were designed and then implemented in relation to the National Council of the Judiciary have been criticized by European institutions. The Venice Commission clearly indicated in its opinion that there is a threat of politicization

of the Council if the Parliament were to elect the judges-members of the Council.[34] Together with the early termination of the serving members term of office and their immediate replacement, this would lead to a weakening of the Council's independence vis-à-vis the parliamentary majority, and taking into account the effects of other judicial reforms in Poland – to a weakening of the independence of the entire judiciary.[35]

A negative assessment of a number of changes concerning the National Judicial Council was expressed also by the European Commission in its fourth recommendation on the rule of law in Poland[36]. In particular, the Commission pointed out that legislative changes mean that Parliament will gain decisive influence over the Council's composition and allow a high degree of political influence.[37] In October 2018, the Commission brought an infringement action before the CJEU against Poland in connection with the changes made to the Supreme Court.[38] The action has not yet been communicated in the EU Official Journal or published on the Court's website. The case may relate to the National Council of the Judiciary to the extent that it has been involved in the early retirement of Supreme Court judges and the extension of judge's mandate. The Commission sees the KRS clearly as a politicized body which does not meet European standards. In this case, the Court of Justice ordered interim measures to restore the situation as it had existed before 3 April 2018, that amounts, in particular to the reinstatement of prematurely retired judges.[39] In fact, this decision has retroactive effect and forces Poland to reverse some of the personal changes implemented so far in the Supreme Court until the CJEU delivers its final judgment. The measures also concern the National Council of the Judiciary in two aspects. First, Poland was obliged to refrain from any action aimed at appointing new Supreme Court judges to the positions to which the legislative provisions challenges by the infringement action relate. Secondly, the application of the provisions on early retirement of Supreme Court judge has been suspended. The National Council of the Judiciary, as a constitutional body, is required to comply with the Court's decision to the extent that its actions relate to the two areas mentioned above.

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[34] Opinion of 11 December 2017 on the Draft Act amending the Act on the National Council of the Judiciary, (CDL-AD(2017)031), para. 24.

[35] *Ibidem*, para. 31

[36] Commission Recommendation 2018/103 of 20 December 2017 regarding the rule of law in Poland (OJ 2018 L 17/50); repeated in Commission's Reasoned proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of Law (COM(2017) 835 final), para. 137–145.

[37] *Ibidem*, para. 29–30.

[38] Case *Commission v Poland*, C-619/18. This is a second action brought by the Commission against Poland on the basis of Art. 258 TFEU with regard to the rule of law issues in Poland. The first one (C-192/18) deals with the differentiation in pensionable age for female and male judges of ordinary courts, and the discretionary powers of the Minister of Justice to decide on the prolongation of judges' mandate.

[39] Decision of 19 October 2018, EU:C:2018:852.

## 1. Preliminary questions to the Court of Justice of the European Union

The composition and functioning of the National Council of the Judiciary will probably be considered soon also by the EU Court of Justice. In particular, a number of doubts concerning changes in the Council and their effects on the functioning of the Supreme Court were raised in preliminary questions sent by the Supreme Court to the Court of Justice of the European Union. The fundamental change of the model of electing KRS members from a model with a predominance of the judicial element (election of judges-members by assemblies of judges) to a model with the dominance of the legislative and executive powers is the core of the questions addressed to CJEU on 30 August and 19 September 2018.[40] In its submission, the Supreme Court considers that the National Council of the Judiciary does not guarantee independence. Therefore, it asks whether such a body can elect judges of the newly created chamber of the Supreme Court and whether such a chamber, staffed exclusively with judges elected by such a body, is a 'court' within the meaning of the law of the European Union. In substantiating questions referred to the Luxembourg Court, the Supreme Court indicated a number of circumstances and activities of the National Council of the Judiciary (lack of defense of the independence of the Supreme Court and its judges, no acceptance of the six-year term of office of the First President of the Supreme Court, demands to initiate disciplinary proceedings against judges who have submitted preliminary questions, condemning judges cooperating with European institutions, no justification or laconic justification of negative opinions, etc.), which lead the Court to a firm conclusion that it *'finds no arguments that would allow the present Council to be regarded as a body truly, and not only formally, upholding the independence of courts and judges'*.[41]

If the Court of Justice of the EU were to share these doubts, this would lead to far-reaching consequences, first of all, denying the judicial nature of the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs and the need to exclude them from adjudicating. It would further necessitate a change in the procedure for the selection of judges and a new reform of the National Council of the Judiciary. The most serious effect of a preliminary ruling recognizing the consequences suggested by the Supreme Court would, however, be that a similar reasoning could then be applied to all courts in Poland, not only to the Supreme Court. This could lead to a negation of the capacity of Polish courts to adjudicate on EU cases. Without this ability, the participation in the Union would be practically impossible. The Supreme Court, probably trying to limit such far-reaching effects, stresses that the question relates to the situation of a court composed exclusively (in full) of judges appointed by an authority which does not guarantee independence. However, in the context of judicial independence and the right to a fair trial, the situation of a court composed 'exclusively' of such judges is not fundamentally different from that of a court staffed

[40] Decision of 30 August 2018 (III PO 7/18), in CJEU: case *Krajowa Rada Sądownictwa*, C 585/18; Decision of 19 September 2018, (III PO 8/18).

[41] *Ibidem*, para. 31–34.

'almost entirely' or 'by a large majority', or even 'by a majority', of such judges. Indeed, no judge should be elected by a body described by the Supreme Court.

The Act adopted recently by the Parliament, now waiting for President's signature is to repeal some of the amendments introduced in 2017 in the Supreme Court.[42] If it enters into force, it may affect questions referred for a preliminary ruling by the Supreme Court. The Act reverses the changes concerning early retirement of the Supreme Court judges and abolishes the procedure for extending judges' mandate. The Act also provides that appeal proceedings initiated in these cases will be closed *ex lege* (discontinued). The intention of the project proponents was undoubtedly to discontinue as well the preliminary ruling proceedings initiated in these cases. Such a measure will probably succeed. Art. 267 TFEU authorizes a domestic court to request a preliminary ruling when it '*is necessary to enable it to give judgment'*. It presupposes that the domestic case is pending both at the time when the questions are asked and when the Court of Justice gives its ruling. Since CJEU's ruling is intended to assist the national court in resolving a domestic case, the preliminary ruling procedure is to no purpose when the domestic case is discontinued.[43] However, this will only delay but not exclude the possibility of challenging the status of the National Council of the Judiciary in further judicial proceedings. Questions about the independence of the KRS and its impact on the judiciary in Poland may be referred to the Court in next cases and may be submitted also by other judicial bodies. By coincidence, on the day of submission and the adoption of the draft Act by the Sejm, the Supreme Administrative Court (SAC) referred its own questions to the Court of Justice for a preliminary ruling. In its second question, the SAC also raised the issue of the National Council of the Judiciary, in particular by asking whether the situation in which representatives of the judiciary in the Council are elected by the legislature does not disturb the principle of institutional balance, which would consequently affect its role of the guardian of judicial independence. Questions were asked in the appeal proceedings of five candidate to the Supreme Court were not recommended by the KRS. The nomination procedure to the Supreme Court is not covered by the current amendment, thus questions will probably be considered by the Court of Justice in Luxembourg. The Supreme Administrative Court asked questions without being aware of the upcoming amendment to the Law on the Supreme Court and its possible consequences for preliminary ruling proceedings. It can be assumed that otherwise, concerns about the National Council of the Judiciary would be more highlighted in the SAC's questions. However, the question already posed concerns the fundamental issue of the current KRS: the direct election by politicians. It is likely that further questions will be referred to the CJEU which will 'take over' the issues previously indicated in the questions posed by the Supreme Court.

[42] Act of 21 November 2018 amending the Law on the Supreme Court. The draft was submitted to the Sejm on 21 November 2018 (Doc. No 3013), adopted by it on the same day and passed on to the Senat (Doc. No 1019), which adopted it on 23 November without any amendments.

[43] See i.a. K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2014, p. 62–63.

## 2. Suspension of the KRS in the European Network of Councils for the Judiciary

On 17 September 2018 the European Network of Councils for the Judiciary suspended one of the founding members: the Polish KRS. The unprecedented step, taken after a fact-finding mission to Warsaw in mid 2018 and the dialogue between the two institutions, is the result of a negative assessment of the changes brought into the Polish judicial system over the last three years. They directly affected also the National Council of the Judiciary. The Network's basic membership condition requires the national institutions to be *'independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice'*.[44] The General Assembly of the ENCJ came to the conclusion that its Polish member no longer meets the criteria.

The ENCJ's decision means that while formally maintaining the membership, the Polish Council is no more an active member: it has been deprived of the right to vote and will not be involved in further activities of the Network. Although the suspension is, by its nature, of temporary character, the decision to suspend is taken for an indefinite period of time. The KRS may resume its full status only when the ENCJ is satisfied that it again fulfils the conditions for membership. This would require a new resolution of the ENCJ General Assembly.

The ENCJ Statute does not expressly provide for the suspension of membership. It does nonetheless permit to exclude a member if it *'committed serious breaches of the aims and objectives of the Association'*.[45] In line with the *argumentum a maiori ad minus*, if the organization is entitled to apply a more far-reaching sanction (the exclusion of a member), it as well is authorized to use a more lenient sanction (the suspension). When considering the suspension of the KRS, the ENCJ applied the procedural rules applicable to the exclusion: the request was presented by the ENCJ Executive Board, the KRS had the opportunity to provide explanations and defend its position. In the end, the decision was taken by the General Assembly by a qualified majority of three quarters of the members present (a hundred votes in favour, six votes against – of the Polish delegation, eight abstentions).

The ENCJ decision to suspend the KRS contributes to the reaction of European institutions to the changes introduced into the Polish judiciary since Autumn 2015. They have been marked first by the disabling the Constitutional Tribunal, then by the intensification of administrative and disciplinary supervision over ordinary courts, the politicization of the National Council of the Judiciary, and, currently under way, the gradual takeover of the Supreme Court. They disrupted the relations between the legislature, the executive and the judiciary, which are defined by the principles of the rule of law, the separation of powers and the judicial independence.

[44] See Art. 6 (1) ENCJ Statutes, https://www.encj.eu/images/stories/pdf/other/statutes_and_rules_encj-recj_2014_finances_2016.pdf (access: 17.11.2018).

[45] Art. 6 (4) ENCJ Statute.

The latter has been recently halted or slowed down by interim measures ordered by the Court of the Justice of the European Union pending its final judgment in an infringement case brought by the European Commission. They led to triggering the EU judicial and political control mechanisms: infringement action, and the Art. 7 TEU mechanism to protect the EU values. Moreover, the Court of Justice already issued a preliminary ruling in the *LM* case on to the execution of a European Arrest Warrant[46] and was requested by Polish courts, incl. the Supreme Court, to give further rulings on a number of issues related to the independence of the judiciary.

The National Council of the Judiciary was suspended primarily on account of the legislative changes that reshaped the body and led to its re-composition incompatible with the 1997 Constitution and the European standards. The controversy over the formation of the 'new' KRS has been widely discussed within the legal community. It seems united to a large extent in its negative assessment of the changes. The ENCJ decision to suspend the KRS was received as a natural consequence but also as a very strong and meaningful sign of the European perception of the developments. All the more importantly, since it was taken by the judges themselves and almost unanimously, if the votes of the Polish delegation were to be deducted.

## VI. Concluding remarks

**1.** The changes in the composition and functioning of the National Council of the Judiciary introduced over the last year have not brought about a balance between: on the one hand – the postulated greater public participation in shaping the composition of the Council and increasing its legitimacy and, on the other hand – maintaining by the KRS its constitutional function of the guardian of judicial independence. The functioning of the new KRS for several months now has confirmed many of the concerns expressed before. The negative consequences became particularly evident in the recent election process for the new Supreme Court judges.

**2.** While maintaining formal autonomy in exercising its powers, the Council does not appear to maintain personal independence of its members. The composition and functioning of the KRS have been directly influenced by political factors. The Council operates unprofessionally and seems no longer able and willing to fulfill its crucial task. The judiciary in Poland has been deprived of an institutional guarantor of its separation and independence from the executive. Further to the changes made earlier to the Constitutional Tribunal, another constitutional safety mechanism was *de facto* switched off and the KRS was turned into a facade body.

**3.** The deficiencies of the KRS undermine the objective of the judicial reforms declared by the government: to improve ('heal') the judiciary. They also run counter the motto of making the state 'strong' that the ruling party proclaimed. A strong state cannot be build by failing institutions. The weaknesses of the KRS may be inherited by further judicial bodies on whose staffing the Council co-decides:

[46] Judgment of 25 July 2018, *LM (Celmer)*, C-216/18 PPU, EU:C:2018:586.

the Supreme Court, the ordinary courts, the administrative courts and the military courts. As a consequence, the current composition and activities of the Council contribute to undermining the authority of the entire judicial system in Poland.

**4.** The recent process of nominating judges to the Supreme Court by the new KRS was flawed, too hasty and superficial. The Council has carried out a very sketchy and shallow evaluation of candidatures to the Supreme Court, based on incomplete materials, by unclear criteria and in pursuance of a largely confidential procedure. It did not guarantee the selection of the best candidates. It was more an imitation of a real procedure. It left the impression that the Council's role was downgraded to implement decisions which had been taken beforehand and outside the KRS.

**5.** The new National Council of the Judiciary has not been properly fulfilling its role as the guarantor of independence of the judiciary. It does not speak when politicians of the ruling majority offend judges or threaten them with disciplinary proceedings when the court's decision do not meet political expectations. On the contrary, the KRS has sometime supported such statements either tacitly or even explicitly. Some members of the KRS have insulted judges themselves and threatened them with disciplinary responsibility as well. That alone should disqualify them from the membership of a judicial council.

The KRS did not support the Supreme Court when representatives of the executive refused to give effect to its decision on interim measures which accompanied the referral of preliminary questions to the Court of Justice of the European Union. In fact, the KRS itself questioned these decisions and contributed to their ineffectiveness.

**6.** There are no direct legal consequences for the national judicial system resulting from the suspension, exclusion or withdrawal of a national council from the European Network of Councils for the Judiciary. The consequences are indirect and can be spread over time. The decision of the ENCJ to suspend the KRS may be invoked by other European institutions in their assessment of the state of the rule of law in Poland, contributing to the further isolation of the country. The ENCJ's own assessment sends a clear signal to judges from other EU countries about problems in ensuring the independence of the Polish courts. The foreign court may find there a confirmation of the concern that Polish courts can no longer be trusted because their independence has been undermined by systemic changes. As a consequence, it may refuse to execute a decision or a judgment issued by a Polish court. The recognition of judicial decisions based on the principle of mutual trust is an important part of European integration. Poland may therefore lose its ability to continue to participate fully in this process.

**7.** The current KRS does not meet either Polish or European standards of a judicial council. In fact, it has renounced its constitutionally assigned role. It has destructive influence on the functioning of Polish judiciary and the stability of the legal system in Poland. The suspension of the KRS by the ENCJ is a veto of no confidence expressed by European judges. It is a call for legislative changes to restore the rule of law constitutional standards. It should also prompt the individual members

of the KRS to reconsider their participation in the Council's work. The latter was in clear words also suggested by their Polish peers who called for their resignation.[47]


## STRESZCZENIE

### NOWA KRAJOWA RADA SĄDOWNICTWA I JEJ WPŁYW NA SĄD NAJWYŻSZY W ŚWIETLE ZASADY NIEZAWISŁOŚCI SĄDÓW

Zmiany w składzie i funkcjonowaniu Krajowej Rady Sądownictwa wprowadzone w minionym roku wpływają negatywnie na wypełnianie przez nią konstytucyjnej roli strażnika niezależności sądownictwa. Szczególnie widoczne było to w niedawnych wyborach sędziów Sądu Najwyższego. Rada zachowuje wprawdzie formalną autonomię w wykonywaniu uprawnień, jednak członkowie Rady nie wydają się utrzymywać personalnej niezależności w swoich działaniach. Niedawny proces nominacji przez KRS sędziów do Sądu Najwyższego był wadliwy, pospieszny i powierzchowny. Rada dokonała bardzo pobieżnej i płytkiej oceny kandydatur, na podstawie skromnych materiałów, w oparciu o niejasne kryteria i procedurę o dużym stopniu poufności. Nie gwarantowała ona wyboru najlepszych kandydatów. Obecna KRS nie spełnia ani polskich, ani europejskich standardów rady sądowniczej. Wydaje się, że Rada w istocie zrezygnowała z wykonywania powierzonej jej roli konstytucyjnej. Przez to ma destrukcyjny wpływ na funkcjonowanie polskiego sądownictwa. Niedawny akt zawieszenia członkostwa KRS w Europejskiej Sieci Rad Sądownictwa jest wyrazem wotum nieufności ze strony sędziów europejskich, a jednocześnie kolejnym wezwaniem do wprowadzenia zmian legislacyjnych w celu przywrócenia standardu konstytucyjnego.



**Słowa kluczowe:** niezależność sądownictwa, Krajowa Rada Sądownictwa, polski Sąd Najwyższy

**Key words:** judicial independence, National Council of the Judiciary, Polish Supreme Court


[47] E.g. Resolution No. 2 of 20 September 2018 of the Assembly of Judges Representatives of the Regional Court in Warsaw, http://monitorkonstytucyjny.eu/archiwa/5989 (access: 17.11.2018).