



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



Ref: CommHR/NM/sf 015-2017

Mr Marek KUCHCIŃSKI
Speaker of the Sejm
of the Republic of Poland
Warsaw, Poland

Strasbourg, 31 March 2017

Dear Speaker,

I am writing to you to express my concern about the proposed amendments to the Act on the National Council for the Judiciary and Certain Other Acts (*projekt ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*). I understand that the Sejm will discuss the bill in its next session beginning next week, on 5 April 2017.

As you may recall, in the report following my visit to Poland last year, I highlighted concerns by various human rights stakeholders regarding the announcement by the Minister of Justice about a planned reform of the judiciary and in particular of the National Council for the Judiciary ("the Council").

According to information in my possession, the proposed amendments create a new procedure for appointing members of the Council, reorganise its structure and modify the procedure for selection of judges and trainee-judges.

It is proposed that the members of the Council be selected from among candidates put forward by both members of parliament and the judiciary, then selected through a parliamentary vote after pre-selection by yourself in your capacity as Speaker of the Sejm. In my view, such a procedure raises concerns in terms of the constitutional principle of separation of powers as well as that of independence of the judiciary, as it effectively means transferring the power to appoint members of the Council from the judiciary to the legislature. These principles are well-established internationally, as reflected in the relevant recommendations of the Venice Commission and the Consultative Council of European Judges (CCJE) of the Council of Europe, and also enshrined in the Polish Constitution. Further, the Recommendation of the Committee of Ministers of the Council of Europe (CM Rec 12/2010) requires that the composition of a council for the judiciary should ensure that it is free from any political influence, and the Council of Europe's 1998 European Charter on the Statute for Judges prescribes that the authority deciding on judicial appointments should be independent of the executive and legislative powers and composed at least in half of judges elected by their peers. Principles developed by the European Network of Councils for the Judiciary (ENCJ) also stipulate that the mechanism for appointing judicial members of a judiciary council must exclude any executive or legislative interference and that the election of judges should be solely by their peers.

As regards the proposed new structure of the Council, two separate 'assemblies' would be created, one appointed chiefly by the legislative and executive branches and another one composed of judges, and all decisions on appointments would require the agreement of both assemblies. I believe that the proposal carries with it a high risk of stalemates and politicisation of decision-making, allowing each assembly to block the judicial appointment process. As jointly observed by the CCJE and the Consultative Council of European Prosecutors (CCPE), "the independence of the judiciary can be infringed by weakening the Council for the Judiciary, by reducing its powers, (...) means at [its] disposal or by changing [its] composition". The creation of 'assemblies' wielding veto powers effectively means that legislature and executive, rather than as before the judiciary, would have a decisive role in the appointment of judges and trainee-judges. My understanding is

that this solution - which effectively divides the Council in two separate sub-units - does not have a basis in the Polish Constitution.

Most importantly, perhaps, the new bill foresees the end of the term of all the judges currently sitting on the Council thirty days after the entry into force of the new regulation. Shortening the term of the current members of the Council would subvert the constitutional balance of powers, creating a situation where the legislative branch may terminate the mandate of constitutional organs at will, depriving them of their independence. The proposed provision may interfere directly with the guarantees of Article 6 of the European Convention on Human Rights (right to fair trial) in so far as the current members would not be able to challenge the termination of their mandates before a judicial body. It may also run counter to the Polish Constitution, which foresees that the term of office of the Council's members shall be 4 years.

As you will know, a number of stakeholders have already expressed concerns about the proposed legislation. The OSCE's Office for Democratic Institutions and Human Rights (ODIHR), in its Opinion of 22 March, found that the amendments raise serious concerns with regard to the key democratic principles of separation of powers and independence of the judiciary. A similar position with regard to the new bill was also expressed by the Polish Ombudsman in an open letter he addressed to the Minister of Justice on 1 February 2017. As for the National Council of the Judiciary itself, it issued an opinion on 30 January 2017 stating that the proposed amendments infringe on the Constitution and "create a real threat for the protection of Rule of Law and human rights and freedoms". On the same day, the Executive Council of the European Network of Councils for the Judiciary issued a similarly critical opinion.

In order to preserve the principles of separation of powers and the independence of the judiciary, the selection of members of the judiciary should be a decision process wholly independent of the government, so as to stave off the risk of any undue political influence. By entrusting the legislature with the task of appointing members to the National Council for the Judiciary and by affording the legislative and executive branches the power to exercise decisive control over the selection of judges and trainee-judges, the proposed amendments infringe on the independence of a body which is the constitutional guarantor of judicial independence in Poland. The independence of the Council's members is directly linked to the independence of the judiciary, which is a key pillar of any democracy and essential to the protection of individual rights and freedoms.

For this reason, I strongly encourage the Polish Parliament to reject the proposed amendments.

I stand ready to discuss all these matters further with you and other members of the Parliament.

I would also be grateful if you could ensure that all members of the Sejm receive a copy of this letter.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Nils Muižnieks', with a long horizontal flourish extending to the right.

Nils Muižnieks