



**1 March 2017**

**Declaration of MEDEL**

**on the governmental Draft of the Law Amending the Law on the National Judicial Council  
and Other Relevant Laws (UD73)**

**MEDEL (*Magistrats Européens pour la Démocratie et les Libertés*)** is an organization of European judges and prosecutors created with the main purpose to defend the independence of the judiciary, democracy and human rights. It currently comprises 22 national associations from 15 European countries, including Poland, and is an observer member of the Consultative Council of European Prosecutors of the Council of Europe (CCPE) and the Consultative Council of European Judges of the Council of Europe (CCJE).

Since the end of 2015, MEDEL together with other European institutions, including the European Commission, the Council of Europe and the Venice Commission, has been following with increasing concern the developments of the situation in Poland and notes that the fundamentals of the democratic state based on the rule of law have been and are being constantly undermined.

Recently, the Board of MEDEL has been informed about the governmental draft on the *Law Amending the Law on the National Judicial Council and Other Relevant Laws*. It *contains* proposals for radical changes in the election of members of this body as well as in the decision-making procedure.

The National Judicial Council of Poland (*Krajowa Rada Sądownictwa*, hereinafter the Council) is an independent constitutional body which according to Article 186 of the Constitution of the Republic of Poland shall safeguard the independence of courts and judges. It is a collective body composed of representatives of all three powers, but with a higher participation of judges, which is a logical consequence of entrusting the Council with protection of judicial independence. The Council consists of fifteen judges elected by their peers, the First President of the Supreme Court, the Minister of Justice,

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the President of the Chief Administrative Court, a representative of the President, four representatives of *Sejm* (the Lower Chamber of the Parliament) and two representatives of *Senat* (the Higher Chamber of the Parliament).

According to the government bill, the following amendments to *the Law on the National Council of the Judiciary* have been proposed:

- interruption of the term of office of the current judicial members of the Council, which according to the Constitution amounts to four years. The draft provides that their term of office is to expire after 30 days from entry into force of the law what will effectively jeopardize the continuity of this body;
- introduction of two assemblies of the Council (the First and the Second) that will have a power to block each other in relation to judicial appointments;
- change of the procedure of the election of judicial members of the Council. Pursuant to the bill, judges will no longer elect their representatives to the Council. This competence will be vested in the Sejm, as according to the bill in case of vacant post in the Council, the Presidium of the Sejm or at least 50 its members present their candidates for a member of the Council to the Speaker (*the Marshal*) of *the Sejm*. Judges' associations will be allowed to present their recommendations concerning the proposed candidates but their stance will not be binding. The final list of candidates for vacant posts of judges in the Council will be presented to the Sejm by the Speaker, who will decide discretionary which candidate to propose.

The Consultative Council of European Judges (CCJE) in its Opinion no.10 (2007) from 23 November 2007 addressed to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society<sup>1</sup> underlined:

*“(25) In order to guarantee the independence of the authority responsible for the selection and career of judges, there should be rules ensuring that the judge members are selected by the judiciary.*

*(26) The selection can be done through election or, for a limited number of members (such as the presidents of Supreme Court or Courts of appeal), ex officio.*

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<sup>1</sup> <https://wcd.coe.int/ViewDoc.jsp?p=&id=1221839&direct=true>

*(27) Without imposing a specific election method, the CCJE considers that judges sitting on the Council for the Judiciary should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels.”*

Recommendation 2010/12 from 17 November 2010 of the Committee of Ministers of the Council of Europe: CM/Rec (2010) 12 on Judges, Independence, Efficiency and Responsibilities<sup>2</sup> in Article 26 and 27 stipulates:

*“(26) Councils for the judiciary are independent bodies established by law or under constitution, that seek to safeguard the independence of the judiciary and of individual judges, and thereby to promote the efficient functioning of the judicial system.*

*(27) Not less than half members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism within judiciary.”*

MEDEL has no doubts that the selection of the judges -members of the Council directly by the Sejm is not in accordance with these standards. The main points of concern are as follows:

- the whole process of electing judicial members of the National Judicial Council will be indeed dominated by politicians;
- the proposal does not contain any criteria to be applied for the selection of judicial candidates to the Council; therefore the Speaker of the Sejm will be allowed to choose among them based on his/her own arbitrary assessment;
- the process of selection of judicial members will not be democratic, and many judges who are not members of any judicial associations will be completely deprived of their right to be properly represented in the Council, to elect and to be elected;.
- there are no provisions which would guarantee that each group of judges, serving on various levels of courts, will be adequately represented in the Council.

Furthermore, the government Bill provides the division of the Council into two assemblies, the first one - comprising representatives of powers other than judicial, as well as the First Presidents of the Supreme Court and the Chief Administrative Court, and the second one — composed of judges selected in fact by

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<sup>2</sup> [https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2010\)12E\\_%20judges.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2010)12E_%20judges.pdf)

the Parliament. This partition will have significant impact on the selection and promotion of judges, as any decision to present a candidate for a judicial position will have to be supported by both assemblies, acting separately.

In the opinion of the Board of MEDEL the proposed solutions constitute a serious threat to the principle of separation of powers and independence of judiciary. There is a severe risk that the National Judicial Council will fall under influence of politicians what may deprive it of a possibility to act effectively as a safeguard of independence of courts and judges. Furthermore, the procedure of selection and promotion of judges will be fully controlled by politicians having the majority in the Parliament. Judicial nominations will be based on political support and involvement instead of being based on merit, qualifications and experience, what constitutes a serious risk for judicial impartiality and independence. In this way, individuals will be deprived of their right to an independent and fair court.

The principle of judicial independence, without which the rule of law is impossible, is an essential feature of constitutional democracies around the world. It is important not only that the judiciary acts independently, but that judges are considered to do so as well. The principle of separation of powers provides that there is a system of internal mechanisms within the state authorities preventing concentration and abuse of powers, and guaranteeing that individual rights and freedoms are respected.

There are acceptable interdependencies and different forms of cooperation between the legislative and executive powers. In some areas both of their competences may even cross or overlap. However, relations between the judiciary and other branches of power must be based on the principle of separation. Independence of judges and courts is a core element of the judiciary and other powers must not interfere in any of their actions. This reflects the specific connection between judiciary and protection of the individual's rights and freedoms. Any intervention of legislative or executive powers into judiciary can be allowed only in those cases prescribed by the law.

The European standards in the field of judiciary are not developed to serve in the interest of judges. These standards reflect the shared principles and values of the EU Member States which guarantee a proper functioning of a democratic systems based on the Rule of Law. Therefore, the Board of MEDEL hopes that the Republic of Poland, as the important Member State of the United Nations and of the Council of Europe, recognizes these international standards. The Board of MEDEL calls the competent authorities of the Republic of Poland to refrain from any steps which may undermine the principles of the democratic state based on the rule of law.