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FOR Communication 2/2024:

Government's draft act on the National Council of the Judiciary: correct direction, insufficient safeguards

The draft amendment to the Act on the National Council of the Judiciary presented by the Minister of Justice stipulates a return to the election of the judicial part of the Council by judges. Complemented with the proposal to grant all judges - not just their representatives - an active and passive electoral right, the project aims to ensure the independence of the NCJ and limit the influence of politicians on the judges' nomination process. Although most of the proposals in the project are reasonable, some of them may preserve the "corporate" nature of the Council and insufficiently guarantee its democratic legitimacy.

Correct direction of changes

The [draft act](#) has been a subject to broad consultations. The Civil Development Forum also [presented its comprehensive opinion](#), the summary of which is presented in this communication.

The Ministry's of Justice proposal focuses on changing the model for selecting 15 members of the NCJ from among judges. Instead of the current regulations, where judges to the Council are elected by the Sejm, it is planned to return to the practice where judicial community indicate their representatives. However, unlike in regulations before 2018, the election is to be carried out by all eligible judges, not just their representatives sitting in assemblies or unions of judges.

Moving away from the politicized appointment of NCJ members from among judges is a good solution, ensuring the independence of the Council and limiting the influence of other powers on the judicial

nomination process. It is worth to remind that due to the flawed composition of the Council, judges selected by this body do not provide the standard of the right to a fair trial, as established by both Polish and European courts. Thus, resolving the NCJ issue is crucial from the perspective of ensuring the rule of law standards in Poland.

Nevertheless, in our opinion, this requires the adoption of ambitious, thoughtful, and innovative solutions, as - alongside ensuring the right to a fair trial - it is also important to:

1. Guarantee the democratic legitimacy of the Council.
2. Limit the risk of conflicts of interest and minimize the "corporate" nature of the NCJ.
3. Reduce the noticeable polarization within the judiciary.
4. Enable sufficiently broad citizen oversight of the Council's work.

Joint elections instead of seven separate votes

The Ministry proposes elections of NCJ members from among judges to consist of seven votes, separately for each group of judges from different courts. Mandates of the Council members will be obtained by candidates with the highest number of votes in each group, according to the number of mandates assigned to each group.

In our opinion, the selection of NCJ members from among judges should take place in one, joint vote. This would increase the democratic mandate of the Council and reduce its dependency on judges of a particular type and level of court where they currently adjudicate. This will minimize the "corporate" nature of the NCJ.

A more rational distribution of mandates among courts

The draft act proposes a fixed and set distribution of mandates of NCJ members chosen from judges among seven types and levels of courts. According to declarations, it is supposed to reflect the number of judges in each group.

In our opinion, we found this division unjustified. It is subject to the accusation of arbitrariness and inadequacy from the perspective of the tasks entrusted to the NCJ. The proposal also does not match to any of the commonly used methods of mandate distribution. We believe that no group of judges

should have a numerical advantage in the Council, as it limits its internal pluralism and makes it difficult to adopt balanced positions that take all interests into account.

Therefore, we proposed a four-stage algorithm that ensures balanced representation of judges from all types and levels of courts. In our proposal, the final determination of who is entitled to a mandate as a NCJ member would be based on election results, not predetermined by law.

Let every candidate nominate themselves

When it comes to the procedure for nominating candidates for NCJ members, the ministry assumes that, in addition to groups of judges and citizens, judges wishing to run for a mandate in the Council could be indicated by the attorney-at-law and advocates' self-governments and institutions authorized to award academic degrees in the field of legal sciences. In our opinion, this choice was arbitrary, among other reasons, because only some, albeit the largest, legal self-governments could nominate candidates. In the current version of the project, this idea has been abandoned in favor of nominating candidates by groups of judges. However, in both these variants, to obtain the status of a candidate, a judge must seek favors of the legal community. This may preserve the corporate model of the Council in public perception, which seems to contradict the declarations of its greater democratization.

In our assessment, the model for nominating candidates for Council members elected from among judges should be as simple as possible, which will, in practice, guarantee the passive electoral right to every judge and avoid accusations of arbitrariness. We therefore propose that any judge wishing to run for a mandate in the NCJ should be able to nominate themselves. This will limit potential doubts about their independence after being elected to the Council.

Innovative electoral system

The project pictures an electoral system that assumes majority voting within each group of judges. In such model, the representativeness of the NCJ will not be fully ensured, as many votes will be cast for candidates who do not obtain a mandate.

We advocate for the use of a system based on preferential voting - the single transferable vote (STV). This system much better reflects the preferences of voters. It will more effectively implement the essential goal of elections, which is to cast a thoughtful vote, and limit the chances of the most extreme

candidates - thus serving as a remedy for the existing polarization within the judicial community. The STV system will also ensure greater representativeness of the Council, and as a result, a larger number of judges will identify with its members.

Active voting rights for trainee judges, court clerks, and retired judges

The Constitution states that members of the NCJ from the discussed group should be selected "from among judges." From the perspective of the tasks of the Council and the necessity to ensure its independence from politicians, it is optimal for this choice to belong to the judiciary.

However, we believe that the Constitution does not prohibit granting active electoral rights, in addition to judges, to other persons with a status equal to or similar to judges. Therefore, aiming to achieve the greatest possible democratic legitimacy of the NCJ, we postulate that trainee judges and court clerks should also be allowed to vote for candidates to the Council. This will also help to reduce polarization within the judiciary and ensure a sense of inclusion for those affected by the NCJ's decisions or for whom the predominant career path is to become a judge.

Idea equally worth to consider is to grant active voting rights to retired judges. Similar to trainee judges and clerks, their number should not affect the election results. Considering the continued commitment of retired judges to their oath and the obligation to adhere to ethical principles, this would serve as an acknowledgment of this group's service to the state.

Social Council to be deleted

The Ministry propose to establish a new body at the National Council of the Judiciary (NCJ) - the Social Council, which aims to provide opinions on judicial and assessorial vacancy candidates, among other issues upon request from the Council's Presidium. The Social Council is to consist of nine members indicated by, among others, legal self-governments, the Ombudsman, or the President of Poland.

While we advocate for the greatest possible citizen oversight over the tasks performed by the NCJ, we believe that the Social Council, as described in the project, will unfortunately be a facade body. Representatives to the Social Council are expected to include individuals from legal professional bodies or those closely associated with them, potentially contributing to the "corporate" nature of this body.

The draft's authors do not foresee the repeal of regulations that already stipulate the participation of legal professions' self-governments' representatives in committees assessing candidates. Thus, it's challenging to find the added value of the Social Council. We believe a better solution would be to remove regulations concerning the Social Council and to conduct a thorough analysis of other possibilities for citizen oversight of the NCJ's work, introducing them at a later date.

"Neojudges"? Let them run as candidates!

According to the ministry's solutions, judges appointed at the request of the current composition of the NCJ will not be able to seek a Council membership mandate or endorse candidates during the first elections.

We consider this solution unjustified and disproportionate. None of the European court verdicts binding Poland have questioned their status as judges. Moreover, the state itself honors this status by recognizing some of their rulings or paying "neojudges" their salaries. In our view, the problem is not their status per se but their participation in adjudicating panels, as this determines the violation of the right to a fair trial. However, the inadequacy of a court's composition does not, in itself, justify depriving "neojudges" of the passive electoral right in NCJ elections. This will only lead to further polarization within the judicial community and raises doubts regarding compliance with the Polish Constitution and European law.

What's missing?

The Ministry focuses its project on mechanisms to restore the independence of the Council by changing the method its members from among judges are elected. Unfortunately, it does not address other solutions that would allow for greater citizen control over the NCJ's work.

The project does not address the perceived conflicts of interest of Council's members elected from among judges, even though it would be a good opportunity to amend regulations concerning the exclusion of NCJ members, their participation in competitions for judicial positions, or finally, the relationships between evaluators and candidates. We have described solutions to these issues in detail in our opinion.

The proposal also does not address the issue of transcripts and transmissions of Council meetings. In our opinion, to improve the transparency and integrity of the Council's work, it should be obliged to produce transcripts of meetings and publish them on the NCJ's website, as well as provide access to

archival transmissions of its sessions. Furthermore, we believe that remote participation in meetings should be abandoned or significantly reduced, as it negatively affects the integrity of the decisions. Practice shows that NCJ members participating in discussions remotely are not always focused on their work.

The reviewed draft, before reaching the Sejm, will still be subject to government proceedings. FOR will analyze the changes and propose further amendments to ensure the independence of the NCJ and increase Council's democratic legitimacy.

Civil Development Forum (FOR)

FOR was founded in 2007 by prof. Leszek Balcerowicz in order to effectively protect freedom and promote truth and common sense in the public discourse.

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