
The reform of justice system as systemic threat to rule of law protection in Poland

THE REFORM OF THE JUSTICE SYSTEM

Summary:

- In January 2017, the Minister of Justice announced the main elements of the reform of the justice system¹. Most of the ideas were focused on the organisation of the common court.
- The reform will embrace among others the organisation and management of the common courts, the process of appointing new judges and, most probably, the organisation of the Supreme Court.
- The reform will be carried out by adopting five different pieces of legislation concerning different aspects of organisation the justice system in Poland. Each of the elements of the reform aims at widening the political control over the justice system.
- On July 12, 2017, the parliament passed an amendment to the National Council of Judiciary.
- On July 12, 2017, the parliament adopted an amendment to the Law on common courts organisation.
- On July 20, 2017, the parliament passed a new Law on Supreme Court. It includes many disturbing provisions, which once adopted will extremely extend the political control over the Supreme Court.

FIVE ELEMENT OF THE REFORM

The **first** draft of law concerned the directors (managers) of the court – whom became fully subordinated to the Minister of Justice. Norms concerning the appointment of directors were repealed from the statute law (the rules concerning the competition process will be regulated by the Ministry with the executive regulation). Directors of the court are capable of deciding upon administrative and financial issues, while these spheres of the court's functions remain outside of the duties of the court's president (judge). The law entered into force on 4 May 2017.

The **second** draft² relates to the model of judges training – the main “road” to the office of a judge will be through the National School of Judiciary and Prosecutors. The law on National School was

¹ The main elements were described in the press release available at [in Polish]: <https://ms.gov.pl/pl/informacje/news,8989,zalozenia-planowanej-reformy-sadownictwa.html>.

amended a few times in previous years. The law gives the Minister of Justice the power to appoint the “trainee judges” (*asesorzy*) for the office of a judge for 4 years. The approval of the National Council of the Judiciary in Poland will not be required (it will only be entitled to express its objection within 30 days without access to relevant information about the candidates - which will be binding for the Minister). Such an amendment is contrary to the judgement of the Constitutional Court of 2007, which stated that the process of appointing judges shall guarantee their independence³. The Act was adopted in mid-May 2017 and came into force in June 2017.

The **third** draft concerns the status of the National Council of Judiciary [*Krajowa Rada Sądownictwa*, KRS]. The basic rules of the Council are established in the Constitution. The draft aims at ending the 4-year term of office for current judge-members of the Council. It also introduces a new procedure of appointing judge-members, which will be carried out by the Parliament. Judges will not be entitled to appoint members of the KRS⁴. In the opinion of HFHR, the draft undermines the Council’s independence from politicians.

The draft also amends a procedure of reviewing judge candidates. Currently, the Council decides the issue of candidates sitting in plenary (after the preparatory stage of reviewing the candidates within the working group). The proposal divides the Council into two chambers. The first chamber consists of politicians and the heads of two supreme courts (10 members). The second chamber consists of judges appointed by the Parliament. Both chambers must express positive opinions of a judge candidate to allow that candidate’s nomination. The “veto” of the political chamber can be “overruled” by 17 judges (15 judges of the second chamber and the heads of 2 supreme courts). It will be impossible in practice. As a result, the amendments will expand the political control over the process of appointing judges.

The previous procedure of appointing judges to the Council was criticized by lower court judges, who rightfully asserted that they are under-represented in the Council (currently there is only one district court judge in the Council). However, the draft of amendments was also criticized by the same judges, as they will not have power to appoint the members of Council. The procedure also undermines the Council’s main role – to safeguard the independence of courts and judges.

OSCE Office for Democratic Institutions and Human Rights found that the proposed amendments raised serious concerns with respect to key democratic principles, in particular the separation of powers and the independence of the judiciary. The changes proposed by the Draft Act could also affect public trust and confidence in the judiciary, as well as its legitimacy and credibility. If adopted, the amendments could undermine the very foundations of a democratic society governed by the rule of law. The representatives of the legislative and executive powers would be able to de facto control and block judicial appointment processes. The above criticism was expressed by Consultative Council of European Judges (CCJE), European Network of Councils for the Judiciary (ENCJ), as well as the states’ representatives (including among others the United States of America, Canada, Germany and France) during the session of the Universal Period Review in May 2017.

The draft law on the National Council of Judiciary in Poland was adopted by Sejm on 12th July 2017 and now awaits President’s signature.

The **fourth** draft concerns the organisation of the common courts⁵. It gives more powers to the Minister of Justice in appointing and dismissing the presidents of the common courts. The Minister

² Draft no. 1406 – <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=21D2BF0BF71F520DC12580EB003917E0>.

³ HFHR opinion on the draft of law [press release in English] - <http://www.hfhr.pl/en/does-new-mode-of-appointments-of-junior-judges-undermine-triple-division-of-power-hfhrs-opinion/>.

⁴ The recommendation of judges’ association will be non-binding for the Parliament.

⁵ It amends the Law on common courts organisation (*Prawo o ustroju sądów powszechnych*).

will not be obliged to receive the opinion of the judges before appointing presidents. Within 6 months (after the draft enters into force), the Minister of Justice will be entitled to dismiss any president of the court for any reason (art. 18 of the draft). Additionally, the draft lowers the retirement age of judges – 60 for women and 65 for men.⁶ However, the Minister of Justice will have discretionary power to allow judges to remain in office after the above age limits expire. Moreover, the draft allows the prosecutors much broader access to the offices of judges of the appellate court.

The announcement of the fourth draft resulted in judges organising a “strike” on 20 April 2017. They stopped the court proceedings for 30 minutes in protest against the planned reforms to the judiciary system. As judges are not allowed to strike, the judges officially went on a break to discuss the proposed changes to the law.

The amendment to the Law on common courts organisation was adopted by Sejm on 12th July 2017 and now awaits President’s signature.

The **fifth** draft concerns changes in the Supreme Court. On late evening of 12 July, the group of MPs directed to the Parliament the draft law amending the Act on the Supreme Court. The draft presents a wide reform of functioning of the highest instance court. The draft law was adopted by Sejm on 20th July 2017 despite protests and critical voices from experts, lawyers and civil society organizations.

One of the most controversial provisions of the new law states that all tenures of judges sitting currently in the Supreme Court will be terminated a day after the Act’s coming into force with an exception to these who are selected by the Ministry of Justice. In the light of the new procedure, within 14 days since Act’s coming into force the Minister of Justice will apply to the National Council of Judiciary to leave in the office the judges he has selected. Then, the National Council of the Judiciary will have 14 days to make a decision whether a judge should stay in the office, and next the President will have 14 days to make a decision to uphold the National Council of Judiciary’s decision. If the President does not make any decision at all then the judge’s term of office will be terminated.

New judges, who will replace those whose tenures are terminated, will be elected by the National Council of Judiciary. In the light of changes regarding the composition of the Council the appointment of a new judge of the Supreme Court will not be possible without the consent of the representatives of government, Parliament and President sitting in the Council.

Furthermore, in the new Law on the Supreme Court, the President will prepare the Statute of the Supreme Court which will regulate its works.

Last but not least, the law states that the term of office of the First President of the Supreme Court expires when they turn 65 year old. Judge Małgorzata Gersdorf, the current First President of the Supreme Court, will turn 65 in November this year.

Supreme Court’s competences are very wide and it plays a crucial role in sustaining the independence of the justice system in Poland.

First of all, the Supreme Court supervises the works of the courts of lower ranks in terms of „judiciary control”. For example, the Court can adopt decisions in which it presents the legal interpretation of a provision. Such a decision is binding for courts of lower ranks. At the beginning of this year, when the Constitutional Tribunal was taken over by the governing majority, the President of the Supreme

⁶ The same age-limits are applicable in the „common” pension scheme.

Court underlined that not it is the role of the common courts to protect, implement and interpret the Constitution.

Secondly, the Supreme Court confirms the validity of the elections to the Parliament and Presidential elections.

Thirdly, the Supreme Court has a right to issue opinions about draft legislation. For example, in 2016 the Supreme Court presented a very strong opinion regarding the draft Law on Assemblies in which it called the draft legislation „an attempt to violate the constitutional order of the Republic of Poland”.