



POLAND

BRIEFING BY AMNESTY INTERNATIONAL AHEAD OF THE GENERAL AFFAIRS
COUNCIL MEETING TAKING PLACE ON 18 SEPTEMBER 2018

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INTERNATIONAL



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1. CHANGES IN THE SUPREME COURT

Pursuant to the 2017 amendment of the Law on the Supreme Court, the terms of 27 out of the 74 Supreme Court judges expired on 3 July.¹ Three judges had their application to extend their tenure at the Supreme Court rejected by the National Council of the Judiciary (NCJ). The three judges appealed the decision. The chairman of the NCJ, Leszek Mazur, stated, however, that he would not process the judges' appeals.²

The amendment of the Law on the Supreme Court, which resulted in – among other things – the forced retirement of the 27 judges, was adopted in December 2017 and entered into force in April 2018. Among those judges forced to retire was the First President of the Supreme Court Małgorzata Gersdorf (age 65) whose 6-year term of office was supposed to finish in 2020. Her forced retirement was deemed unconstitutional by many observers, including Amnesty International.³

All the new Supreme Court judges are being chosen by the new National Council of the Judiciary, which has been politicized pursuant to the amendment of the law that gives Parliament the power to directly appoint NCJ members.⁴

In June, the authorities advertised 44 vacancies and in August another 11 vacancies, including the vacancy for the First President of the Supreme Court, the post currently held by Małgorzata Gersdorf.⁵ The President of Poland will nominate a new President of the Supreme Court from among five candidates who will be chosen by the Assembly of judges of the Supreme Court.⁶

Pursuant to the amendment of the Law on the Supreme Court, the Court will have 63 new judges:

- 27 judges who will replace those who were forced to retire;
- 16 judges of the newly created Disciplinary Chamber;
- 20 judges of the newly created Extraordinary Chamber.

Two new chambers with broad powers (Extraordinary and Disciplinary) will start to operate once the new judges are elected by the NCJ and appointed by the President of Poland. The significance of these changes is likely to take several months and is expected to include new disciplinary proceedings against judges who publicly criticized the government's reform of the judiciary and/or took part in protests.⁷

The NCJ started interviews with the judicial candidates for the Supreme Court on 20 August.⁸ There were 200 candidates,⁹ of whom approximately 15 percent withdrew their

¹ Art.111 para.1 and Art. 37 of the Law on the Supreme Court:

<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU2018000005/T/D20180005L.pdf>

² <http://prawo.gazetaprawna.pl/artykuly/1193143,mitera-przewodniczacy-krs-nie-przesle-do-sn-odwolan-3-sedziow.html>

³ Art.183 para 3 of the Constitution of Poland sets the tenure of the President of the Supreme Court for six years. For more details, see also Themis, Association of Judges, 'Alarming revolution within the Polish Supreme Court': <http://themis-sedziowie.eu/wp-content/uploads/2018/07/Revolution-within-the-Polish-Supreme-Court-final.pdf>; Amnesty International has also criticised the law as an attempt to oust the current Supreme Court President, calling on the Senate to reject it, see <https://www.amnesty.org/en/latest/news/2018/07/poland-attempts-to-oust-the-current-supreme-court-president-must-be-rejected/>

⁴ See also Amnesty International's March 2018 briefing ahead of the GAC for more details:

<https://www.amnesty.org/download/Documents/EUR3780592018ENGLISH.PDF>

⁵ <https://www.infor.pl/akt-prawny/MPO.2018.110.0000633,metryka,obwieszczenie-prezydenta-rzeczypospolitej-polskiej-o-wolnych-stanowiskach-sedziego-w-sadzie-najwyzszym.html>

<https://www.infor.pl/akt-prawny/MPO.2018.148.0000831,metryka,obwieszczenie-prezydenta-rzeczypospolitej-polskiej-o-wolnych-stanowiskach-sedziego-w-sadzie-najwyzszym.html>

⁶ Art.12 para.1 of the Law on the Supreme Court:

⁷ Amnesty International. The power of the street: Protecting the right to peaceful protest in Poland, London: 2018, p. 31

⁸ <http://www.krs.pl/pl/aktualnosci/d,2018,8/5469,informacja-o-spotkaniach-z-kandydatami-na-urząd-sedziego-sadu-najwyzszego>

⁹ <http://www.krs.pl/pl/aktualnosci/d,2018,8/5469,informacja-o-spotkaniach-z-kandydatami-na-urząd-sedziego-sadu-najwyzszego>

applications. On 28 August, the NCJ chose 20 new judges to the Extraordinary Chamber and seven judges to the Civil Chamber.¹⁰ The two biggest associations of judges in Poland, Iustitia and Themis, as well as lawyers and human rights organizations that formed the Justice Defence Committee,¹¹ have strongly criticised the appointment procedure of the new Supreme Court judges.¹²

On 20 July 2018, the Parliament adopted another law that amends, among other things, the Law on the Supreme Court and the Law on the National Council of the Judiciary. The President signed the amendment on 26 July and the law entered into force on 10 August.¹³ A crucial change in this law involves the procedure for the election of the new President of the Supreme Court. The Law lowers the required quorum: under the amendment, only 2/3 of Supreme Court judges will need to be present at the election. The amendment also speeds up the election of judicial candidates for the Supreme Court by cutting the timeframe for an appeal against the decision of the NCJ to 14 days. As it is unlikely that the Supreme Administrative Court would be able to decide on appeals within such a short timeframe, the appeals will be ineffective in practice. Moreover, under the amendment, such appeals do not have a suspensive effect. Therefore, a possible judgment of the Supreme Administrative Court may be taken after the appointment of another candidate promoted by the NCJ.¹⁴

The NCJ has elected many candidates reportedly associated with the current ruling party. For example, among the 12 candidates applying for positions in the Disciplinary Chamber there are six prosecutors alleged to have close links to the Prosecutor General, who is also the Minister of Justice.¹⁵

One of the candidates, is the "judge-doubler" – i.e. one of the judges elected in 2015 to the Constitutional Tribunal to one of the posts already occupied by lawfully appointed judges¹⁶ – who submitted his application to the NCJ through the deputy minister of justice. When asked to comment, the minister told the media that it was only a friendly favour (the candidate withdrew his application in the end).¹⁷

Taken in conjunction with the considerable involvement of the Prosecutor General in the new disciplinary proceedings, the election of candidates with alleged links to the Prosecutor General to the Supreme Court's Disciplinary Chamber raises serious concerns over the lack of independence and impartiality of disciplinary or criminal proceedings against judges in the future.

On 2 August 2018, the Supreme Court of Poland referred five questions to the Court of Justice of the European Union (CJEU) about whether or not the forced retirement of most of its senior judges and other initiatives that have been criticized as infringements of judicial independence are compatible with EU law. The Supreme Court also suspended the application of provisions of the Law on the Supreme Court governing the rules for the retirement of judges. In response, the Prosecutor General (i.e. the Minister of Justice) submitted a motion to the Constitutional Tribunal, which lost its independence to the government in 2016,¹⁸ questioning the competence of the Supreme Court to request such clarification from the CJEU regarding the forced retirement of judges. The Prosecutor General has alleged that the request was related to the employment status of

¹⁰ <http://www.krs.pl/pl/aktualnosci/d,2018,8>

¹¹ In Polish: Komitet Obrony Sprawiedliwości: <https://www.facebook.com/KomitetObronySprawiedliwosciKOS/>

¹² <https://www.iustitia.pl/83-komunikaty-i-oswiadczenia/2444-wspolne-stanowisko-stowarzyszen-sedziowskich-iustitii-i-themis-w-sprawie-naboru-do-sadu-najwyzszego>

¹³ <https://www.tvn24.pl/wiadomosci-z-kraju,3/prezydent-podpisal-ustawe-o-sadzie-najwyzszym,856682.html>;

<https://www.newsweek.com/judge-who-wont-retire-quietly-opinion-1066526>

¹⁴ Pursuant to the amendment of Art. 44 of the Law on NCJ. For details see (in Polish): <http://www.hfhr.pl/wp-content/uploads/2018/07/HFPC-opinia-SN-KRS-Senat-07-2018.pdf>

¹⁵ <http://wyborcza.pl/7,75398,23815901,krs-wybiera-sedziow-sn-mariusz-muszynski-zrezygnowal.html>

¹⁶ Sadurski, W. How Democracy Dies (in Poland). Legal Studies Research Paper 18/01., p. 19

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491.

¹⁷ <http://wyborcza.pl/7,75398,23794379,sad-najwyzszy-nowa-misja-agenta-muszynskiego-tym-gorzej-dla.html>

¹⁸ European Commission, Recommendation regarding the rule of law in Poland. C(2016) 8950 21 December 2016

some of the Supreme Court judges and was unrelated to ongoing proceedings at the court.¹⁹

2. THE NATIONAL COUNCIL OF THE JUDICIARY

There are serious concerns over the lack of independence of the National Council of the Judiciary (NCJ) pursuant to the government reforms. The amendment to the Law on the NCJ came into force in January 2018 and gave the Parliament the power to appoint all 15 judges that comprise the NCJ. The Polish Constitution, however, expressly limits the number of members of the NCJ appointed by Parliament to six. On 5 March, the Parliament appointed the new NCJ members, 8 of whom happen to be the new presidents or vice-presidents of courts appointed since August 2017 by the Minister of Justice.²⁰

On 16 August, in response to these changes, the Board of the European Network of Councils for the Judiciary (ENCJ) stated that the Polish NCJ does not comply with the statutory rule of the ENCJ that a member should be independent from the executive. The Board concluded that the NCJ no longer “guarantees the final responsibility for the support of the judiciary in the independent delivery of justice.”²¹ It proposed a suspension of the NCJ’s membership in the ENJC. The ENJC will decide on the suspension at its General Assembly on 17 September in Budapest.

3. PROTESTS

The purge of over a third of the Supreme Court judges created a significant outcry and hundreds of people were prompted to the streets; both in Poland and abroad. People were protesting from 3 until 26 July, calling on the Parliament to reject the latest amendment of the Law on the Supreme Court.

On 25 June, Amnesty International issued the report “The power of ‘the street’, protecting the right to peaceful protest in Poland”, which documented the state response to peaceful protest in Poland.

Amnesty International’s concerns regarding violations of the rights to freedom of peaceful assembly and expression are directly relevant to the discussion relating to the rule of law in Poland under Article 7 TEU at the General Affairs Council. Many of the protests in the past years were sparked by the government’s reforms and have been held in support of an independent judiciary. Further, the independence and impartiality of the judiciary are essential to ensure the right to fair trials and other human rights.

In light of the high volume of prosecutions of protesters in Poland and in the context of government attempts to stifle dissent and criticism, the exercise of human rights is becoming a risky activity. To date, the judiciary has been upholding the rights to freedom

¹⁹ <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/wniosek-prokuratora-generalnego-do-trybunalu-konstytucyjnego-3/>
<http://trybunal.gov.pl/sprawy-w-trybunale/art/10283-zabezpieczenie-przewidziane-w-kpc-majace-postac-zawieszenia-stosowania-przepisu-ustawy-objetej-do/>

²⁰ <http://wyborcza.pl/7,75398,23108831,krakowa-rada-ziobrownictwa-zobacz-kim-sa-nowi-sedziowie.html>

²¹ <https://www.encj.eu/node/492>, p. 5

of peaceful assembly and expression. However, pursuant to the 2017 “reform” of the judiciary, the independence of courts has been severely undermined. This raises serious concerns over whether hundreds of protesters whose cases are currently pending in courts will get fair trials.

4. INTERNATIONAL RESPONSE

EUROPEAN COMMISSION

In addition to the ongoing Article 7 TEU proceeding triggered in December 2017, the European Commission (EC) launched an infringement procedure in response to the Law on the Supreme Court on 2 July, giving Polish authorities one month to respond to its concerns. After analysing the response from Poland, the EC passed to the next stage of the procedure and issued a Reasoned Opinion on 14 August. The Polish authorities were given one month” to take the necessary measures to comply” with EU law and fundamental values, in particular the arbitrary dismissal of judges. This deadline expires roughly five days before the upcoming GAC hearing on 18 September. If Polish authorities do not comply, and thus far there is no indication of their intention to do so, the case of Poland can be referred to the CJEU. At that point, the EC should ask for the CJEU to take interim measures, freezing implementation of the law (if such measures are not already granted in the procedure started by the Supreme Court of Poland on 2 August). The Polish authorities are in a race to finalise appointments before any such action is taken.

COUNCIL OF EUROPE (DELIVERED BY THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES):

The Council of Europe (CoE) has stated that the process of replacing 149 presidents or vice-presidents of common courts in Poland, which was carried out between September 2017 and May 2018, clearly contradicts CoE standards on judicial independence. It voiced the same concern with regard to the NCJ pursuant to the appointments of new NCJ members. It also raised concerns over infringement of Article 6 of the European Convention on Human Rights, since the presidents of courts who have been dismissed have no right to challenge the decision before a competent judicial body. Thus, it called for further examination of the reform of disciplinary proceedings. Finally, it summarised the reforms introduced as a setback with regard to judicial independence, separation of powers and rule of law in Poland.²²

UN SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS:

The Special Rapporteur on the independence of judges and lawyers has expressed grave concerns over the “far-reaching adverse effects” on the independence of Polish courts and tribunals as a consequence of the government’s reform.²³

²² <https://rm.coe.int/ccje-bu-2018-6rev-en-statement-poland-en/16808b5fbc>

²³ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23258&LangID=E>

INTERNATIONAL COMMISSION OF JURISTS:

Twenty-two judges of the International Commission of Jurists (ICJ) signed a letter in which they called for an immediate reinstatement of the forcibly retired Supreme Court Judges. They expressed grave concern that “the effective dismissal of one third of the Supreme Court, coupled with the broad discretion given to the President’s office to make exceptions, has taken place in contravention of international human rights law and standards, including the right to a fair hearing, and is contrary to basic principles of the rule of law.”²⁴

²⁴ <https://www.icj.org/poland-icj-sitting-and-former-judges-call-for-immediate-reinstatement-of-supreme-court-justices/>

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BRIEFING BY AMNESTY INTERNATIONAL AHEAD OF THE GENERAL AFFAIRS COUNCIL MEETING TAKING PLACE ON 18 SEPTEMBER 2018

Since 2016, the state of the rule of law and independence of the judiciary in Poland has been under increased scrutiny of international human rights monitoring bodies, as well as European Union institutions. In July 2017, the European Commission (EC) assessed that there was a systemic threat to the rule of law. The EC asked the Polish authorities “not to take any measure to dismiss or force the retirement of Supreme Court judges.” Despite that, Poland has adopted legislation and taken measures undermining the independence of all arms of judiciary: the common courts, the National Council of the Judiciary and finally also the Supreme Court.

On 26 June 2018, the General Affairs Council of the European Union held the first hearing on the rule of Law in Poland. Since then, there has been an escalation of measures to speed up the forced retirement of judges and appointments of new judges of the Supreme Court. Such measures are in direct defiance of the ongoing procedures at the level of the European Commission, the Council and the Court of Justice of the European Union.

This briefing provides a summary of developments and documents Poland’s continuation of undermining the independence of the judiciary. It focuses on the impact of the amendment of the Law on the Supreme Court and the forced retirement of a third of the Supreme Court judges. It raises concerns over the politicization of the National Council of the Judiciary, a body responsible for, among other things, election of judges.