



Devastation of Poland's Supreme Court and judicial independence: the situation now

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On 2 July, the European Commission launched an infringement procedure against the law on the Supreme Court under Article 258 of the Treaty. The Polish government was given 30 days to **amend the violations** of the Treaty by halting the dismissal of the Supreme Court's judges, including its first chief justice, before the end of her constitutional six-year term.

Since 2 July, the government has not taken any actions to modify the law on the Supreme Court in line with the Commission's request. On the contrary: the devastation of the Supreme Court has begun and will accelerate.

- **Judge are being removed from their posts**
- **New laws has been adopted in express mode to pack the Supreme Court and replace its first chief justice as soon as possible, with very limited (if any) assessment of a given judge's stature**

Removal of Supreme Court judges

Timeline:

- On 2 July, Małgorzata Gersdorf designated judge Józef Iwulski as her replacement in case she were to be banned from the building. President Andrzej Duda did not find a Supreme Court (SC) judge to act as a temporary replacement, so he agreed to Iwulski "pretending" to be "temporary chief justice". A public "ping-pong" started, with the president claiming that Gersdorf lost her post, while Gersdorf affirmed that her term is set out in the constitution.

- On 3–4 July, demonstrations in support of the Supreme Court’s judges took place in front of its building in Warsaw. Małgorzata Gersdorf came in to work 4 July, accompanied by thousands of citizens who were there to support her.
- On 5 July, President Andrzej Duda started informing SC judges over the age 65 that they have retired. Letters to this effect were sent to judges who did not ask the president to prolong their term. They did not request this because they consider their term to be protected by the constitution, which means that it cannot be shortened by the regular laws, as stipulated in Article 2 and Article 180 section 1 of the constitution. The “letters” sent by Duda did not even contain the form required by his law and were not countersigned by the prime minister, as required by the constitution for any action by the president (with some exceptions set out in the constitution). The letters are legally invalid, but the law does not provide a procedure for judges to appeal against this obvious breach of constitution. So far, **14 judges** of the Supreme Court have received this letter and are considered to have retired. Both the Supreme Court’s penal and civil divisions have lost one-third of their posts, which limits citizens’ right to a quick and fair trial.
- On 12 July, the new, unconstitutional National Judiciary Council assessed the judges who, in one form or another, had stated that they wish to stay on at the Supreme Court. The Council’s meeting was held behind closed doors. **Just 5 of the 12** judges assessed received a positive opinion. Now, based on the law on the SC, the President will decide whether to prolong their term. The negative opinions issued by the NJC were in the wrong legal form and without the right to appeal. No justification for the negative opinion was provided, not even to the most respected judges. Right now, the judges are preparing appeals against the NJC’s illegal opinions, despite there being no right to appeal against them. Three appeals have already been submitted to the Supreme Court. More may be on their way to the Supreme Administrative Court or the European Court of Human Rights.
- Małgorzata Gersdorf maintains that she is still first chief justice of the Supreme Court.

Selection of the new judges by the politicised National Judiciary Council

- On 29 June, President Andrzej Duda launched a competition for **44 new posts at the Supreme Court**, mostly for the newly-formed political chambers, the disciplinary one and the public one.
- According to public statements issued by common court judges’ associations (Iustitia), common court judges will apply *en masse* for these posts to question the SC law in individual appeals against the NJC’s decisions not to recommend their candidacies to the president. This would also give the EU Court of Justice time to assess the Polish case before the Supreme Court is devastated.
- To pack the Supreme Court before the EU Court of Justice has a chance to consider the law on it and achieve a political *fait accompli*, a fifth amendment to the SC Law and various other laws was presented to parliament on 12 July (“the Amendment”). The Amendment reinforces political influence over judges in various other ways.

The Amendment

The Amendment, officially called the "Act amending the Act on the Public Prosecutors and some other Acts", to disguise its actual contents from the public, passed through parliament in extraordinary express mode. The opposition was given 30 seconds to ask questions and propose changes. It was adopted without a parliamentary discussion on those changes on 20 July.

The Amendment goes against the Commission's requests, set out in its position launching the procedure under Article 258. The Amendment introduces the following changes:

- I. A new first chief justice of the SC can be appointed by the president once two-thirds of the statutory number of SC judges are appointed. This lowers the threshold from the current number of 110 to 80. **This change was introduced to speed up the forced and illegal replacement of First Chief Justice Małgorzata Gersdorf;**

Any candidate can apply for two posts at any common courts at the same time, but this does not extend to applications for the Supreme Court, Supreme Administrative Court or administrative court posts. Judges also cannot apply for a post at a common court and the SC, SAC or administrative court at the same time. Candidates who have two applications pending when the Amendment enters force will have 14 days to choose between the common court application or SC/SAC/administrative court application. If they do not, the common court application will be chosen automatically and the other one will be considered withdrawn. **This change was introduced to discourage candidates from applying to the SC and SAC, so that only government-backed candidates apply.**

- II. The number of cases each candidate for a common court, Supreme Court or Supreme Administrative Court post must present for evaluation during the assessment procedure will be lowered by half, from 100 to 50. The current rule that all verdicts that a candidate issued over three years before applying that have been changed or quashed on appeal shall be reviewed as part of the assessment procedure will be changed, shortening the three-year period to two years. **These changes reduce scrutiny over candidates for judicial posts, so that unqualified candidates can be appointed.**

- III. When assessing candidates for a judicial post, the NJC panel that recommends candidates to the whole NJC can present a list of recommended candidates **without having to review any documents concerning the candidates**, if the required documents have not been presented. **This change will allow the NJC to avoid assessing the qualifications of new Supreme Court judges and hasten the packing of the Court with politically selected judges.**

- IV. When the NJC passes a resolution on presenting some of the candidates for a judicial post to the president and not recommending others, if one of those not recommended appeals against the decision to the SAC, **the appeal will not stop the resolution from becoming final, in terms of presenting some of the candidates the president.**

This means that any candidate whom the NJC does not recommend will not stand a chance of being appointed to the post, even if he or she appeals against the NJC's decision and even wins the appeal. Before a decision on the appeal can be made, the final recommendations will be presented to the president, who will most probably appoint a candidate.

The provision further states that if the unsuccessful candidate wins the appeal, his or her candidacy will be considered in any proceedings for an open judicial post pending at the time.

These changes were introduced so that the government can pack the SC faster and prevent common court judges from effectively blocking the proceedings. The changes are unconstitutional, as they directly violate Article 45 section 1 and Article 77 section 2 of the constitution. They also mean that illegally chosen judges will keep their posts even if the court deems the procedure to have been breached.

- V. If an application for a judicial post does not meet the requirements set out in the NJC act, is submitted after the given period or does not meet formal requirements, the NJC will be able to set it aside without reviewing it. There is no right to appeal against an application rejected on these grounds.

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- VI. The NJC will be able to reject appeals against its resolutions that are filed after the prescribed period, which do not meet formal requirements or which are inadmissible for “other reasons”. There is no right to appeal against rejection on these grounds.

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- VII. The changes to procedures for appointing SC judges introduced in the Amendment will enter force on the **day after the Amendment is published.**

- VIII. The changes to procedures for appointing SC judges introduced in the Amendment will affect proceedings pending when the Amendment enters force.

The solutions described in points viii and ix are unconstitutional, for two reasons. Firstly, the act, which introduces major changes, will have no *vacatio legis*. Secondly, the changes will affect proceedings pending at the time when the Amendment enters force.

For example, this means that NJC resolutions on not recommending a certain candidate for a judicial post to the president, which were appealed against before the Amendment entered into force, and which therefore did not become final, will become final with regard to presenting some of the candidates for a judicial post to the president.

This amounts to unconstitutional interference in the effects of a procedural act (an appeal), made before the Amendment enters force.

- IX. In terms of regulator courts, the Amendment abolishes the requirement that at least half of the statutory number of judges must be present at any general assembly of judges or judges’ representative to pass resolutions. This will allow a politically driven minority of judges to vote in the name of the majority. Politically appointed court presidents have already started manipulating general assembly dates by postponing them at the last moment.

- X. When two candidates receive the same number of votes when electing representatives for an assembly of judges’ representatives (at district court or appellate court circuits where there are too many judges, the general assembly of all the judges in the district or appellate circuit is replaced by an assembly of judges’ representatives), the candidate with the longest tenure will win. This change further limits the scope of judges’ self-government.

- XI. A judge whose scope of work and responsibility has been changed by the court president will have the right to appeal to the NJC, rather than the appropriate Appellate court college, as is

currently the case. This change was introduced to further limit the scope of judges' self-government and place them under the influence of the politicised NJC.

- XII.** If a retired judge is sentenced to forfeit his or her retirement payment for a disciplinary act, the sentence will automatically result in the retirement payment being lowered by 50% until the disciplinary proceedings are finished (if the judge is acquitted or receives a different penalty in the end, he or she will receive the full sum deducted from the retirement payment).

This means that a judge can be deprived of his or her earnings without being found guilty in a final judgement. This is particularly shocking given the length of disciplinary/criminal proceedings.

The changes are unconstitutional, as they directly violate Article 42 section 3, Article 21 section 1, Article 64 sections 2 and 3, and Article 31 section 3 of the constitution, in connection with Article 2, Article 45 section 1 and Article 46 of the constitution.

- XIII.** If a disciplinary court allows criminal charges concerning an intentional crime to be brought against a retired judge, it must lower his or her retirement payment by 25-50% for the duration of the disciplinary proceedings (if the judge is acquitted or the proceedings are discontinued, he or she will receive the full sum deducted from the retirement payment).

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- XIV.** The Amendment will allow judges in any case to be replaced before the first open session is held.

This change means that judges and panels presiding over specific cases can be changed at will and without any judicial oversight. This change completely negates the fair trial safeguards, involving cases assigned randomly by an IT system.

The Amendment was passed by Sejm on 20 July. The Senate will vote on it this week.

Summary

The events in Poland over the past few weeks completely go against the Commission's requests. The rapid, undemocratic adoption of the Amendment shows that it is a deliberate effort by the ruling majority to take over the Supreme Court before the EU Court of Justice has a chance to assess the law on the Supreme Court.

It is crucial that the Commission apply for interim measures halting, as much as possible, the unconstitutional takeover of the Supreme Court by politically selected judges.

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The authors are members of the #Free Courts Initiative, a civil society group of Polish lawyers seeking to preserve the independence of the Polish judiciary.

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