

Briefing on the draft of new Polish act on the Supreme Court: **End of separation of powers in Poland¹**

Summary

The purpose of this briefing is to provide international bodies with up-to date information about the draft of new Polish act on the Supreme Court², which was presented by ruling Law and Justice party on 12th July 2017 and first reading regarding which took place on 18th July 2017.

We have observed an upcoming process of politicization of the judiciary which started when President of the Republic of Poland Andrzej Duda refused in the end of 2015 to assume the swearing in of three constitutional tribunal judges elected by former Parliament. This process may end in July 2017 with an introduction of new acts on National Council of the Judiciary of Poland and on the Supreme Court. As the draft of the latter gives the Minister of Justice the mandate to decide who will remain the judge of the Supreme Court we found this project contradictory to many constitutional principles.

We believe that separation of powers and independence of the judiciary plays an essential role in ensuring the rule of law; and we, therefore, recommend that the European Commission take account of the current situation in the Polish judiciary system through the Rule of Law Framework and take urgent effective steps to prevent the Polish government and the Polish Parliament from destroying one of the last mainstays of rule of law in Poland. It is the very last moment to react and to keep Polish citizens in the area of the legal culture of Western Europe. Otherwise, the return of Polish society to full democracy will be a very complicated process that will last years.

Introduction

Supreme Court competencies

The Supreme Court, next to the Constitutional Tribunal, is the most important body in the Polish judiciary system. According to art. 10 of the Polish Constitution judiciary is independent of any other authorities, including the Government, the Parliament and the President of the Republic. Among the Supreme Court's competencies it must be mentioned:

1. ensuring, in the context of the supervision of the legality and uniformity of the case-law of the common and military courts, by examining cassation and other remedies,
2. adopting resolutions resolving legal issues,
3. recognition of election protests and declaring the validity of the elections to the Sejm and the Senate and the election of the President of the Republic of Poland as well as the national referendum and the constitutional referendum;
4. giving opinions on draft bills and other normative acts.

¹ The briefing is current as of 19 July 2017 and was prepared by the Frank Bold Foundation, a part of public-interest law organization Frank Bold. Further information about Frank Bold may be found at the end of this briefing.

² The draft is available on the Sejm's website: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1727>

Because of the mentioned issues, it is essential to preserve the Supreme Court as an impartial and independent – from both the Government and the Parliament – authority.

Legislative process

The draft was presented by ruling Law and Justice party on 12th July 2017 without any previous notice. Its complexity and structure, as well as comments on its content made by the representatives of the Ministry of Justice, suggest that it was prepared within the Government and presented by MPs to bypass an obligation to perform a public consultation. Such practice has been a rule for last two years regarding almost all important and controversial drafts. The governing party is working in a rush, ignoring opinions of NGOs, most important faculties of law of universities, academics, representatives of courts, judges and other legal professions, and last but not least ordinary citizens who decided to present their point of view during demonstrations. The first reading regarding the draft took place on 18th July 2017. The second reading, after a fuss in the Sejm, has started on the same day and was continued on 19th July 2017. Currently, the draft is proceeded by the Committee of Justice and Human Rights. There is a high risk that the proposal will be adopted during the current hearing of the Sejm by 20th July 2017 and further processed by the Senate next week.

Most important changes proposed in the original draft

In the table below we collected the most important and dangerous regulations for the separation of powers (art. 10 of the Polish Constitution) and the independence and autonomy of courts (art. 173 of the Polish Constitution) in the original version of the draft of the act on the Supreme Court.

Number of the draft article	Content	Comment
Art. 87	All current judges of the Supreme Court will be retired on the next day following the day of the Act's will come into the force, with the exception of judges designated by the Minister of Justice.	According to art. 180 of the Polish Constitution judges are irremovable. The Constitution does not contain any rule which might be used as a justification for this proposal. Minister of Justice is not only a politician but also a Prosecutor General who is a party of many pending trials. Therefore, he can choose judges because of their political or legal views.
Art. 23	Next judges of the Supreme Court will be nominated by the National Council of the Judiciary in Poland and appointed by the President of the Republic of Poland.	Due to the introduction of the new act on the National Council of the Judiciary, the Council will fully politicized as all of its members will be chosen by the Sejm. It is clearly said in the Constitui
Art. 14, 31	The term of office of the First President of the Supreme Court expires when a judge turns 65 years old.	Presently the age level is set at 70 years. The current First President of the Supreme Court, Małgorzata Gersdorf, who criticizes the government and the ruling party for

		introducing unconstitutional regulations, turns 65 years in four months.
Art. 88	The Minister of Justice will appoint a judge, who will perform tasks and competencies of the First President of the Supreme Court.	According to the art. 183 of the Polish Constitution the term of office of the First President of the Supreme Court lasts six years and cannot be shortened by ordinary law. The term of office of current First President ends in 2020.
Art. 93	Presidents of Chambers of the Supreme Court will be appointed by the President of the Republic of Poland at the request of the Minister of Justice.	This proposal breaches the separation of powers rule (art. 10 of the Polish Constitution). Presently Presidents of Chambers are nominated by the judges of the Supreme Court and appointed by the President of the Republic of Poland.
Art. 3	The Minister of Justice will introduce the Statute of the Supreme Court which will regulate its work.	Currently, the Statute is created internally by the Supreme Court. This change will breach the separation of powers rule (art. 10 of the Polish Constitution).
Art. 5, 13, 41	Creation of the Disciplinary Chamber of the Supreme Court and the post of the President of the Disciplinary Chamber of the Supreme Court.	There is a high risk, due to lack of justified grounds to the creation of such chamber, that the Disciplinary Chamber will be used as a pressure tool on judges and representatives of other legal professions. The Chamber will have a position of a court inside the Supreme Court. Judges who will work in the Chamber will receive 40% higher salaries than other judges of the Supreme Court. Furthermore, the President of this chamber will have competencies similar to the First President of the Supreme Court and will not be supervised by him/her.
Art. 54	The Minister of Justice may invoke his disciplinary Ombudsman to pursue the case of a specific judge of the Supreme Court.	The Minister of Justice will interfere in the disciplinary proceedings breaching the separation of powers rule.
Art. 57	The Minister of Justice can raise the objection on the absence of the grounds for initiating disciplinary action, in the Disciplinary Chamber of The Supreme Court.	Raising such objection will be equal with initiating the disciplinary proceedings what will breach the separation of powers rule.

Art. 91	The reduction in the number of judges of the Supreme Court from 88 to 44. 12 of them will take seats in the Disciplinary Chamber.	Currently, the average time for finishing the case in the Supreme Court is approximately 7 months ³ . It means that after reduction to 32 judges this period unquestionably will be much longer.
Art. 24	Reduction of requirements (connected mainly with experience) for candidates for judges of the Supreme Court.	In extreme example, a prosecutor of Institute of National Remembrance will fulfil requirements to become a judge of the Supreme Court when he will have 5 years of experience at his hitherto post.
Art. 24	Candidates for the position of judge of the Supreme Court will have to have exclusively Polish citizenship.	Currently, a judge has to have the Polish citizenship, without the exclusive requirement. This rule will cover all judges in Poland. The regulation may breach rights of national minorities in Poland and demand from candidates for judges to renounce their secondary nationality.

Amendments to the original draft

Governing party's MPs amendments

According to the Polish Press Agency⁴, the governing party MPs was going to submit an amendment to the draft which changes the body responsible for making a decision which judge will remain at the Supreme Court (art. 87). As claimed by the media this competence will be given to the National Council of the Judiciary of Poland. It must be underlined that this change is only a sham what follows from the two premises:

1. the termination of a judge's term of office is unconstitutional since its permanence is a guarantee of the independence of the judiciary;
2. when the new act on the National Council of the Judiciary of Poland, adopted by the Parliament on 15th July, will come in force all members of the Council, including representatives of judges, will be elected by the Sejm, what means that there is a high risk that the Council will be politicized and partial.

President's proposal and amendments to the draft of the act on the Supreme Court

³ *Informacja o działalności Sądu Najwyższego w roku 2016*, Sąd Najwyższy, Warszawa 2017, p. 226

⁴ <http://www.pap.pl/aktualnosci/news,1015446,poslowie-pis-zglosza-poprawke-do-projektu-ustawy-o-sadzie-najwyzszym.html>

The information was later confirmed by the Vice-Minister of Justice, Marcin Warchoń. Till the publication of this briefing no such amendments were proposed officially in the Parliament, nor anybody from the governing party MPs confirmed that they are going to propose them.

On 18th July 2017 the President of Poland, Andrzej Duda, announced his ultimatum for the governing party and sent to the Sejm a draft of the act on the National Council of the Judiciary of Poland⁵. The draft included only one regulation connected with the majority of MPs who can elect judicial members of the Council. The President proposed that this majority should be 3/5 in the presence of at least half of a statutory number of deputies. According to his ultimatum, he is not going to sign discussed act on the Supreme Court until the Parliament will not vote for his proposal.

However, the proposal does not change anything as the National Council of the Judiciary will be still politicized⁶. What is more, the President's draft should be recognized as unconstitutional as it breaches at least art. 10 (the separation of powers), art. 173 (independence and autonomy of courts) and art. 187 (structure of the Council) of the Polish Constitution.

After a consultation between the President and Marshals of the Sejm and the Senate, which took place late evening on 18th July 2017, MPs of governing party decided to present proposals for amendments to the draft of the act on the Supreme Court according to which some of the new competences of the Minister of Justice (including a decision which judges will remain at their posts) will be transferred to the President of Poland . However, such amendments will not change the fact that introduction of these proposals will politicize the Supreme Court.

Consequences of the introduction of the new Polish act on the Supreme Court

Regardless of the final shape of the new act on the Supreme Court, all described proposals are unconstitutional and breach at least listed below regulations of the Polish Constitution:

1. art. 10 (the separation of powers);
2. art. 173 (the independence and autonomy of courts);
3. art. 45 (the right to a fair trial);
4. art. 180 (the principle of independence and irremovability of judges);
5. art. 185 (the term of office of the First President of the Supreme Court);
6. art. 179 (rules of the nomination of new judges).

The new act on the Supreme Court will, first of all, politicize the Supreme Court and make it subordinate to the executive power. This means the end of the separation of powers and the end of the rule of law in Poland. The politicized Supreme Court will be servile to the governing party in most important issues, such as declaring the validity of the elections, as well as in ordinary citizens cases where people in power will have their interest – personal, fiscal or financial. Dependence of the Supreme Court means at the same time dependence of all other courts and end of distracted control of compliance of statutes with the Constitution, which was a chance for the Polish democracy after politicization of the Constitutional Tribunal.

⁵ The draft is available on the Sejm's website:

<http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=E7C1B0EADAFD2FAFC1258154002BF8D5>

⁶ Judiciary representatives will be chosen by MPs. Furthermore the new Council will be divided to two chambers – political, more important, and judicial, with smaller rights.

Recommendations for international organizations

As the Polish Government and the Parliament have been ignoring all opinions of experts and international organizations since December 2015 and is still devastating the rule of law in Poland we consider that there is no time and no place for using another soft tool to counteract these activities.

Therefore, we recommend that the European Commission take account of the current situation in the Polish judiciary system through the Rule of Law Framework and take urgent effective and real steps to prevent the Polish government and the Polish Parliament from destroying one of the last mainstays of rule of law in Poland. Such steps should include the proceedings from art. 7 of the Treaty on European Union. It is the very last moment to react and to keep Polish citizens in the area of the legal culture of Western Europe. Otherwise, the return of Polish society to full democracy will be a very complicated process that will last years.

Background

Frank Bold is a public-interest law organization with offices in the Czech Republic, Poland and Brussels, Belgium. At the EU-level, we are a steering group member of the European Coalition for Corporate Justice, which promotes corporate responsibility within the EU; a member of ALTER-EU, promoting lobby transparency across Europe; and a founding member of the Justice & Environment network. In Poland, Frank Bold is a member of the Open Government Coalition, advocating for Polish accession to Open Government Partnership, respecting the rule of law and transparent legislative process; and a founding member of the CSR Watch Coalition.