



Comparison of the 4th Rule of Law Recommendation presented by the European Commission on 20th December 2017 and the amendments proposed by the government of Poland

20 June 2018

What the European Commission asked for in the recommendation of 20.12.2017 regarding the rule of law in Poland (4th Rule of Law Recommendation)	What the Polish government has proposed to do	Analysis
<i>(a) – not apply a lowered retirement age to the current Supreme Court judges</i>	Nothing.	<p>The amendment of the Law on the Supreme Court adopted in December 2017 lowered the retirement age of Supreme Court judges from 70 to 65 years. A judge who wishes to remain on the court after turning 65 must seek approval of the President of Poland.</p> <p>The Law on the Supreme Court entered into force on 3 April 2018. This change will force 40 percent of the current judges, including the current president, to retire by July 2018</p>
<i>– remove the discretionary power of the President of the Republic to prolong the active judicial mandate of the Supreme Court judges;</i>	No significant change. The new amendment adopted on 12 April 2018 in the lower chamber of the Polish Parliament permits the President of the Republic to seek the opinion of the National Council of the Judiciary prior to issuing a decision on any extensions of mandates of those judges over the age of 65 years.	This change is structurally insignificant. Pursuant to the amendment of the Law on the National Council of the Judiciary (hereafter: NCJ, for details: see below), the current NCJ has been elected by the Parliament. The new NCJ thus consists of nominees selected in a process that does not comply with the requirements of judicial independence and the Polish Constitution.



<p><i>– remove the extraordinary appeal procedure;</i></p>	<p>No significant change.</p>	<p>The Law on the Supreme Court entered into force on 3 April 2018. Among other things, it authorizes the new Extraordinary Chamber of the Supreme Court to reopen – within three years after entry into force – any final court decision that became valid after 17 October 1997 (Article 115.1). This can be done without the knowledge or consent of the parties.</p> <p>Pursuant to the amendment of the Law on the Supreme Court adopted on 5 May 2018, an appeal to the Extraordinary Chamber can be submitted only by the Poland’s Human Rights Commissioner and the Prosecutor General (Law on the Supreme Court, Article 115§1a). This change, however, does not address the EC’s concerns regarding the possibility of the extraordinary appeal procedure and its non-compliance with the principle of legal certainty which is a key component of the rule of law (EC Reasoned Proposal, 20 December 2017, para 129)</p>
<p><i>(b) ensure that the law on the National Council for the Judiciary is amended so that the mandate of judges-members of the National Council for the Judiciary is not terminated...</i></p>	<p>Nothing.</p>	<p>The mandate of 13 judges-members of the National Council for the Judiciary was terminated on 6 March 2018.</p>
<p><i>...and the new appointment regime is removed in order to ensure election of judges-members by their peers;</i></p>	<p>Nothing.</p>	<p>Under the amendment of the NCJ Law, which entered into force on 17 January 2018, the Parliament has the power to appoint the 15 judges–members of the National Council for the Judiciary. The Polish Constitution, however, expressly limits the number of the members of the National Council for the Judiciary appointed by Parliament to six.</p> <p>On 5 March 2018, Parliament – and not the judicial self-government bodies – elected the new National Council for the Judiciary members, 8</p>



		<p>of whom happen to be the new presidents or vice-presidents of courts appointed since August 2017 by the Minister of Justice. The independence of the National Council for the Judiciary has thus already been compromised. This raises concerns over the NCJ's capacity to safeguard judicial independence, including its capacity to challenge any decisions related to judiciary made by the Minister of Justice.</p>
<p><i>(c) refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.</i></p>	<p>Nothing</p>	<p>The Minister of Justice and other governing party politicians routinely comment on individual judges and court decisions in the media. Amnesty International has documented cases of judges, in which the government party politicians have commented on the work of individual judges and voiced statements about their “unsuitability”.</p> <p>The new Law on the Supreme Court also includes provisions that allow reopening closed disciplinary proceedings against judges (Article 124.1 Law on the Supreme Court). The law establishes the new Disciplinary Chamber¹ whose members will be elected by the politicized National Council of the Judiciary and whose “lay judges” will be elected by members of the Senate.² Judges interviewed by Amnesty International feared that once the new Disciplinary Chamber is elected, a series of disciplinary proceedings will commence against judges who have ruled against the wishes of the government in politically sensitive cases.³</p>

¹ The Chamber has two divisions: one serves as the first and the other as the second instance for disciplinary proceedings against judges, prosecutors, attorneys and notaries. Source: Art. 3 (Art. 27) of the Law on the Supreme Court <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/T/D20180005L.pdf>

² Under Art. 61§2 of the Law on the Supreme Court, the Senators will elect the lay members of the SC: http://orka.sejm.gov.pl/proc8.nsf/ustawy/2003_u.htm

³ Amnesty International. “Reform” of the judiciary in Poland poses risk to the right to fair trial: Briefing by Amnesty International ahead of the General Affairs Council Meeting. March 2018, p. 7.



<p><i>(d) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed...</i></p>	<p>Nothing</p>	<p>As a result of the President’s refusal to appoint previously elected judges waiting to serve their term, and instead pursuing new appointments to the existing positions of judges by the new Parliament elected in October 2015, the government has effectively gained control over the Constitutional Tribunal (CT). This has directly translated into decisions that have affected human rights in Poland. For example, in March 2017, the CT ruled that the law prioritizing certain types of assemblies over others was constitutional, which paved the way to bans (issued by the regional government authority in Warsaw) on any alternative assemblies during the monthly pro-government assemblies. The practice of blanket bans and discriminatory treatment of certain types of assemblies is not compliant with international human rights law. An NGO, Helsinki Foundation for Human Rights has documented a number of other cases where the CT failed to uphold safeguards guaranteed by the Polish Constitution and Poland’s human rights obligations in 2017 alone.</p>
<p><i>(f) ensure that the law ... on the National School of Judiciary is withdrawn or amended in order to ensure its compliance with the Constitution and European standards on judicial independence;</i></p>	<p>Nothing</p>	<p>Under the law on National School of Judiciary which entered into force in June 2017, assistant judges are permitted to sit as the sole judges in district court cases for a fixed term of four years. This raises concerns because assistant judges do not go through the same appointment procedure as regular judges. The appointments procedure for regular judges involves a full review of a person’s application by the National Council for the Judiciary. In the case of the new assistant judges, the National Council for the Judiciary will only be able to raise objections to their applications within 2 months (Law on the National School of Judiciary and Public Prosecution, Article 33a, para 14).</p>



<p><i>(f) ensure that the law on Ordinary Courts Organisation...is withdrawn or amended in order to ensure its compliance with the Constitution and European standards on judicial independence; concretely, the Commission recommends in particular to:</i></p> <p><i>– remove the new retirement regime for judges of ordinary courts, including the discretionary power of the Minister of Justice to prolong their mandate;</i></p>	<p>The amendment adopted by the lower chamber of the Parliament on 12 April 2018 introduced the same retirement age (65) for both female and male judges. However, it provides the possibility for female judges to retire at age 60 on their own motion (art. 69, Law on the Common Courts). In addition, the amendment removes the power of the Minister of Justice to approve an extension of the mandate of a judge who has reached the retirement age and has given that power to the NCJ.</p>	<p>The discriminatory provision that introduced a different retirement age for female and male judges of 65 and 70 years respectively entered into force in October 2017 and has been implemented. The April amendment of the Law on Common Courts does not remedy the situation of female judges who had to retire in the period from October 2017.</p>
<p><i>– remove the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts and remedy decisions already taken;</i></p>	<p>Under new amendments adopted by the lower chamber of the Parliament on 12 April 2018, the Minister of Justice – who also serves as Poland’s national Prosecutor General – would be required to consult a college of a court. In the case it issues a negative opinion, the Minister shall consult the National Council of the Judiciary (NCJ) before removing a president or vice-president of a court (Art. 27.2-5, Law on the Common Courts).</p>	<p>This proposal is merely a return to what had been the practice before the 2017 reform and it is comes too late to have a significant impact. Between August 2017 and May 2018, the Minister of Justice dismissed 160 presidents or vice-presidents of the 377 common courts in Poland.⁴ Moreover, the independence of the National Council for the Judiciary has already been compromised and it is highly unlikely that this body would challenge any removal decisions by the Minister of Justice.</p> <p>No judicial review is available against a decision by the Minister of Justice to dismiss presidents or vice-presidents of common courts. The National Council for the Judiciary would be able to block a dismissal but only with a 2/3 majority vote against the decision of the Minister of Justice (Art. 27.5a, Law on the Common Courts).</p>

⁴ <http://monitorkonstytucyjny.eu/archiwa/3982>



<p><i>(g) ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence and is prepared in close cooperation with the judiciary and all interested parties.</i></p>	<p>The amendments adopted on 12 April 2018 fail to adequately address a “clear risk of a serious breach” by the Polish government of the values protected by Article 2 TEU.⁵</p>	<p>Even if these amendments were adopted by the upper chamber of the Parliament and implemented, Poland would continue to be in breach of its international obligations to uphold the rule of law by ensuring the independence of the judiciary, and protecting human rights, including the right to a fair trial.</p>
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⁵ Article 2 of the Treaty on European Union provides that: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.