



# Separation of powers undermined

## The judicial reforms in Poland and the ruling of the ECJ

**Marta Bucholc , Maciej Komornik**

25 October 2018

On 19 October, the European Court of Justice issued an injunction on Polish laws that the European Commission claims undermine the separation of powers in the country. On the political substance of a highly complex, legalistic assault on democratic institutions and the question of how far the ECJ ruling is likely to put a halt to a process well underway.

*Since the end of 2016, the Polish government has passed a series of laws that place the country's judiciary, from the Constitutional Court down, under greater control of the executive. Hailed by PiS as a historical break with the legacy of communism and as enjoying broad popular support, the opponents of the reforms in Poland and Europe see them as a concerted attempt to undermine the rule of law and the separation of powers. On 19 October, the European Court of Justice issued an interim injunction on some of these laws, including those stipulating the premature retirement of high court judges. This decision follows the commencement of article 7 proceedings by the European Commission against Poland in July this year. The Polish government has defended the laws as a correction of an attempt by the departing government to lock in place a politically sympathetic judiciary. How did it come to this? The following text explains the political substance of a highly complex, legalistic assault on institutions established in the spirit of 1989 and given constitutional status in 1997, raising the question of how far the ECJ ruling is likely to put a halt to a process already well underway. Ed.*

Since the end of 2016, the Polish government has implemented radical judicial reforms, taking advantage of the parliamentary majority of the national conservative Law and Justice party (Prawo i Sprawiedliwość, PiS) and the support of President Andrzej Duda, who comes from PiS ranks. The reforms have brought about fundamental changes in the Polish judicial system. They have taken place in an atmosphere of political tension and deep social division and have been carried out with great haste and without concern for criticism. Debates in parliamentary committees have been directed in a draconian manner and the government has continually introduced new bills that have required the Sejm to deliberate late at night or just before public holidays. Parliamentary procedures have generally been opaque and normal legislative processes bypassed completely. A constant stream of new projects, proposals and repeated amendments to the same law



has meant that MPs and journalists – and thus the public – have no longer had an overview of the overall intention. This has prevented objective discussion of the reforms and often led to a simplistic and partisan presentation of the issues, which the Polish government has in turn criticized.

More significant than the disregard for the fundamentals of good lawmaking characterising PiS's overall approach is the symbolism of the reforms. They were introduced in the same year that the Polish Supreme Court was celebrating its centenary. The weakening of the court is testimony to the cynicism of PiS, which has referred to the reforms as a historic break with the past. The Minister of the Interior Mariusz Błaszczak declared on 27 December 2017, 'A week ago, communism in Poland came to an end.' Judicial reform thus became a key element of PiS programme. The justification and implementation of the reforms exemplify what PiS understands by 'post-communism' and the methods it has used in order to combat it.

Supreme Court of the Republic of Poland. Photo source: Flickr

## **In the name of 'ordinary people'**

Poland's courts were already been subject to criticism before PiS came to power. Members of all political camps concurred that proceedings often took too long and that there was an increasing backlog of cases. The quality of jurisprudence was agreed to be bad. Dissatisfaction was also evident in opinion polls, although it was sometimes difficult to distinguish between criticism of the courts and of the legal system as a whole. In 2015, in its regular comparison of the judiciary in member states, the EU concluded that the criticism was to some extent valid – even though PiS only took office in December that year. However, Poland was not exceptional at this point and still ranked around the middle of the table.

So, the problem was and is a real one. However, the PiS leader Jarosław Kaczyński and the minister of justice and attorney general General Zbigniew Ziobro, who is responsible for implementing the reforms, claim that it is a problem that has its roots in the legacy of socialism. In March 2017, for example, Kaczyński said that,

in our judgement, the courts are bastions of post-communism in Poland. At their head stands the Supreme Court, which has done great service by protecting people who served the old system, but which for many is also a byword for highly questionable judgements. At the same time, leftism is rife and the courts are increasingly becoming vassals of foreign powers. [1]

Almost all the key PiS ideological terminology is present here: post-communism, an elite clique, the unpatriotic left, hostility to the Polish state and those working 'for foreign countries'. In the same interview, the PiS leader explained that 'wide-ranging reform of the judiciary's personnel and structure' was required, that it was 'degenerate from top to bottom' and needed a 'radical change'. This was also the case for the National Council of the Judiciary (Krajowa Rada Sądownictwa). According to Kaczyński, since 1989 the latter been used 'by the last Sejm of the Polish People's Republic as an instrument for



perpetuating post-communism in the judiciary'. PiS even tried to discredit the Constitutional Tribunal, created in 1982, by arguing that it had been established during the communist period.

Judicial reform is thus a central tenet of the PiS concept of statehood, intended to 'transform the theoretical state into a real state'. The covering letter sent to the Sejm by President Andrzej Duda with his draft Supreme Court Act complained that the judiciary has 'no democratic legitimacy whatsoever stemming directly from the people'. [2] According to PiS thinking, the judiciary should be subject to the state executive, which is seen as the direct embodiment of the people. In a national address on 24 July 2017, Duda claimed that 'Judicial reform will help to create a truly bright future for our homeland in the form of a strong and just state, a state that respects and protects ordinary people.' [3] Justice and a strong state - PiS keywords - are linked with concern for 'ordinary people'. The reforms thus have a social and moral dimension. The President's explanatory memorandum to the draft Act explained that justice must 'be sensitive to citizens' needs and problems, because citizens do not seek justice formally through the courts, they want to be properly understood.' Instead, 'prominent representatives of the judiciary' had publicly 'expressed disdain, contempt even, for ordinary people and their material situation'. Such behaviour was, he said, 'unacceptable in a constitutional democracy', in which it was the obligation of judges to 'act in the interests of the common good and show loyalty to the people.'

## **Laws against the rule of law**

After PiS came to power in November 2015, it immediately got to work disempowering the Constitutional Tribunal. After a year of heated discussions with the Tribunal itself and in the face of protests - from the public, academics and international organizations - PiS emerged victorious. [4] Andrzej Rzepliński, who as President of the Constitutional Tribunal had opposed its subordination, stepped down in December 2016 at the end of his term. On the same day, three laws came into force enabling the appointment of Julia Przyłębska as interim president and shortly afterwards as president. Przyłębska supported self-disempowerment, with the effect that the Constitutional Tribunal was no longer able to undertake independent scrutiny of laws passed by the Sejm. Instead, it has become a 'governmental enabler', according to the lawyer and political scientist Wojciech Sadurski. [5] PiS has thereby removed a key safeguard against the misuse of law by the parliamentary majority. Referred euphemistically by PiS as a 'repair' of the Constitutional Tribunal, this disempowerment marked the start a 'judicial reform' targeting the Supreme Court, the National Council for the Judiciary, the common courts and the National School of Judiciary and Public Prosecution. Whilst the laws relating to the school and the common courts have seemingly progressed smoothly, the reorganization of the Supreme Court and the National Council for the Judiciary has become a major battleground.

### *The Common Courts and the National School of the Judiciary and Prosecution Service*

It began quietly. On 21 December 2016, a day after PiS had disempowered the Constitutional Tribunal, the Ministry of Justice introduced to the Sejm a bill amending the constitution of the common courts. On the face of it, the amendment did not have great significance: administrative directors of the courts would in future be appointed and



dismissed by the Minister of Justice. They had previously been awarded their posts on the basis of their qualifications via a selection process and were subordinate to the President of the Court. However, with the reorganization, the Ministry of Justice obtained influence over the financial management of the courts and – with the exception of judges – over staffing structures. The Sejm passed the Act on 23 March 2017 and President Duda signed it on 11 April 2017.

On the very next day, a group of PiS MPs introduced a new bill to the Sejm, proposing much more far-reaching amendments. The minister of justice was to have a decisive role in the appointment and dismissal of presidents and vice presidents of the courts, i.e. in the appointment of judges who not only pass sentences but also influence the work of other judges. Presidents and vice presidents had previously been elected by judges' professional bodies. The bill also provided for mandatory retirement of judges at 60 (women) or 65 (men), unless the minister of justice personally allowed them to remain in post. The bill also included a transitional provision, allowing the minister of justice to dismiss and replace court presidents and deputies in the first six months after the bill's entry into force, without giving reasons. The Sejm passed the bill with the votes of PiS MPs in on 12 July 2017.

Eight weeks before, the Sejm had passed another Act – also thanks to PiS votes alone – that had even more significance for the Polish judiciary. Its primary target was new regulations for the National School of Judiciary and Public Prosecution Service (Krajowa Szkoła Sądownictwa i Prokuratury or KSSiP), that had been founded in 2009 as a central training institution for judges and public prosecutors under the supervision of the minister of justice. However, the school was unable to establish itself: only around 20 percent of graduates successfully completed selection procedures and were appointed to the bench by the National Council of the Judiciary. PiS's aim with this legislative change was to guarantee the school's best graduates positions as assessors (junior judges) in the common courts. Courts had had assessors until 2009, when the function was abolished on the basis of a Constitutional Tribunal ruling in 2007, which had held that it was not possible to guarantee the independence of assessors appointed for an unlimited term by the minister of justice. Before the abolition of their post, assessors had acted as judges and were even allowed to lead court chambers. Once PiS had disempowered the Constitutional Tribunal, it was able to reinstate the assessors, whose would again be appointed by the justice ministry.

The two acts were passed in May and July 2017. After their entry into force, the justice minister at the time, Zbigniew Ziobro, replaced about 150 court presidents, including the presidents of ten out of the eleven appeal courts, the courts of highest instance in civil and criminal law. Outside legal circles, however, the executive's use of the two acts to secure influence over the judiciary hardly was registered, however. The primary reason for this was that the battle was also raging on two other fronts.

### *The National Council of the Judiciary*

In March 2017, while work continued on the common courts act, the PiS government brought forward another bill concerning the National Council of the Judiciary. The establishment of the National Council had been agreed in the Round Table Talks of 1989; the new constitution of 1997 gave it the task of overseeing the independence of courts



and judges. However, its key role was the appointment of judges.

Once again PiS started with the staffing of the body. Article 187 of the Polish constitution stipulates that three of the twenty-five Council members should be *ex officio*: the President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice. One member is nominated by the President, four are elected by the Sejm from amongst its members, and two by the Senate, also from amongst its members. The fifteen other members of the Council are elected from 'amongst the judges of the Supreme Court, common courts, administrative courts and military courts'. However, this only stipulates who may stand for election, and not who elects the fifteen members. Previously, these fifteen were elected by the judiciary. Now, Zbigniew Ziobro's Ministry of Justice wanted to remove that power from judges and make the Sejm responsible for the election of the fifteen members of the National Council. This gave the parliamentary majority a say over nineteen of the members - the four parliamentarians and the fifteen judges. In other words, the bill aimed at extending the influence of politics over the judiciary. Critics saw it as a breach of the constitution.

The government refuted this, arguing that the constitution did not lay down any rules concerning the election of members of the National Council. Above all, though, it argued that other EU states had similar regulations, in particular Germany. Indeed, the body in Germany tasked with electing judges to the federal courts (the so-called Judges Election Committees) comprises only government ministers and members selected by the Bundestag. Many of the German states have similar arrangements. However, the key question is the implications of these regulations for the rule of law, which can only be evaluated in the context of institutional structures as a whole. Hence, in Germany, the Judges Election Committees are non-standing bodies whose sole function is to elect judges. The National Council of the Judiciary in Poland, on the other hand, is a standing committee tasked by the constitution with safeguarding the independence of judges and courts at all levels. Unlike its German counterpart, therefore, it plays a central role in the separation of powers.

But the bill represented an attack on the separation of powers in another respect, too. It proposed dividing the National Council of the Judiciary into two chambers, one of which would consist of the fifteen judges selected by the Sejm, and the other of the remaining members, including the four Sejm delegates and the two senators, who at the time were all members of PiS. Since the agreement of both chambers would be needed to appoint a judge, the amendment effectively introduced a right of veto for the Sejm delegates and senators. So that PiS could assume power over the National Council of the Judiciary immediately, the bill proposed a one-off reduction of the four-year term of office for current members. PiS votes allowed the Sejm to pass the amendment on 12 July 2017.

### *The Supreme Court*

On 12 July 2017, the same day the PiS majority in the Sejm was passing the National Council of the Judiciary Act, a group of PiS delegates presented another bill during a late-night parliamentary session seeking to subordinate judicial power to the executive. The focus here was the Supreme Court, the court of highest instance for the common courts and the military court. Here again, PiS was seeking to replace staff and exert executive control: all incumbent judges of the Supreme Court would be automatically



retired, with exceptions authorized by the minister of justice. Likewise, judges replacing those retiring early would be proposed by the Minister of Justice and, of course, decides upon by the National Council of the Judiciary.

The term of office of the First President of the Supreme Court was – despite being guaranteed by the constitution – also brought to an end and the responsibilities of the President transferred to a judge appointed by the Minister of Justice. The new First President can dismiss members of the Supreme Court administrative staff without further justification. Finally, changes were proposed to the structure of the Supreme Court: instead of its previous four chambers there would now be two, with a third dealing solely with disciplinary proceedings at a later date. The purpose of the this third chamber would be to enable pressure to be exerted on judges by means of disciplinary proceedings. On 20 July 2017 – eight days after the first late-night debate on the new law – PiS votes passed it in the Sejm.

### *Half-hearted: The presidential veto*

Before the Act agreed by the Sejm could come into force, it required the agreement of President Duda, who now faced a wave of protest. Tens of thousands had demonstrated against the bill in front of the Sejm and the Supreme Court in Warsaw and elsewhere across the country, and now demanded that the President veto the law. The European Commission, too, announced that if the law came into force, it would submit a resolution to the Council of the European Union stating that Poland was infringing the fundamental values of the EU. At the same time, Duda was under heavy pressure from his own party to sign the Act quickly. He arrived at a half-hearted solution: on 24 July 2017 he signed the common courts act, which came into force in mid-August 2017, however vetoed the Supreme Court Act and the National Council of the Judiciary Act on 31 July.

At the end of September, Duda presented his own bills to the Sejm on the National Council of the Judiciary and the Supreme Court. But instead of halting the massive restriction of judicial independence, Duda's bills merely transferred to the President the responsibilities that the Act passed by the Sejm had allocated to the Minister of Justice. The Council of the Judiciary was no longer to be split into two, and instead of requiring a simple majority, every judge would now have to be elected by a three-fifths majority, determined by the Sejm and the Senate. Should a three-fifths majority not be achieved, the decision would lie with the President. Duda's new Supreme Court Act, meanwhile, no longer proposed merging the four chambers into two, but it did import from the Act passed by the Sejm the creation of a disciplinary chamber.

The President also proposed the creation of an extraordinary complaints procedure. For up to three years after the Act came into force, it would be possible to challenge any judgements passed in a Polish court after 17 October 1997 – the day the constitution of which PiS is so critical came into force. One single chamber would be responsible for this process.

### *An operetta with a tragic ending*

Both bills were then discussed in the Sejm and once again amended substantially by PiS. Although the parliamentary opposition, along with numerous judges associations, the



Polish Council of the Judiciary, the European Network of Councils for the Judiciary, the Polish Ombudsman, the Venice Commission of the Council of Europe, the OSCE and the EU Commission all stated that the proposed Act breached the fundamental standards of the democratic rule of law, it passed and was signed by President Duda on 20 December 2017. On the same day the European Commission stated that it saw a clear risk that Poland had seriously violated the EU's central values – respect for human dignity and human rights, freedom, democracy, equality, and the rule of law – and referred the matter to the Council of the European Union under Article 7(1) of the Treaty on European Union. The United Nations Special Rapporteur on the independence of judges and lawyers also stated on 22 December,

The reform and modernization of the judiciary is a legitimate goal for every government ... But what is happening in Poland today is a dangerous attempt to place the entire judicial system under the control of the legislature and the executive. [6]

Nevertheless, the laws were published at the start of January 2018, with the Council of the Judiciary Act coming into effect two weeks later and the Supreme Court Act coming into effect on 3 April 2018. The National Council of the Judiciary Act stipulated – as all its previous incarnations had done – that the terms of office of all existing Council members would expire with its entry into force. The fifteen new Council members who were not ex officio appointments would be elected by parliament, which would agree a list of fifteen judges. This list was put together by the Sejm's Justice Committee from candidates suggested either by a group of twenty-five sitting judges or by 2000 members of the public. The first vote must agree the list by a three-fifths majority. If this is not achieved, an absolute majority would be sufficient in the second vote.

PiS thus achieved the central aims of its reform: the Sejm, in which it has a majority, now had huge influence over the appointment of almost all members of the Council of the Judiciary and therefore indirectly over all judicial appointments in Poland. The significance of this becomes clear when one bears in mind that Zbigniew Ziobro's Ministry of Justice suspended judicial appointments in 2015. Estimates place the current number of vacancies in the common courts at 500 – all appointments over which the Council of the Judiciary in its new incarnation would now exert its influence. The composition of the Council confirmed all fears: the eighteen candidates for the fifteen judges to be elected by the Sejm to the National Council for the Judiciary were almost all close associates of Ziobro, either professionally or personally; three candidates had even been subject to disciplinary proceedings. PiS had difficulty in coming up with a list, since judges critical of the party declined to be included and the opposition in the Sejm protested against the list. Under heavy criticism, it was passed at the beginning of March on the basis of votes from PiS and the Kukiz'15 party.

In mid-April, PiS amended its own laws in an attempt to get the European Commission to close its rule of law proceedings under Article 7 of the EU Treaty. However, the Commission judged the amendments to have been insufficient, even stating that many were amendments in name only. On the 2 July 2018, the Commission formally initiated proceedings against Poland by sending a Letter of Formal Notice to the Polish authorities. Poland was finally referred to the Court of Justice of the EU by the



Commission. On 19 October, the Vice-President of the ECJ issued an interim order against Poland, to the effect that the new law on the Supreme Court regarding the pensioning off of serving judges and the nomination of new judges should not be applied until a final ruling by the Court.

It remains to be seen how these developments affect the situation in Poland. The ECJ decision may be pivotal for maintaining the separation of powers in the country, at least as far as the Supreme Court is concerned. However, it should be borne in mind that the injunction does not pertain to the whole scope of the reform of Polish judiciary. In particular, the ordinary courts are not covered by the Commission's action. The redistribution of powers has already largely been accomplished and the independence of the judiciary has been reduced. For example, The Council of the Judiciary has influence over the appointment of presidents and deputies in the common courts, who were previously selected by the relevant judges' panel. One of the most important powers that the executive has withdrawn from judges at the courts - even the Supreme Court - is the preparation of court statutes. These are vital for the organization of departments and the number of judges in each department. In practice, this has a significant influence on verdicts, and will open the door to political manipulation. These and many other provisions will not be affected by the ECJ proceedings.

Despite seeming like an operetta, the judicial reforms - which are in no way complete - thus have a tragic outcome. The independence of the courts has been weakened; the parliamentary majority and the government have been given greater control and disciplinary power and can exert pressure on individual judges or courts, and by extension verdicts themselves. PiS can thus influence decisions of critical importance in political terms, such as whether elections or referendums are declared valid, or whether complaints against National Broadcasting Council decisions or restrictive trade practices rulings are upheld. These two areas are currently of particular significance, since PiS is trying to 're-Polonize the media market' - with the specific aim of driving out German ownership. It is a matter of the acquisition of shares, of granting or withdrawing licences and of setting caps for the participation of foreign capital. Although PiS has come up against major difficulties and adjourned discussion of media ownership for the time being, the issue is certainly not off the table.

## **Against diversity**

At first glance, the judicial reforms in Poland appear to be a common or garden power grab. PiS first took control of the Constitutional Tribunal and seized the opportunity to pass unconstitutional laws. While starting work on changes to electoral law, it also ensured that it had control of the Supreme Court, which is charged with declaring elections valid or invalid. PiS also secured its ability to intervene in appointments to the judiciary and to administrative posts in the common courts. And yet it is not enough merely to describe the actions of PiS at the instrumental level. After all, its means and ends, its methods and ideology, are one and the same.

PiS sees pluralism as a problem. Wherever possible, its aim is to eradicate diversity. Pluralism in Poland was epitomized by the 1997 constitution, which has its origins in the spirit of the Round Table Agreements of 1989. Unlike Fidesz in Hungary, PiS has not replaced the constitution with something else. But it has sought to discredit it as 'pure,





ossified post-communism' and effectively suspended it. PiS sees its judicial reforms as expunging the last vestiges of post-communism. It is a key component of the party's ideology of 'change for the better' (dobra zmiana), which is all about cleansing the state of supposed enemies, filling key positions in the machinery of state with its own people, and eradicating the institutional pluralism inherent in the separation of powers. PiS is systematically undermining public trust in the institutions of the democratic rule of law. Its aim is to convince the public that it can put its trust in one power and one power alone, a power representing the undivided sovereign Polish nation, a power that nothing stands in the way of.

*The translation has been reviewed and updated by the authors. For further reading on the subject, see Marta Bucholc, 'Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015', Hague Journal on the Rule Law (2018), <https://doi.org/10.1007/s40803-018-0080-7>.*

## Footnotes

1. Kaczyński: Będziemy rządzić długo, <https://wiadomosci.onet.pl/tylko-w-onecie/kaczynski-bedziemy-rzadzic-dlugo-wicepremier-morawiecki-mowi-ze-do-2031-r-to/765herq>.
2. Druk nr. 2003, Uzasadnienie, 3.
3. See: [www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/art,257,prezydent-w-najblizszym-czasie-przedstawie-nowe-wersje-projektow-reformujacych-sadownictwo.html](http://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/art,257,prezydent-w-najblizszym-czasie-przedstawie-nowe-wersje-projektow-reformujacych-sadownictwo.html).
4. Cf. Marta Bucholc, Maciej Komornik, PiS and the Law. The Constitutional Crisis and the Culture of the Judiciary in Poland, in: OSTEUROPA, vol 1-2, 2016, pp. 79-93.
5. Wojciech Sadurski, 'The Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', Hague Journal on the Rule of Law (2018), 10.1007/s40803-018-0078-1.
6. See: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22564&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22564&LangID=E).

**Published 25 October 2018**

Original in **German**

Translation by **Sarah Rimmington**

First published in **Osteuropa 3-5/2018 (German version); Eurozine (shortened and updated English version)**

Downloaded from [eurozine.com](http://eurozine.com) (<https://www.eurozine.com/separation-powers-undermined/>)

© Marta Bucholc / Maciej Komornik / Osteuropa / Eurozine